

# Unreformed: Towards Gender Equality in Immigration Law

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## INTRODUCTION

The history of American immigration law and policy has hills and valleys, twists and turns. When it comes to the inclusion and exclusion of socially and politically marginalized communities into the fabric of U.S. citizenship and society, U.S. immigration law is characterized by its inhospitality. Not surprising when considered against the backdrop of our own history of forced migration through slavery and the displacement and forced colonization of indigenous people, the origins of U.S. immigration law include formal and explicit restrictions against the migration and naturalization of people of color and of other political, racial, social, cultural, or ethnic minorities.<sup>1</sup>

Among these groups, immigrant women and U.S. citizen women seeking to marry immigrants have endured the oppressive effects of explicit and implicit gender discrimination. From the earliest times of restrictive laws against women to the

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<sup>1</sup> Specifically, at different points in its history, immigration law has explicitly excluded people of color, women, gay, lesbian, and transgendered people, and those from certain politically-sensitive or somehow undesirable countries or cultures. *See, e.g.*, IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (rev. and updated 10th Anniversary ed. 2006) (discussing the history of U.S. immigration law explicitly excluding people of Black African descent and from certain Asian countries); Logan Bushell, “*Give Me Your Tired, Your Poor, Your Huddled Masses*”—*Just As Long As They Fit the Heteronormative Ideal: U.S. Immigration Law’s Exclusionary & Inequitable Treatment of Lesbian, Gay, Bisexual, Transgendered, and Queer Migrants*, 48 GONZ. L. REV. 673, 677–85 (2013) (discussing the history of immigration law’s explicit exclusion of the admission of homosexual people and exploring the various ways in which immigration law has legislated against the admission of people who are, or are perceived to be, national security risks for various ideological or political beliefs); Olga Tomchin, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans\* People*, 101 CALIF. L. REV. 813, 829–34 (2013) (noting the similar restrictions against transgendered individuals).

current effects of contemporary immigration law and proposed legislation, the law has deterred the migration of women, the naturalization of women, the authorization of women to work lawfully within U.S. borders, and women's freedom to escape domestic and state-sponsored violence and abuse within their countries of origin and within the United States.

As Congress and the American public seek to reform the broken immigration system, calls for gender equality in the next round of amendments to the Immigration and Nationality Act (INA) have been faint at best. As this Article argues, however, rather than create another generation of discriminatory legislation, policymakers must enact comprehensive immigration reform that embodies equality and that embraces policy correcting the legacy of oppression against women.

This Article advocates for comprehensive immigration reform that encompasses gender equality by including legislative provisions that benefit women. In this way, immigration law and policy can ameliorate the discriminatory effects of the explicit and implicit oppression against women that has characterized immigration law from its beginning. Part I provides a basis to understand this legacy of oppression by exploring the subordination of women in immigration law. Since its inception as formalized federal law, immigration law has restricted the manner in which immigrant women could come to the United States and the type of immigration status benefits for which they could be eligible. Building on this historical foundation, Part II discusses the current state of immigration reform and comments on the continued oppressive measures that have infiltrated these proposals. Even though comprehensive legislative immigration reform remains elusive, this Part discusses a piece of proposed legislation that passed the Senate, the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013<sup>2</sup> ("2013 Border Security Bill"). While the political process has likely stalled the chance of law reform passing in the current congressional session, the 2013 Border Security Bill serves as an illustrative case study in understanding current legislative trends and how they continue to disadvantage women. This Article concludes by discussing the feasibility and efficacy of a continued push for gender equality in immigration law and policy, given the environment of heightened anti-immigrant animus. Though change may be difficult to obtain, the history of immigration law teaches that the law has evolved to encompass

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<sup>2</sup> Border Security, Economic Opportunity, and Immigration Act, S. 744, 113th Cong. (2013).

more gender-neutral norms. Thus, equality will be achieved only through vigilant, unceasing efforts.

### I. THE HISTORICAL SUBORDINATION OF WOMEN IN IMMIGRATION LAW

From its earliest iterations, immigration law has contained explicitly discriminatory provisions against women. This should not be surprising, as early immigration law followed the mores of other areas of law regarding the rights of women. In the early part of the nineteenth century, the law formally embraced the legal doctrine of coverture.<sup>3</sup> Under coverture, women were considered little more than property of their husbands, unable to act independently in the eyes of the law.<sup>4</sup> As Janet Calvo explains:

Coverture is the legal notion that a husband and wife are one, and the one is the husband. Under the doctrine of coverture, the husband had ownership rights over his wife and was legally entitled to control his wife's income, property and residence . . . . The wife's legal identity merged with that of her husband to such an extent that she was unable to file suit for damages or to enforce contracts. Moreover, under coverture, the children of the marriage were considered marital property and, therefore, were under the father's control. A mother was entitled to no power over her children. The law sanctioned the power and control of the husband over the wife. The legal notion of coverture thus established a legal regime that enforced the subordination of one adult human being to another.<sup>5</sup>

The subordination of women to men in the formal law softened in the late nineteenth century, when women were afforded the right to own property as individuals and not through their husbands or fathers. Beginning in the mid-1800s, states passed versions of the Married Women Property Act,<sup>6</sup> creating a critical fissure in

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<sup>3</sup> See Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N. ILL. U. L. REV. 153, 161 (2004) [hereinafter Calvo, *Coverture's Diminishment*].

<sup>4</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (15th ed. 1809) ("By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called . . . a *feme-covert*, . . . is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*."); see also Marisa S. Cianciarulo, *U.S. Immigration Law: Where Antiquated Views on Gender and Sexual Orientation Go to Die*, 55 WAYNE L. REV. 1897, 1899 (2009); Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 596 (1991) [hereinafter Calvo, *Spouse-Based Immigration Laws*].

<sup>5</sup> Calvo, *Coverture's Diminishment*, *supra* note 3, at 160–61.

<sup>6</sup> Mississippi was one of the first states to enact the law, in an effort to protect women's rights to own slaves. See 1839 Miss. Laws 72. New York passed its own

the hard confines of coverture. Yet despite these explicit gains, the implicit effects of the legacy of coverture continued to infiltrate law and policy, including the rights of women to control their own property and labor.<sup>7</sup>

Although domestic and property law is generally well-ensconced in the purview of the state's regulatory and legislative powers—while immigration law is inherently federal law—the federal law of immigration as it pertains to family dynamics, ordering, and marriage borrows much from state conceptions of domestic rights and privileges. So although coverture was losing favor as an explicit premise in state law,<sup>8</sup> it flourished in immigration law. The oppression of women in the immigration law system took various forms, including immigrant women's entrance and formal admission to the United States, their ability to sponsor family members for admission, and the laws surrounding naturalization of women. The effect of marital status—that is, being married—was of critical import. Thus, being married (or unmarried) impacted a woman's ability to lawfully immigrate and remain in the United States, to eventually naturalize, or even to retain her American citizenship. In short, coverture remained alive and well in immigration law and policy.

In fact, since its earliest iterations, immigration law has contained provisions that operate to discriminate against women. Within the Immigration Act of 1917 and the Immigration Act of 1924 (and their later amendments), certain American citizen women married to foreign national men were unable to petition for their husbands' lawful immigration status, while no such restrictions operated against American citizen men petitioning for their wives.<sup>9</sup> Similarly, the Immigration Act of 1917 provided what was essentially a waiver of the literacy requirement for otherwise admissible aliens if the petitioner was a man seeking to bring in his father, grandfather, wife, mother, grandmother, or

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progressive version, which awarded women the right to sue and keep their earnings. See 1848 N.Y. Laws 307.

<sup>7</sup> See, e.g., Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) (exploring the shift of coverture from contract law to status, whereby husbands could justifiably continue to claim their wives' earnings even though the formal doctrine of coverture was being written out of domestic and property law).

<sup>8</sup> Reva B. Siegel discusses, however, that although coverture lost explicit favor in the law, its effects were felt in myriad ways. See Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative*, 105 YALE L.J. 2117, 2172 (1996), *discussed and cited in Calvo, Coverture's Diminishment*, *supra* note 3, at 161.

<sup>9</sup> See S. REP. NO. 81-1515, at 414-15 (1951).

unmarried or widowed daughter.<sup>10</sup> No such waiver existed for a woman petitioning for those same family members.<sup>11</sup> Other explicitly discriminatory provisions lurked throughout these early immigration laws.<sup>12</sup>

Immigration law also historically discriminated against women in the naturalization context. Due to racist restrictions on who could naturalize,<sup>13</sup> only immigrant women who were eligible to be citizens—i.e., only white women—could naturalize through their U.S. citizen husbands.<sup>14</sup> Moreover U.S. citizen women lost their citizenship if they married immigrants who themselves were ineligible for citizenship.<sup>15</sup> The law targeted U.S. citizen white women seeking to marry immigrants of color, who could not themselves naturalize due to the law's formalized racial discrimination.<sup>16</sup>

In a 1915 case deciding the validity of the law requiring that an American woman lose her U.S. citizenship (through involuntary expatriation) by marrying a foreign national, the United States Supreme Court summarized the intersection of domestic policy—i.e., marriage—and immigration law as it pertained to the rights and limitations of women:

The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in

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<sup>10</sup> *Id.* at 415; see also Calvo, *Spouse-Based Immigration Laws*, *supra* note 4, at 600–06 (discussing the history of gender discrimination in early immigration law).

<sup>11</sup> S. REP. NO. 81-1515, at 414.

<sup>12</sup> See *id.* at 415–17 (describing discrimination against women treaty traders, women seeking to bring in family members affected with certain contagious diseases, and women ministers and professors, among other categories experiencing blatant discrimination).

<sup>13</sup> The author discusses this historical discrimination through a gender-critical framework as applied to the recent reauthorization process of the Violence Against Women Act. See Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 271–76 (2014) (discussing the discriminatory history of immigration law and policy).

<sup>14</sup> See López, *supra* note 1, at 33 (discussing how a woman's citizenship would depend on both her marriage to a U.S. citizen and on her own eligibility for naturalization by being white).

<sup>15</sup> See *id.* at 34–47 (citing Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228, 1228) (“[A]ny American woman who marries a foreigner shall take the nationality of her husband.”).

<sup>16</sup> López, *supra* note 1 at 34 (explaining that although the law was partially repealed in 1922, it “continued to require the expatriation of any woman who married a foreigner racially barred from citizenship” until 1931); see Act of Sept. 22, 1922, ch. 411, § 3, 42 Stat. 1021, 1022; see also Cianciarulo, *supra* note 4, at 1898; see also Kelly v. Owen, 74 U.S. (7 Wall.) 496, 498 (1868) (holding that only “free white women” could become citizens through marriage to a U.S. citizen), cited in Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 161 & n.142 (1996); see also Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 443–49 (2005) (discussing how the repeal of the 1922 law did not apply to those women and their spouses who were of Chinese nationality or descent).

many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. Having this purpose, has it not the sanction of power?<sup>17</sup>

The Court in *Mackenzie* was drawing on the common practice of law and policy at the time: absent her own political and legal independence due to the effects of coverture, a woman could not be extricated from the personality of her husband. Involuntary expatriation by statutory mandate was thus seemingly inevitable because the male domination over female spouses held this “sanction of power.”<sup>18</sup> This long-standing history perpetuated and reflected the common law norms of coverture, and as Kerry Abrams writes, “[i]t took enfranchisement through the Nineteenth Amendment, extensive feminist activism, and the specter of illiterate, potentially disloyal, and now *voting* foreign wives to finally persuade Congress that derivative national citizenship was a bad idea.”<sup>19</sup>

Indeed, in 1950, to ameliorate the long-standing effects of coverture in immigration law, Congress worked towards a comprehensive immigration legislative reform. These efforts ultimately resulted in the Immigration and Nationality Act of 1952.<sup>20</sup> As part of the preparation and drafting of the 1952 Act, Congress undertook an extensive investigation into the state of the law.<sup>21</sup> One small portion of this investigation discussed the oppressive effects of immigration law against women, noting:

The so-called discrimination against women features of the acts of 1917 and 1924 probably are in those laws as a legislative enactment of the common-law theory that the husband is the head of the household and the woman’s nationality and residence follows [sic] that of her husband.<sup>22</sup>

The Congressional Report goes on to address how this “so-called” discrimination against women affected various portions of the law, including the spousal citizenship and admission waiver

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<sup>17</sup> *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915).

<sup>18</sup> See Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 416–17 (2013) (discussing the legal history prior to *Mackenzie* and the effects of the decision).

<sup>19</sup> *Id.* at 417.

<sup>20</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

<sup>21</sup> S. REP. NO. 81-1515, at 414 (1951).

<sup>22</sup> *Id.*

provisions, discussed above.<sup>23</sup> The Congressional Report concludes: “The subcommittee believes that there is no justification for according different treatment to the sexes under the immigration laws and recommends, therefore, that the laws be amended to remove all such inequalities.”<sup>24</sup> In an accompanying footnote, the reporting subcommittee offers the solution to the inequities: “The recommendation will require the substitution of the word ‘spouse’ for the word ‘wife’ where it appears in the following provisions of the laws” and then lists the affected sections of the 1917 and 1924 Acts.<sup>25</sup> When the 1952 Immigration and Nationality Act (INA) was passed—the law that still forms the basis for the current version of the INA—this word change had been effectuated.

Yet as scholars have researched and explored, gender inequality was not so easily fixed.<sup>26</sup> Although the word choice in the 1952 INA provided facial neutrality in the law (i.e., changing “wife” to “spouse”), the long-time effects of coverture and oppression against women were still operational in the law’s implementation. As one example, the family-based immigration visa petitioning process—whereby the Lawful Permanent Resident (LPR) or U.S. citizen spouse is required to petition for his/her foreign national spouse’s immigration status<sup>27</sup>—became an easy vehicle for abusive spouses with lawful or citizen status to manipulate and keep their spouses in the abusive marriages.<sup>28</sup> And as studies consistently show, the vast majority of domestic abuse occurs at the hands of men against women.<sup>29</sup> Thus, the effect was to keep many immigrant women locked within the confines of an abusive marriage to fulfill the requirements for her own LPR status. Despite these realities, legislators were instead concerned that this petitioning process was fraught with fraudulent marriages—i.e., marriages that occurred simply for

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<sup>23</sup> *Id.* at 414–17.

<sup>24</sup> *Id.* at 417.

<sup>25</sup> *Id.* at 417 n.8.

<sup>26</sup> See, e.g., Calvo, *Spouse-Based Immigration Laws*, *supra* note 4, at 604–12; Cianciarulo, *supra* note 4.

<sup>27</sup> Calvo, *Spouse-Based Immigration Laws*, *supra* note 4, at 600–02.

<sup>28</sup> Julie E. Dinnerstein, *Options for Immigrant Victims of Domestic Violence*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK 482 (2007–2008 ed. 2007), reprinted in 190 PRACTISING L. INST. N.Y. 161, 164 (2009) (detailing how a U.S. citizen or LPR spouse effectively holds the reins and controls the success or failure of his or her spouse’s immigration stability).

<sup>29</sup> *Intimate Partner Violence: Consequences*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> (last updated Dec. 24, 2013) (citing studies that show nearly fifteen percent of women have been injured as a result of intimate partner violence (domestic violence) during their lifetime, compared with four percent of men—nearly four times the rate of men).

immigration benefits and not for bona fide “marriage purposes.” As a result, Congress passed the 1986 Immigration Marriage Fraud Amendments (IMFA)<sup>30</sup> at about the same time as the comprehensive Immigration Reform and Control Act (IRCA).<sup>31</sup>

The IMFA sought to stop immigrants from receiving immigration relief through sham marriages. To do so, the IMFA created a petitioning process in which the foreign spouse was dependent on the continued support of her petitioning spouse for at least two years.<sup>32</sup> During those two years, the petitioning spouse could simply revoke his support of his spouse’s immigration petition.<sup>33</sup> The result was that immigrant domestic violence victims had to endure continued domestic abuse or risk losing lawful immigration status.<sup>34</sup> In this way, the law continued to prefer men petitioning for their wives and to uphold a long-standing barrier for women to gain independence from abusive or coercive husbands.<sup>35</sup> Although the effects of the law were softened in the 1990 Immigration Act through provisions for battered immigrant spouses,<sup>36</sup> it was not until the 1994 Violence Against Women Act (VAWA) that certain battered immigrants could self-petition for immigration benefits and not rely on an abusive spouse for immigration relief.<sup>37</sup>

Similarly, Congress passed the 1986 IRCA law, seeking to deter the influx of undocumented immigrants—largely from Central American countries—who were fleeing violence and

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<sup>30</sup> Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537.

<sup>31</sup> Immigration Reform and Control (Simpson-Mazzoli) Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

<sup>32</sup> See Immigration Marriage Fraud Amendments, 100 Stat. at 3537.

<sup>33</sup> See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS IN THE VIOLENCE AGAINST WOMEN ACT (VAWA) 19 (2012) (quoting a House Judiciary Committee report on the purposes for the battered spouse waiver provision of the Violence Against Women Act: “The purpose of this provision is to ensure that when the U.S. citizen or permanent resident spouse or parent engages in battering or cruelty against a spouse or child, neither the spouse nor child should be entrapped in the abusive relationship by the threat of losing their legal resident status.”) (citing H.R. REP. NO. 101-723(I), at 78 (1990)).

<sup>34</sup> See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1247 (1991); Calvo, *Spouse-Based Immigration Laws*, *supra* note 4, at 607–11; Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1551 (1995).

<sup>35</sup> The author has written on the spousal petitioning process and its deleterious effects on immigrant victims of domestic violence. See Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence*, 34 HAMLINE L. REV. 149 (2011); Olivares, *supra* note 13; see also Calvo, *Spouse-Based Immigration Laws*, *supra* note 4, at 604–12; Cianciarulo, *supra* note 4.

<sup>36</sup> See 8 U.S.C. § 1186a(c)(4)(C) (2012).

<sup>37</sup> Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. §§ 40,001–703 (1994).



political turmoil and seeking employment in the low-skilled service and agricultural industries in the United States.<sup>38</sup> The IRCA created strict prohibitions against employers hiring undocumented people and increased enforcement measures at the U.S. border.<sup>39</sup> But recognizing the large number of undocumented workers already in the country, the IRCA also provided legalization programs, including one for undocumented agricultural workers.<sup>40</sup> Among other provisions, these “special agricultural workers” had to prove that they resided in the United States for at least ninety days in “seasonal agricultural services” during the time between May 1985 and May 1986.<sup>41</sup> This legalization provision did not require that the seasonal agricultural workers remain in this particular labor pool, but as Hiroshi Motomura writes, “the proponents of the program anticipated that many would do so,”<sup>42</sup> thereby guaranteeing a cheap labor force. Moreover, the IRCA contained a more general legalization provision, which stipulated that certain undocumented immigrants who had been residing in the United States since January 1, 1982 could petition for an eighteen-month-long lawful “temporary resident status.” This temporary status could then lead to “permanent resident status”<sup>43</sup> upon meeting certain eligibility requirements, including lack of a felony conviction and demonstration of a minimal understanding of the English language.<sup>44</sup>

These IRCA legalization provisions, though seemingly beneficial to the undocumented population, were implicitly skewed to benefit male immigrants and disfavor undocumented women. The IRCA special agricultural worker legalization provision disproportionately benefited men, who were more often employed in the agricultural industries.<sup>45</sup> Undocumented women

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<sup>38</sup> See H.R. REP. NO. 99-682, pt. 1, at 56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5660 (“[T]he [Judiciary] Committee is convinced that as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or to violate status once admitted as a nonimmigrant in order to obtain employment will continue.”), *cited in* Dennise A. Calderon-Barrera, *Hoffman v. NLRB: Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119, 120 (2003).

<sup>39</sup> 8 U.S.C. § 1324a(a)(2), (b)(1).

<sup>40</sup> Immigration and Nationality Act § 210, 8 U.S.C. § 1160 (2012).

<sup>41</sup> Immigration and Nationality Act § 210(a)(1)(B); *see also* Hiroshi Motomura, *What is “Comprehensive Immigration Reform”? Taking the Long View*, 63 ARK. L. REV. 225, 226 (2010) (discussing the IRCA provisions).

<sup>42</sup> Motomura, *supra* note 41.

<sup>43</sup> *See* Immigration and Nationality Act § 245A(b); *see also* Motomura, *supra* note 41.

<sup>44</sup> Immigration and Nationality Act § 245A(b)(1)(C), (D); *see also* Motomura, *supra* note 41.

<sup>45</sup> *See* Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN’S L.J. 138, 205–06 (2004).

who worked outside of the home, on the other hand, often held jobs in domestic industries and thus were ineligible for this IRCA legalization program.<sup>46</sup> As Margot Mendelson notes: "No equivalent provision was available, for example, to nannies and housecleaners, or even to hotel workers and hospital aides, which are predominantly female positions."<sup>47</sup> Mendelson writes further about how the implementation of even the general IRCA "temporary resident status" legalization provision also contained gendered bias:

The law's documentary requirements placed the burden on immigrants to prove they had resided in the United States continuously for the necessary time period [since January 1, 1982]. Many immigrants fulfilled that requirement by collecting letters from their employers in the fields. Access to that kind of documentary proof was far less accessible to women, who may not have worked continuously due to childrearing, or who worked irregular jobs under individual employers. In fact, the very access to information about the IRCA process was gendered, as immigrants who work in isolation or spend more time in the home have less access to information, advice, and assistance from other immigrants undergoing the process. The legal provisions themselves, as well as the information and institutional access to utilize them, were less available to immigrant women than their male counterparts. The result was a law that disproportionately granted amnesty to men.<sup>48</sup>

The gendered effects of the IRCA continued through its implementation and ended up affecting millions of immigrants in the United States. In fact, the IRCA legalization provisions afforded status to roughly 3 million undocumented immigrants.<sup>49</sup> Of these immigrants, 1,763,434 obtained lawful status under the general legalization provision, and 1,277,041 obtained status as seasonal agricultural workers.<sup>50</sup> Motomura observes that this

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<sup>46</sup> See *id.*

<sup>47</sup> *Id.* at 205.

<sup>48</sup> *Id.* at 205–06; see also Laura E. Enriquez, *Gendered Laws: VAWA, IRCA and the Future of Immigration Reform*, HUFFINGTON POST (Mar. 7, 2013, 3:56 PM), [http://www.huffingtonpost.com/laura-e-enriquez/domestic-violence-immigration\\_b\\_2793828.html?utm\\_hp\\_ref=latino-voices](http://www.huffingtonpost.com/laura-e-enriquez/domestic-violence-immigration_b_2793828.html?utm_hp_ref=latino-voices) ("In the case of IRCA, a lack of attention to gendered differences in the private and public lives of undocumented men and women meant that undocumented women were less able to legalize. Specifically, IRCA required undocumented immigrants to prove their work status and length of time in the U.S. This was a lot harder for undocumented women to do because they tended to work in private homes as housekeepers and nannies—where their employers did not want to confirm their employment—and did not have bills or accounts in their names—because this was their husband's responsibility.")

<sup>49</sup> See NANCY RYTINA, OFFICE OF POLICY & PLANNING STATISTICS DIV., U.S. IMMIGRATION & NATURALIZATION SERV., *IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001*, at 3, exhibit 1 (2002), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf>.

<sup>50</sup> *Id.*

represented legalization for “over sixty percent of the pre-IRCA undocumented population.”<sup>51</sup> Importantly, however, there were no provisions in the IRCA legalization programs that extended this lawful status to family members of the beneficiaries, who themselves might have been otherwise individually ineligible.<sup>52</sup> Instead, the primarily male beneficiaries were “followed by a huge wave of wives, girlfriends, and families migrating to the United States for family reunification.”<sup>53</sup> Thus, immigrant women’s dependence on their male spouses and family members continued.

This summary historical review of immigration law—from its early days of explicit and formal enshrinement of the doctrine and practice of coverture through much more recent reform measures—shows that it embraces discriminatory provisions against women. Seen as ancillary to her male spouse or family member, the woman immigrant is the dependent beneficiary or the expatriated citizen, following and beholden to the status of the man. Despite measures of gender equality in more contemporary times, current immigration reform proposals do little to quash the disparity, as discussed in Part II.

## II. CURRENT PROPOSED IMMIGRATION REFORMS PERPETUATE THE SUBORDINATION OF WOMEN

Despite years of discussion and political promises, there has been no large-scale, comprehensive immigration reform since the 1990 Immigration Act.<sup>54</sup> This legislative inertia changed after the 2012 elections. The 113th Congress (2013–2014) heralded in unprecedented movement towards reforming the current immigration law system. Bolstered by President Obama’s landslide victory in the 2012 presidential election, in which he won the overwhelming support of Latino/a voters,<sup>55</sup> both Republicans and Democrats endorsed Obama’s commitment to immigration reform.<sup>56</sup> Campaigning in his re-election bid to make immigration reform his “top priority,”<sup>57</sup> Obama thus set the stage for Congressional action. In late 2012 through 2013, the

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<sup>51</sup> Motomura, *supra* note 41.

<sup>52</sup> See, e.g., *id.*

<sup>53</sup> Mendelson, *supra* note 45, at 205.

<sup>54</sup> See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

<sup>55</sup> See Elise Foley & Sam Stein, *Immigration Reform Effort to Begin in Senate Post Inauguration*, HUFFINGTON POST (Nov. 8, 2012, 12:44 PM), [http://www.huffingtonpost.com/2012/11/08/immigration-reform-senate\\_n\\_2093178.html](http://www.huffingtonpost.com/2012/11/08/immigration-reform-senate_n_2093178.html).

<sup>56</sup> See *id.*

<sup>57</sup> Alexandra Jaffe, *Obama Promises Immigration Reform in Second Term*, NAT’L J. (Apr. 15, 2012), <http://www.nationaljournal.com/2012-presidential-campaign/obama-promises-immigration-reform-in-second-term-20120415>.

commitment to reform on all sides seemed strong, as Republican Speaker of the House John Boehner noted in November 2012: “This issue [immigration reform] has been around far too long. . . . A comprehensive approach is long overdue, and I’m confident that the president, myself, [and] others can find the common ground to take care of this issue once and for all.”<sup>58</sup>

The discussions resulted in action, as lawmakers busily drafted and ultimately introduced numerous immigration law reform bills in the House and Senate through 2014.<sup>59</sup> After much negotiation and anticipation on both sides of the political aisle, the Senate passed the Border Security, Economic Opportunity and Immigration Modernization Act of 2013<sup>60</sup> (“2013 Border Security Bill”) in June 2013 and sent it to the House of Representatives, where it has since languished. In the House of Representatives, numerous comprehensive immigration reform bills were introduced in the 2013–2014 session.<sup>61</sup> None of those bills reached a debate on the House floor.<sup>62</sup> On October 2, 2013, Representative Joe Garcia (D-FL) introduced H.R. 15, the Border Security, Economic Opportunity and Immigration Modernization Act, which mirrors the language of the Senate 2013 Border

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<sup>58</sup> John Parkinson, *Boehner: Raising Tax Rates 'Unacceptable'*, ABC NEWS (Nov. 8, 2012), <http://abcnews.go.com/Politics/boehner-exclusive-raising-tax-rates-unacceptable-revenue-table/story?id=17672947&page=2>.

<sup>59</sup> See *Proposed Federal Legislation*, AM. IMMIGR. LAW. ASS'N, <http://www.aila.org/content/default.aspx?docid=11536> (last visited Aug. 14, 2014) (summarizing current federal immigration legislative proposals pending in the U.S. House of Representatives and U.S. Senate in 2013–2014 period).

<sup>60</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

<sup>61</sup> See Immigration Policy Ctr., *What's on the Menu? Immigration Bills Pending in the House of Representatives in 2014*, AM. IMMIGR. COUNCIL (Mar. 26, 2014), [www.immigrationpolicy.org/just-facts/what's-menu-immigration-bills-pending-house-representatives-2014](http://www.immigrationpolicy.org/just-facts/what's-menu-immigration-bills-pending-house-representatives-2014) (summarizing the thirteen bills' key features and noting each one's congressional progress). This discussion does not include bills introduced in the summer of 2014, which focused on appropriations of federal money to respond to the humanitarian crisis on the U.S.-Mexico border regarding the arrival of large numbers of immigrant children from certain Central American countries. In response to the wave of child migrants, the Obama administration sought a congressional appropriation of \$3.7 billion to bolster border security, assistance, and shelter for the immigrants. See David Nakamura & Paul Kane, *House GOP Proposes to Make It Easier to Deport Central American Minors*, WASH. POST (July 29, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/29/house-gop-strips-border-bill-to-659-million-as-deadline-approaches/>. The House of Representatives and Senate responded by introducing their respective competing bills, providing a lower amount of funds and proposing other changes to the INA. See, e.g., *id.* (“Even if the House acts to pass a bill, there’s little sense on Capitol Hill that its plan would pass the Senate. Democrats in the upper chamber have proposed a \$2.7 billion plan that has also been met with bipartisan skepticism. Further complicating matters is that the GOP is calling for amendments to a 2008 anti-trafficking law that currently provides greater legal protections to unaccompanied children who enter the United States illegally from countries other than Mexico or Canada.”); see also discussion *infra* Conclusion.

<sup>62</sup> See Immigration Policy Ctr., *supra* note 61.

Security Bill, with some changes to the border security provisions.<sup>63</sup> Although H.R. 15 had 199 co-sponsors, including Republicans, it has yet to reach the House floor for debate.<sup>64</sup> Thus, by many accounts, the prospect of a comprehensive immigration reform law emerging from the 113th Congress is dim.<sup>65</sup> Yet as politicians and advocates push for progress—a move supported, too, by the majority of Americans<sup>66</sup>—it is imperative to continue the debate about what reform should include—and whom reform should protect. In this regard, now is an ideal time to advocate for gender equality in immigration law.

#### A. Provisions of the 2013 Border Security Bill Typify How Contemporary Comprehensive Immigration Reform Efforts Continue to Disadvantage Women

As discussed, bipartisan support and sponsorship pushed the 2013 Border Security Bill through the Senate in June 2013. With a 68-32 vote in favor of its passage,<sup>67</sup> the 2013 Border Security Bill swept in a wave of optimism that comprehensive immigration reform could finally be possible. Although the bill has yet to get to a vote on the House of Representatives floor, the

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<sup>63</sup> See H.R. 15, 113th Cong. (2013).

<sup>64</sup> See *Bill & Summary Status, 113th Congress (2013–2014), H.R. 15*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR00015>: (last visited Aug. 30, 2014) (detailing bill summary, co-sponsorship, and lack of committee movement).

<sup>65</sup> See, e.g., Dan Roberts, *Boehner Suggests Immigration Reform Will Not Pass This Year*, GUARDIAN (Feb. 6, 2014), <http://www.theguardian.com/world/2014/feb/06/boehner-immigration-reform-will-not-pass>. In response to the House stalemate, Obama indicated that his administration would carry out reform measures through executive order:

And in this situation, the failure of House Republicans to pass a darn bill is bad for our security, it's bad for our economy, and it's bad for our future. So while I will continue to push House Republicans to drop the excuses and act—and I hope their constituents will too—America cannot wait forever for them to act.

The White House Office of the Press Sec'y, *Remarks by the President on Border Security and Immigration Reform*, WHITE HOUSE (June 30, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform>.

<sup>66</sup> Pam Constable & Michelle Boorstein, *Americans Still Favor Immigration Reform, Despite Political Friction, Study Finds*, WASH. POST (June 10, 2014), [http://www.washingtonpost.com/national/americans-still-favor-immigration-reform-despite-political-friction-study-finds/2014/06/09/764f327a-eff9-11e3-9ebc-2ee6f81ed217\\_story.html](http://www.washingtonpost.com/national/americans-still-favor-immigration-reform-despite-political-friction-study-finds/2014/06/09/764f327a-eff9-11e3-9ebc-2ee6f81ed217_story.html); PEW RESEARCH CTR., PUBLIC DIVIDED OVER INCREASED DEPORTATION OF UNAUTHORIZED IMMIGRANTS 2 (2014), available at <http://www.people-press.org/files/legacy-pdf/02-27-14%20Immigration%20Release.pdf> (“There also has been little overall change in opinions about the importance of passing new immigration legislation [discussing February 2014 findings compared to May 2013 findings]. About half [of polled American adults] (49%) say the passage of new immigration legislation is extremely or very important, while 26% view this as somewhat important and 21% say it is not too important or not at all important.”).

<sup>67</sup> See *U.S. Senate Roll Call Votes on Passage of S. 744 as Amended*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?&congress=113&session=1&vote=00168](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=113&session=1&vote=00168) (last visited Oct. 6, 2014).

long and arduous process to Senate passage, which included many negotiations and concessions by both parties,<sup>68</sup> underscores the importance of its ultimate language. As the best current example of proposed legislation that enjoys strong bipartisan support, the 2013 Border Security Bill illustrates, too, the ways in which immigration law protects and disadvantages women immigrants.

To be sure, the 2013 Border Security Bill proposes to provide important protections for immigrants, including provisions that would help women specifically. In response to calls for equality, the Senate Judiciary Committee convened a hearing on the importance of reform that would help women in March 2013—two months before the bill passed the Senate.<sup>69</sup> Advocates applauded portions of the final bill that improved access to the U visa, which assists certain immigrant victims of crime, including victims of domestic violence, who are often women.<sup>70</sup> Others endorsed portions of the bill that improved parts of the INA concerning family-based immigration petitions, which would have positive effects on women and girls, who receive immigration status relief more commonly through family-based immigration visa provisions than through other avenues.<sup>71</sup> In

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<sup>68</sup> See William Finnegan, *The Gang of Eight's Immigration Fight*, NEW YORKER (May 9, 2013), <http://www.newyorker.com/news/news-desk/the-gang-of-eights-immigration-fight> (detailing the more than three hundred proposed amendments to the Gang of Eight's immigration reform bill in the final days before the U.S. Senate passed S. 744). *But see* Sean Sullivan, *Three Signs of Trouble for Immigration Reform in the House*, WASH. POST (June 21, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/21/three-signs-of-trouble-for-immigration-reform-in-the-house/> (summarizing the significant obstacles to securing House Republican support for comprehensive immigration reform).

<sup>69</sup> *How Comprehensive Immigration Reform Should Address the Needs of Women and Families: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013).

<sup>70</sup> See, e.g., NAT'L COMM. OF LEADING EXPERTS, HOW COMPREHENSIVE IMMIGRATION REFORM AFFECTS IMMIGRANT SURVIVORS OF VIOLENCE: TALKING POINTS ON THE FINAL SENATE BILL AND THE ROAD AHEAD IN THE HOUSE (2013), available at [http://www.asista.help.org/documents/news/Final\\_updated\\_onepager\\_71\\_5749DB9995CDB.pdf](http://www.asista.help.org/documents/news/Final_updated_onepager_71_5749DB9995CDB.pdf) (highlighting the key parts in S. 744 that protect women victims of domestic violence, including the expansion of the U visa eligibility provision and increasing the number of U visas each fiscal year); WE BELONG TOGETHER: WOMEN FOR COMMON-SENSE IMMIGRATION REFORM, ANALYSIS OF THE SENATE IMMIGRATION BILL (S. 744) AND WOMEN'S PRIORITIES FOR IMMIGRATION REFORM, available at [http://www.webelongogether.org/sites/default/files/WBT\\_S744\\_Analysis\\_en\\_0.pdf](http://www.webelongogether.org/sites/default/files/WBT_S744_Analysis_en_0.pdf).

<sup>71</sup> See, e.g., WE BELONG TOGETHER: WOMEN FOR COMMON-SENSE IMMIGRATION REFORM, *supra* note 70 ("Minor children and spouses of LPRs (both within the current backlog as well as for future applications) would be re-classified as 'immediate relatives.' This would allow for immediate access to an immigrant visa and exemption from caps on number of available visas. That means that spouses, minor children and parents of LPRs would no longer have to wait years to be together . . . . The modified V visa would allow family members to work and live in the U.S. once they have been petitioned for, instead of having to wait decades for their LPR status in their countries of origin."). DHS statistics from 2013 show that, of all of the ways in which females obtain LPR status, 68.5% acquire status through the family-based petitioning process. See *Yearbook of Immigration Statistics: 2013 Lawful Permanent Residents*, DEP'T HOMELAND SECURITY (June 16, 2014),

another example, the 2013 Border Security Bill improved due process protections for immigrants and noted the importance of family unity by expanding immigration judges' discretionary powers to terminate the removal proceedings against parents whose removal from the United States would constitute extreme hardship to their U.S. citizen or LPR child(ren).<sup>72</sup> Such a provision would benefit families and mothers especially, who are more frequently primary caregivers of children.<sup>73</sup>

But perhaps the most groundbreaking portions of the 2013 Border Security Bill focused on providing lawful status to categories of currently undocumented immigrants and on revising the immigrant visa system. In these particular provisions, however, the 2013 Border Security Bill failed to fully address the economic, employment, and educational disparities between men and women immigrants. Indeed, at its passage, advocates for women immigrants voiced concerns over the drafting process of the bill, which was led by eight senators—all of whom were men<sup>74</sup>—and over some parts of the bill that would ultimately disadvantage immigrant women.<sup>75</sup> As is explored more fully below, even certain provisions of the Bill that expand benefits for immigrants do not fully include women in their breadth.

#### B. The 2013 Border Security Bill Leaves out Low-Skilled and Undocumented Women

In one of the 2013 Border Security Bill's key provisions, certain undocumented immigrants already in the United States could petition for Registered Provision Immigrant (RPI) status,<sup>76</sup> a type of lawful temporary status that includes a path towards eventual LPR status and then naturalization.<sup>77</sup> To qualify for RPI status, among other requirements, the person must pay a \$1000 fine (and an additional \$1000 fine upon extension of RPI

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<http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents> [hereinafter *Yearbook of Immigration Statistics: 2013*] (Table 9).

<sup>72</sup> See S. 744, 113th Cong. § 2314(a)(D) (as passed by Senate, June 27, 2013).

<sup>73</sup> See, e.g., WE BELONG TOGETHER: WOMEN FOR COMMON-SENSE IMMIGRATION REFORM, *supra* note 70.

<sup>74</sup> See Ruth Tam, *Can Women Give Immigration Reform the Boost It Needs?*, WASH. POST (Nov. 20, 2013, 1:48 PM), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/11/20/can-women-give-immigration-reform-the-boost-it-needs/> (observing that the so-called "Gang of Eight" tasked with drafting comprehensive immigration reform in the U.S. Congress in 2013 was comprised of all men).

<sup>75</sup> See *id.* (reporting remarks by U.S. Senator Mazie Hirono (D-HI): "One of the outcomes of all the guys [in the immigration reform 'Gang of Eight'] was that this new system really disadvantaged women. They put so much emphasis on education experience and high-skilled work experience that women in these countries don't have.").

<sup>76</sup> See S. 744, § 2101.

<sup>77</sup> See *id.* § 2102.

status), pay prescribed filing fees, and pay any federal tax liability, as assessed by the IRS.<sup>78</sup> RPI status is valid for six years and is renewable for an additional six-year period. To be eligible for RPI renewal, a person must prove that s/he has been regularly employed during their RPI status (except for periods not to exceed sixty days) and that s/he will not become a public charge.<sup>79</sup> As part of this proof, the RPI-status holder must show that s/he has earned an average income or is otherwise financially secure at a level that is no less than 100% of the federal poverty level.<sup>80</sup> Moreover, an RPI-status immigrant is ineligible for many types of federal means-tested government aid, including Medicaid, food stamps, and benefits under the Affordable Care Act.<sup>81</sup> In other words, to be eligible for RPI renewal, the person must have maintained and be able to prove steady employment throughout the initial six-year RPI time and have enough financial resources to not be considered impoverished, all without access to traditional safety-net resources for the poor.

When the RPI provision in the 2013 Border Security Bill was announced, advocates for immigrants praised the efforts to address the tenuous status of the roughly 11 million undocumented immigrants already in the United States<sup>82</sup> by providing them an opportunity to regularize their immigration status.<sup>83</sup> Yet the proposed provision of RPI status is fraught with difficult hurdles for immigrants to surpass and is especially problematic for immigrant women. Not surprisingly, a large majority of undocumented immigrants live in poverty, as they are unable to secure stable employment, frequently suffer workplace abuses, and are underpaid and/or exploited by employers.<sup>84</sup> Moreover, an even higher percentage of

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<sup>78</sup> *Id.*; see also *Summary and Analysis: Border, Security, Economic Opportunity, and Immigration Modernization Act of 2013*, NAT'L IMMIGR. L. CENTER. (Aug. 15, 2013), <http://www.nilc.org/s744summary1.html> [hereinafter NAT'L IMMIG. L. CENTER].

<sup>79</sup> See S. 744, § 2101; see also NAT'L IMMIGR. L. CENTER, *supra* note 78.

<sup>80</sup> See S. 744, § 2101; see also NAT'L IMMIGR. L. CENTER, *supra* note 78.

<sup>81</sup> See S. 744, § 2101; see also AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., A GUIDE TO S. 744: UNDERSTANDING THE 2013 SENATE IMMIGRATION BILL (2013), available at [http://www.immigrationpolicy.org/sites/default/files/docs/guide\\_to\\_s744\\_corker\\_hoeven\\_final\\_12-02-13.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/guide_to_s744_corker_hoeven_final_12-02-13.pdf).

<sup>82</sup> See JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010 (2011), available at <http://www.pewhispanic.org/files/reports/133.pdf> (noting that there were 11.2 million estimated undocumented immigrants living in the United States in 2010).

<sup>83</sup> See, e.g., NAT'L IMMIGRATION LAW CTR., ANALYSIS OF SENATE IMMIGRATION REFORM BILL: TITLE II: IMMIGRANT VISAS (2013), available at [www.nilc.org/document.html?id=898](http://www.nilc.org/document.html?id=898) (praising congressional efforts to create a path to U.S. citizenship for undocumented immigrants).

<sup>84</sup> See, e.g., WORLD BANK, GENDER AT WORK: A COMPANION TO THE WORLD DEVELOPMENT REPORT ON JOBS 19 (2013), available at <http://www.worldbank.org/content/>



undocumented women immigrants live in the most extreme levels of poverty, as compared to men.<sup>85</sup> The Department of Homeland Security reports that, in 2011, almost half (forty-seven percent) of the overall population of undocumented immigrants were women,<sup>86</sup> emphasizing the expansive effects of such a punitive proposal.<sup>87</sup> Thus, it is a bleak prospect that a large percentage of the undocumented population would be able to pay the hefty fines, fees, and tax liabilities necessary to apply for RPI status.<sup>88</sup> Such an outcome would ultimately disproportionately affect undocumented immigrant women, who are more likely to live in poverty and be unable to pay excessive fines and fees.<sup>89</sup>

A similar critique can be levied against the 2013 Border Security Bill provision that creates a new type of status for certain agricultural workers. The Agricultural Worker Program specifies that certain undocumented immigrants (including some prior nonimmigrant H-2A visa holders) are eligible for

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dam/Worldbank/document/Gender/GenderAtWork\_web.pdf (summarizing key challenges to women in the work force around the world, including pay disparities, undervalued work, workplace harassment, etc.); MARY BAUER & MÓNICA RAMÍREZ, S. POVERTY LAW CTR., *INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY* (2010), available at [http://www.splcenter.org/sites/default/files/downloads/publication/Injustice\\_on\\_Our\\_Plates.pdf](http://www.splcenter.org/sites/default/files/downloads/publication/Injustice_on_Our_Plates.pdf) (discussing the extreme difficulties faced by women in the agricultural industries).

<sup>85</sup> See BAUER & RAMÍREZ, *supra* note 84; see also ALEXANDRA CAWTHORNE, CTR. FOR AM. PROGRESS, *THE STRAIGHT FACTS ON WOMEN IN POVERTY* (2008), available at <http://www.americanprogress.org/issues/women/report/2008/10/08/5103/the-straight-facts-on-women-in-poverty/> (noting the disparities in poverty rates between men and women in the United States and, as compared to women in other countries, “the gap in poverty rates between men and women is wider in America than anywhere else in the Western world”).

<sup>86</sup> See MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., *ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011*, at 6 tbl.5 (2012), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf).

<sup>87</sup> Recent reports suggest that a high percentage of the undocumented immigrant population is women: “There were 3.9 million undocumented women in the United States in March 2005; by March 2008 that number had increased to 4.1 million.” BAUER & RAMÍREZ, *supra* note 84, at 12 (*citing and comparing* JEFFREY S. PASSELL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* (2006), *with* JEFFREY S. PASSELL & D’VERA COHN, PEW HISPANIC CTR., *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES* (2009)).

<sup>88</sup> See, e.g., WE BELONG TOGETHER: WOMEN FOR COMMON-SENSE IMMIGRATION REFORM, *supra* note 70, at 1 (noting that single women and single mothers would have difficulty in meeting the income thresholds for RPI renewal (110% of the federal poverty guidelines) and for eventual LPR adjustment (125% of the federal poverty guidelines)).

<sup>89</sup> See BAUER & RAMÍREZ, *supra* note 84, at 24 (*citing* RANDY CAPPS ET AL., URBAN INST., *A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE* (2003), available at [http://www.urban.org/UploadedPDF/310880\\_lowwage\\_immig\\_wkfc.pdf](http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf)) (“While undocumented workers often earn less than U.S. citizens in the same jobs, the women typically earn even less than their male counterparts. That may be why, five years after Congress granted legal status to 1.7 million immigrants in 1986, wages for the previously undocumented women had risen by an average of 20.5 percent, compared to 13.2 percent for men.”); SHIRLEY J. SMITH ET AL., U.S. DEP’T OF LABOR, *CHARACTERISTICS OF LABOR MARKET BEHAVIOR OF THE LEGALIZED POPULATION FIVE YEARS FOLLOWING LEGALIZATION* (1996).

“blue-card” status if they, in addition to other requirements, have worked at least 575 hours or 100 work days of agricultural employment during the two-year period before the bill’s enactment, pay a fine, and pay any federal tax liabilities.<sup>90</sup> The temporary blue-card status can last up to eight years, at which time, and if eligible, the blue-card holder can apply for LPR status, which could eventually lead to naturalization.<sup>91</sup> Like immigrants in RPI status, blue-card holders are ineligible for federal means-tested public benefits and must remain employed to qualify to adjust to LPR status.<sup>92</sup>

Despite containing many of the same financial hurdles as the RPI process, the blue-card status program provides a necessary pathway towards lawful status and citizenship for critical agricultural workers. Yet just like the 1986 IRCA provision that legalized undocumented agricultural workers,<sup>93</sup> the Agricultural Worker Program would have a disparate gendered effect. Although women make up nearly half of the overall undocumented population,<sup>94</sup> they comprise only about thirty-nine percent of the undocumented “farm worker” population, as reported by 2001–2002 data from the Department of Labor National Agricultural Workers Survey,<sup>95</sup> the most recent compilation of this information. Albeit not a large disparity, there is enough of a difference to create an unequal effect as to the program’s reach.

It is not clear, though, if the blue-card regulations would also apply to workers in meat, poultry, and seafood processing plants. Although the blue-card provisions are silent as to coverage of processing plant workers,<sup>96</sup> if these workers were included, the

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<sup>90</sup> See S. 744, 113th Cong. § 2211 (2013).

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

<sup>93</sup> See *supra* notes 41–52 and accompanying text.

<sup>94</sup> See HOEFER ET AL., *supra* note 86.

<sup>95</sup> U.S. DEP’T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001-2002: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS 9 (2005), available at [http://www.doleta.gov/agworker/report9/naws\\_rpt9.pdf](http://www.doleta.gov/agworker/report9/naws_rpt9.pdf).

<sup>96</sup> In the Agricultural Worker Program provisions, the 2013 Border Security Bill cites the Migrant and Seasonal Agricultural Worker Protection Act to define agricultural employment as “employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 and the handling, planting, drying, packing, packaging, processing . . . prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.” 29 U.S.C. § 1802(3) (2012). Furthermore, the Fair Labor Standards Act (as cited in S. 744) defines agriculture as the “farming in all its branches . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.” 29 U.S.C. § 203(f) (citation omitted). While neither of these definitions provides a clear reference to meat, poultry, or seafood processing plants, a few cases have applied the Migrant and Seasonal

number of women eligible for the visa would be higher, as some surveys estimate that more than half of workers at some processing industries are women.<sup>97</sup> Even so, important gender disparities still exist that would dilute the effect of these increased numbers of women working in the agricultural and processing industries. As one stark example, one study notes that many women agricultural workers do not get direct payment from their employers, but rather their pay is incorporated into the paychecks of their husbands or other male family members as a way for employers to escape paying unemployment compensation, Social Security taxes, and disability benefits.<sup>98</sup> As the report notes, such a practice

has the immediate impact of depriving women of the minimum wages to which they are entitled and the longer-term impact of denying them any chance of qualifying for Social Security or other benefits. It also subjects these women to control by their husbands, partners or male family members, because they do not have the same financial freedom they would have if they were afforded their own pay check. And, if immigration reform is enacted [like the blue-card status program], it will make proving their eligibility for legalization more difficult.<sup>99</sup>

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Agricultural Worker Protection Act to processing plant work, defining it as agricultural employment. *See, e.g.*, *Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578 (W.D. Tex. 1999) (holding a chicken processing plant as agricultural employment and liable to standards set with the Migrant and Seasonal Agricultural Worker Protection Act); *Almendarez v. Barret-Fisher Co.*, 762 F.2d 1275 (5th Cir. 1985) (holding work performed in vegetable packing plants as agricultural labor and subject to regulations established in the Migrant and Seasonal Agricultural Worker Protection Act). Thus, if S. 744 contemplates processing plants to be agricultural employment in line with this case law interpretation, processing plant workers would potentially be blue-card eligible under S. 744. If, however, the blue-card program was intended for traditional H-2A visa agricultural workers, meat, poultry, and seafood processing plant workers may not be included in its provisions, as processing plant workers typically now receive H-2B visas when they work lawfully (and not H-2A visas). *See, e.g.*, AM. UNIV. WASH. COLL. OF LAW & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WOMEN IN THE MARYLAND CRAB INDUSTRY 5 (2010), available at [http://www.wcl.americana.edu/clinical/documents/20100714\\_auwcl\\_ihrlic\\_picked\\_apart.pdf](http://www.wcl.americana.edu/clinical/documents/20100714_auwcl_ihrlic_picked_apart.pdf) (“The H-2B visa program is a guestworker program that allows U.S. employers to recruit and employ foreign workers for temporary non-agricultural work.”). For example, the report notes that up to fifty-six percent of the crab processing industry relies on H-2B visa workers. *Id.* at 1.

<sup>97</sup> *See* BAUER & RAMÍREZ, *supra* note 84, at 36 n.3 (citing UNITED FOOD & COMMERCIAL WORKERS INT’L UNION, INJURY AND INJUSTICE—AMERICA’S POULTRY INDUSTRY (2010), available at [http://staging.uusc.org/files/programs/econjustice/pdf/injury\\_and\\_injustice.pdf](http://staging.uusc.org/files/programs/econjustice/pdf/injury_and_injustice.pdf)) (discussing one worker’s story: “Rosa’s labor, and that of 250,000 other workers who toil in 174 major chicken factories, have helped make chicken America’s cheapest and most popular meat protein. At least half of these workers are Latino and more than half are women.”).

<sup>98</sup> *See* BAUER & RAMÍREZ, *supra* note 84, at 29.

<sup>99</sup> *Id.* Fortunately, S. 744 contains provisions that are helpful to women and other workers who may have various employers or otherwise have difficulty obtaining traditional proof of employment, like Social Security, IRS, or other governmental agency proof. Petitioners may submit:

Thus, despite efforts at increasing protections for agricultural workers, the effects of gender-oppressive practices would still disadvantage women in these industries.

Supporters of the 2013 Border Security Bill, however, counter that another provision, the newly-created W nonimmigrant visa for certain workers in fields with labor shortages,<sup>100</sup> is geared towards occupations in which women comprise larger numbers of the workforce, like nannies, housekeepers, or domestic workers.<sup>101</sup> Although an important concession that ultimately may lead to regularized immigration status for some women, as a nonimmigrant visa, the W visa contains no established path towards permanency within its proposed language,<sup>102</sup> unlike the RPI system and the Agricultural Worker Program. While a nonimmigrant W-visa holder may utilize the time in W status towards eventual adjustment to LPR status in the Tier 1 of the merit-based system<sup>103</sup> (discussed more thoroughly below), or in a petition to adjust to immigrant status if her/his employer decided to petition for the person in the employment-based immigrant visa process,<sup>104</sup> the program does

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at least 2 types of reliable documents . . . that provide evidence of employment or education, including—

- (I) bank records;
- (II) business records;
- (III) employer records;
- (IV) records of a labor union, day labor center, or organization that assists workers in employment;
- (V) sworn affidavits from nonrelatives who have direct knowledge of the alien's work or education, that contain—
  - (aa) the name, address, and telephone number of the affiant;
  - (bb) the nature and duration of the relationship between the affiant and the alien; and
  - (cc) other verification or information;
- (VI) remittance records; and
- (VII) school records from institutions described in subparagraph (D).

S. 744, 113th Cong. § 2102 (2013) (amended by § 245C(b)(3)(B)(ii)). Moreover, there are provisions that recognize the important work of primary caregivers and the need to account for medical and maternity leave. *See id.* (amended by § 245C(b)(3)(E)(iii)) (“The employment and education requirements under this paragraph shall not apply during any period during which the alien—(I) was on medical leave, maternity leave, or other employment leave authorized by Federal law, State law, or the policy of the employer; (II) is or was the primary caretaker of a child or another person who requires supervision or is unable to care for himself or herself; or (III) was unable to work due to circumstances outside the control of the alien.”).

<sup>100</sup> *See* S. 744, § 4703(a).

<sup>101</sup> *See, e.g.,* WE BELONG TOGETHER: WOMEN FOR COMMON-SENSE IMMIGRATION REFORM, *supra* note 70, at 2 (“A new W visa category would be established to fill high need occupations, likely including domestic workers.”).

<sup>102</sup> *See* S. 744, § 4703(a).

<sup>103</sup> *See id.* § 2301.

<sup>104</sup> *See id.* § 4703(e)(5)(B)(i).

not lead to LPR status on its own. As a result, and again harkening to the effects of the IRCA legalization program in which fields dominated by men workers were preferred over women-dominated fields,<sup>105</sup> the paths to permanency remain more open and available for more men, while leaving out women.

### C. By Focusing on Highly Skilled Immigrants, the 2013 Border Security Bill Leaves Out Women

The 2013 Border Security Bill contains additional provisions that lead to disparately negative results for women immigrants. Embracing familiar calls to make immigration law more focused on rewarding and recruiting the “best and brightest” of the immigrant population,<sup>106</sup> the proposed legislation highlights a merit-based point system that “allows foreign nationals to obtain Lawful Permanent Residence in the United States by accumulating points mainly based on their skills, employment history, and educational credentials.”<sup>107</sup> This point system is “Track One” of the two-track merit-based structure in the 2013 Border Security Bill.<sup>108</sup> Track One is then divided up into Tier 1 and Tier 2, each of which provides a pathway for immigrants to receive points towards ultimately obtaining LPR status.<sup>109</sup> Although there is no threshold point amount that a petitioner must accumulate to receive LPR status, successful applicants will be those who obtain the highest score in the point system.<sup>110</sup> For example, immigrants vying for LPR status in Tier 1 receive 15 points if they have a doctorate degree, 10 points if they have a master’s degree,<sup>111</sup> and 5 points for a bachelor’s degree.<sup>112</sup> Petitioners can receive up to 20 points for a successful employment history and for engaging in certain types of work,<sup>113</sup> and up to 10 points for owning a business in particular fields.<sup>114</sup> Although Tier 2 is ostensibly geared towards less skilled and less formally educated immigrants, just like in Tier 1, the Tier 2

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<sup>105</sup> See *supra* notes 41–52 and accompanying text.

<sup>106</sup> See, e.g., Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 116 (2013) (describing efforts to keep the “best and brightest” young immigrants in the United States through the DREAM Act); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012) (critiquing the narratives used in immigration law to categorize the “good” versus “bad” immigrants, resulting in disparate effects).

<sup>107</sup> AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 9.

<sup>108</sup> See S. 744, § 2301.

<sup>109</sup> See *id.*

<sup>110</sup> See *id.* § 2301(c)(2)(A)–(B).

<sup>111</sup> See *id.* § 2301(c)(4)(A)(i)(I)–(II).

<sup>112</sup> See *id.* § 2301(c)(4)(A)(ii).

<sup>113</sup> See *id.* § 2301(c)(4)(B).

<sup>114</sup> See *id.* § 2301(c)(4)(D).

system awards petitioning immigrants merit-based points for education, performance of an “in demand” occupation, and entrepreneurship.<sup>115</sup>

Although the merit-based system is facially gender neutral, in its operation, it would provide greater benefits to men over women seeking to obtain LPR status. A 2005 Department of Homeland Security (DHS) report highlights that only 27.7% of principal employment-based visa holders were women.<sup>116</sup> Unlike family-based immigration visas, which rely simply on the requisite familial relationship, the employment-based immigration visa provisions are rooted in rewarding those immigrants with the education and skills sought by American businesses.<sup>117</sup> Thus, just like the vast majority of principal beneficiaries from the employment-based visa provisions are men, the 2013 Border Security Bill merit-based program, which places high value on education and skill, would also disproportionately benefit men.

This merit-based point system (i.e., the first track of a two-track system) would account for half of the total number of

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<sup>115</sup> See *id.* § 2301(c)(5).

<sup>116</sup> See KELLY JEFFERYS, OFFICE OF IMMIGR. STATISTICS, DEP'T OF HOMELAND SEC., CHARACTERISTICS OF EMPLOYMENT-BASED LEGAL PERMANENT RESIDENTS: 2004, at 2 tbl.1 (2005), available at <https://www.dhs.gov/xlibrary/assets/statistics/publications/FSEmployBasedLPR2004.pdf>. DHS has not made more recent gender-specific data on employment-based immigration visas publicly available, prompting some to assert that DHS no longer wishes to publicize the gendered gap present in the employment-based visa system. See, e.g., *More Men than Women Get Visas for Highly Skilled Immigrants*, SEATTLE TIMES (Mar. 18, 2013, 9:35 PM), [http://seattletimes.com/html/nationworld/2020590764\\_visasgenderxml.html](http://seattletimes.com/html/nationworld/2020590764_visasgenderxml.html) [hereinafter *More Men than Women*] (detailing the March 2013 congressional hearing, in which the “Obama administration came under fire . . . for not revealing how many men and women hold H-1B visas, the nation’s centerpiece program for highly skilled workers”). Seeking this information, organizations filed a Freedom of Information Act request. See *id.* (quoting *How Comprehensive Immigration Reform Should Address the Needs of Women and Families: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 179 (2013) (statement of Doctor Karen Panetta) (“[Our organization] has been trying for months to get the actual data on this from DHS. They have been stonewalling us. It’s a simple question: how many women get H-1B visas? We are still waiting on our Freedom of Information Request. But it’s a scandal that we even had to file one. When you think about it—why doesn’t DHS already know exactly how many women get H-1B visas? If a major immigration program effectively discriminated based on race or national origin, would that be okay?”). As reported by sources, the Bay Area News Group requested the information from DHS and, upon receipt of the statistics, thereby determined: “The U.S. Office of Immigration Statistics recorded 347,087 male H-1B visa holders entered the country during the 2011 fiscal year compared to 137,522 women. The data is imperfect because it includes many H-1B immigrants traveling to the United States after visits to their home countries, not just first-time arrivals.” Matt O’Brien, *High-Skilled Immigration Debate Grows Over Stark Gender Imbalance, Favoring Men for H-1B Visas*, SAN JOSE MERCURY NEWS (Mar. 19, 2013, 6:28 AM), [http://www.mercurynews.com/ci\\_22819054/high-skilled-immigration-debate-grows-over-stark-gender](http://www.mercurynews.com/ci_22819054/high-skilled-immigration-debate-grows-over-stark-gender); see *More Men than Women*, *supra* (reporting same).

<sup>117</sup> See, e.g., Olivares, *supra* note 106, at 98–104 (describing the hierarchical nature of the employment-based visa preference systems).

merit-based visas each year.<sup>118</sup> Proponents of the 2013 Border Security Bill assert that “Track Two” is reserved for lesser-skilled immigrants in that, rather than focusing on educational or skill credentials, Track Two is devised to eliminate the long backlog for available visas for people whose family or employment-based visa applications have been pending for five years or more.<sup>119</sup> Thus, anyone—regardless of skill or education—could qualify for LPR status under Track Two (if otherwise eligible). In this regard, then, more women—who, globally, lag behind men in their ability to obtain higher levels of formal education,<sup>120</sup> continued employability and employment in certain fields,<sup>121</sup> and success as entrepreneurs of any sort<sup>122</sup>—would qualify for visas under Track Two. Yet the two-track system does not require that

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<sup>118</sup> See S. 744, § 2301(c).

<sup>119</sup> See *id.* § 2302(a), (c)(1)–(2); see also AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 10.

<sup>120</sup> See, e.g., UNESCO, WORLD ATLAS OF GENDER EQUALITY IN EDUCATION 8–9 (2012), available at <http://unesdoc.unesco.org/images/0021/002155/215522E.pdf> (discussing the important advancements made by women and girls in obtaining education in the last forty years, while highlighting the continued educational disparities between men and women, including the low numbers of women in the fields of the hard sciences (e.g., computing and engineering) and in research positions at the post-PhD levels).

<sup>121</sup> See, e.g., *id.* at 62–64; *id.* at 84 (“It must also be noted that over-representation of women in higher education has yet to translate into proportional representation in the labour market, especially in leadership and decision-making positions. Even though many women have started to benefit from their countries’ improved education systems, they face barriers to the same work opportunities available to men. Women continue to confront discrimination in jobs, disparities in power, voice and political representation and the laws that are prejudicial on the basis of their gender. As a result, well-educated women often end up in jobs where they do not use their full potential and skills.”). More generally, though, the disparities between women and men in the work force are heightened outside of the highly educated population. See, e.g., KATRINA ELBORGH-WOYTEK ET AL., INT’L MONETARY FUND, WOMEN, WORK, AND THE ECONOMY: MACROECONOMIC GAINS FROM GENDER EQUITY 4 (2013), available at <https://www.imf.org/external/pubs/ft/sdn/2013/sdn1310.pdf> (“Women make up a little over half the world’s population, but their contribution to measured economic activity, growth, and well-being is far below its potential, with serious macroeconomic consequences. Despite significant progress in recent decades, labor markets across the world remain divided along gender lines, and progress toward gender equality seems to have stalled. Female labor force participation (FLFP) has remained lower than male participation, women account for most unpaid work, and when women are employed in paid work, they are overrepresented in the informal sector and among the poor. They also face significant wage differentials vis-à-vis their male colleagues. In many countries, distortions and discrimination in the labor market restrict women’s options for paid work, and female representation in senior positions and entrepreneurship remains low.”).

<sup>122</sup> See, e.g., ELBORGH-WOYTEK ET AL., *supra* note 121, at 10 (internal citations omitted) (“In many countries, the lack of basic necessities and rights inhibits women’s potential to join the formal labor market or become entrepreneurs. In some emerging and developing economies, restrictions on women’s independent mobility and participation in market work curtail their economic potential. Women dominate the informal sector, characterized by vulnerability in employment status, a low degree of protection, mostly unskilled work, and unstable earnings. They often have limited property and inheritance rights and limited access to credit. In agriculture, particularly in Africa, women operate smaller plots of land and farm less remunerative crops than men, and they have more limited access to agricultural inputs.”).

the higher skilled immigrants be directed into Track One, meaning that these immigrants could arguably benefit from both Track One and Track Two. As a result, men—who would more likely score high point totals in Track One, while just as easily qualifying for visas under Track Two—would outnumber women as the winners in this system.

The prioritization on rewarding immigrants with job skills, formal education, and entrepreneurial success continues in the 2013 Border Security Bill. For example, unlike other professions that are subject to the annual cap on the number of available employment-based visas, the legislation exempts “certain highly-skilled and exceptionally talented immigrants . . . such as those who have extraordinary ability or advanced degrees in STEM [science, technology, engineering, and math] fields from U.S. universities.”<sup>123</sup> But because men, who regularly achieve higher levels of education than women in countries around the world,<sup>124</sup> are more likely to qualify for this STEM-profession exemption,<sup>125</sup> the result is yet again to disadvantage women.<sup>126</sup>

Finally, among these provisions, the 2013 Border Security Bill puts further emphasis on recruiting and retaining immigrants who are able to invest in American business. Not surprisingly, these new “investor” visas would benefit men—who, globally, have more access to the large amounts of money and

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<sup>123</sup> AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 11 (referring to S. 744, § 2307(c)(3), Allocation of Immigrant Visas, outlining the conforming amendments to the current INA employment-based preferences).

<sup>124</sup> See, e.g., UNESCO, *supra* note 120, at 9, 62–64; Ruth Tam, *Can Women Give Immigration Reform the Boost It Needs?*, WASH. POST (Nov. 20, 2013, 1:48 PM), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/11/20/can-women-give-immigration-reform-the-boost-it-needs/> (observing the gender disparities in preferring highly educated immigrants).

<sup>125</sup> See, e.g., *More Men than Women*, *supra* note 116; O'Brien, *supra* note 116; UNESCO, *supra* note 120, at 62–64 (discussing the low numbers of women in the fields of the hard sciences (e.g., computing and engineering) and in research positions at the post-PhD levels).

<sup>126</sup> As one improvement, S. 744 includes a provision to allow derivative visa holders of the principle employment-based visa—that is, the spouses of the employee who obtained the visa—to lawfully work. See S. 744, § 4102, 113th Cong. (2013). In fact, United States Citizenship and Immigration Services (USCIS) advocated this same change to the regulation and has issued a proposed rulemaking allowing certain spouses of H-1B workers to lawfully work in the United States. See Press Release, Dep't of Homeland Sec., DHS Announces Proposals to Attract and Retain Highly Skilled Immigrants (May 6, 2014), available at <http://www.dhs.gov/news/2014/05/06/dhs-announces-proposals-attract-and-retain-highly-skilled-immigrants>. Although this provision, if approved, would be welcome news to these spouses who could not previously work lawfully, the proposal highlights the emphasis on beneficial reform for highly skilled workers, rather than reform provisions targeting the greater population of women immigrants. See generally Sabrina Balmawalla, *Bride and Prejudice: How U.S. Immigration Law Discriminates Against Spousal Visa Holders*, 29 BERKELEY WOMEN'S L.J. 25 (2014).



resources needed to qualify.<sup>127</sup> For example, the new proposed nonimmigrant X visa provides temporary status to “qualified entrepreneurs” who attract investments of at least \$100,000 in a U.S. business or have created at least three jobs in the United States during the three-year period before the initial X visa petition was filed, and, during the two-year period before the visa petition was filed, the immigrant’s business generated at least \$250,000 in annual revenue in the United States.<sup>128</sup> Moreover, the 2013 Border Security Bill proposes a new employment-based visa category, leading to LPR status—the EB-6 investor visa.<sup>129</sup> The EB-6 immigrant visa would be for “qualified immigrant” entrepreneurs who have: (1) “significant ownership interest in a United States business entity”<sup>130</sup> that has created at least five qualified jobs<sup>131</sup> and (2) either reaped venture capital or investments of not less than \$500,000 or have generated at least \$750,000 in annual revenue within the United States in the two years prior to the filing of the immigrant visa petition.<sup>132</sup>

These programs unabashedly target wealthy foreigners, who are willing to expend large sums of money for a chance at U.S. citizenship. Yet the concept of a wealthy businesswoman or entrepreneur is still a rarity across the world. Not surprisingly, the effects of gender discrimination and oppressive systems have

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<sup>127</sup> See generally Priya Alagiri, *Why Aren't There More Foreign Female Entrepreneurs?*, REUTERS (Oct. 10, 2011), <http://blogs.reuters.com/great-debate/2011/10/10/why-arent-there-more-foreign-female-entrepreneurs/> (describing the author’s own surveying of professional immigrant women and noting that many felt they were at a disadvantage compared to American women entrepreneurs and immigrant males, who benefitted greatly from more established professional networks). Expanding on this problem, immigrant women felt they were unable to obtain funding from private investors because many investors hold a bias against funding women, including immigrant women. *Id.* “One investor, for example, has said that ‘a ton of us decide not to invest, support, promote or work with women because of this whole “marriage/pregnancy” hurdle that most women will face in their career.’” *Id.* See generally Del Jones, *Women Business Founders Rising, but Slowly*, USA TODAY (Apr. 23, 2008), [http://usatoday30.usatoday.com/money/companies/management/2008-04-22-women-founders-success\\_N.htm](http://usatoday30.usatoday.com/money/companies/management/2008-04-22-women-founders-success_N.htm) (describing interviews with some of the few women executives or company founders: “Women who have built big companies don’t know why they remain so rare, but explanations fall largely into two camps: discrimination and nature. They say men have easier access to money from bankers and venture capitalists, the lifeblood of growth. Women also are often more devoted to family, and even those who out-earn their husbands often remain responsible for children and households.”).

<sup>128</sup> See S. 744, § 4801(i)–(ii).

<sup>129</sup> See *id.* § 4802.

<sup>130</sup> See *id.* § 4802(C).

<sup>131</sup> *Id.*

<sup>132</sup> See *id.* § 4802(C)(i)(III)(aa)(BB)–(bb)(BB); see also AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 17, for a thorough summary of these provisions.

operated to keep women out of the workforce generally and out of its highest reaches specifically.<sup>133</sup>

As an effect, few women are in the position to be able to benefit from immigrant visas aimed at high-earning investors and entrepreneurs. DHS declines to publicly report on the gender breakdown of the EB-5 investor immigrant visas, but there are visible trends regarding the dearth of women in these positions.<sup>134</sup> Albeit fiscally logical on its face and perhaps otherwise meritorious in reach, one deleterious effect of such programs is to provide immigration status and benefits to men, while leaving out women.

Thus, first, as demonstrated by the point allocation system detailed above,<sup>135</sup> the two-tiered merit-based system “prioritizes immigrants who are young, educated, experienced, skilled, and fluent in English,”<sup>136</sup> characteristics at least some of which globally tend to favor men.<sup>137</sup> Second, priority is further placed on highly educated immigrants pursuing or employed in STEM fields or otherwise able to invest large sums of money in American-based businesses. Thus, although family ties<sup>138</sup> and caregiver status also earn points in the 2013 Border Security Bill’s merit-based system<sup>139</sup>—characteristics that globally favor women<sup>140</sup>—the discrepancy between prioritization of formal education, business acumen, and wealth on one side and familial

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<sup>133</sup> See *supra* notes 120–121 (describing global labor market effects and the dearth of women in the highest level of post-doctorate positions).

<sup>134</sup> See *supra* note 127.

<sup>135</sup> See *supra* notes 111–115 and accompanying text.

<sup>136</sup> AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 9.

<sup>137</sup> See, e.g., UNESCO, *supra* note 120, at 82–84 (discussing the higher rates of men who attain the highest levels of education, including those fields in the hard sciences and which encompass research jobs); ELBORGH-WOYTEK ET AL., *supra* note 121, at 4, 8–10.

<sup>138</sup> See S. 744, 113th Cong. § 2301(c)(5)(G) (2013).

<sup>139</sup> See *id.* § 2301(c)(5)(C).

<sup>140</sup> Research shows, for example, that though the last century has seen great strides in women working outside the home in formal or informal work settings around the world, women still face barriers to engage in paid work and/or are consistently paid less than men. See, e.g., WORLD BANK, *supra* note 84, at 2 (“Social norms are a key factor underlying deprivations and constraints . . . Norms affect women’s work by dictating the way they spend their time and undervaluing their potential. Housework, child-rearing, and elderly care are often considered primarily women’s responsibility. Further, nearly four in 10 people globally (close to one-half in developing countries) agree that, when jobs are scarce, men should have more right to jobs than women. Research shows that women are frequently disadvantaged by gender biases in performance and hiring evaluations.”). Just like women are underrepresented as principals in the employment-based visa system, they are overrepresented as the beneficiaries in the family-based visa system, indicating that they are more often than not beneficiaries of immigration relief due to their status as caregiver (e.g., mother, spouse, daughter) and/or because of their familial ties. See *supra* note 116 and accompanying text; see also *Yearbook of Immigration Statistics: 2013*, *supra* note 71.

or caregiver status on the other side is too large to equalize the concomitant effects on men versus women.<sup>141</sup>

Thus, though many of these proposals negatively affect poor immigrant men too, the result of historic and continued discriminatory practices against women—immigrants and otherwise—produces a disproportionately harmful effect on women. With high levels of anti-immigrant animus in the current political and public climate,<sup>142</sup> it is not surprising that the most comprehensive compromise to come from the Senate would incorporate arduous steps that embody the “good” and “remorseful” immigrant narrative.<sup>143</sup> Creating barriers that very few could surpass for eventual RPI or blue-card status provides easy political soundbites against illegal immigration. But by ignoring the economic and gendered realities of the current immigrant population and their inability to overcome these barriers, proposals like the 2013 Border Security Bill do little to solve the ongoing problems in immigration law and policy. Moreover, the harshness of the 2013 Border Security Bill continues to perpetuate policies that discriminate against women, rather than work towards equality.

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<sup>141</sup> As one immigrant advocacy organization has noted:

Proponents of a point system [i.e., the merit-based point system in the 2013 Border Security Bill] have argued that we must move away from family-based immigration to a system that is tied to economic necessity. The merit-based point system is designed to balance a range of factors in assessing who should be admitted to the United States, but it remains an experiment. Supporters argue that similar systems have been used in other major industrialized nations. Critics have pointed out that it puts some applicants at a disadvantage, such as women, people who work in the informal economy or do unpaid work, relatives of U.S. citizens with insufficient formal education and employment history, older adults, and applicants from less-developed countries.

AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 10.

<sup>142</sup> See, e.g., Lauren Fox, *Anti-immigrant Hate Coming from Everyday Americans*, U.S. NEWS & WORLD REP. (July 24, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/07/24/anti-immigrant-hate-coming-from-everyday-americans> (noting that anti-immigrant protests and sentiments are no longer for extremist groups, but from “everyday Americans”); Justine Hofherr, *Protesters Swarm Beacon Hill, ‘Livid’ Over Illegal Immigration*, BOSTON.COM (July 26, 2014, 1:19 PM), <http://www.boston.com/news/local/massachusetts/2014/07/26/hundreds-attend-anti-illegal-immigration-rally-beacon-hill/> (describing protest against Massachusetts Governor’s decision that the state would house unaccompanied minors). Protesters held signs reading, for example, “Deport Illegals” and “Americans before Illegals.” *Id.*

<sup>143</sup> The concept of the “good” immigrant as being the preferred immigrant is a topic of much debate and research by the author and other scholars. See, e.g., generally Olivares, *supra* note 106; Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101 (2014); Hiroshi Motomura, *Who Belongs? Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359 (2012); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

## CONCLUSION: REFORM FOR THE FUTURE

“The thing this administration needs to do is immediately deport these families, these children.” Representative Raul Labrador (R-ID), July 6, 2014.<sup>144</sup>

Passing comprehensive immigration law reform may be the legislative Sisyphean feat of contemporary times. With solid movement of the 2013 Border Security Bill through the Senate, change seemed afoot. Progress stalled in the House of Representatives, only to be confronted with the next boulder in 2014—the influx of large numbers of undocumented child migrants, sometimes unaccompanied and sometimes traveling with guardians or parents, often their mothers.<sup>145</sup> Reports widely estimated that DHS apprehended more than 50,000 undocumented children in the first nine months of 2014, a huge increase from the year prior.<sup>146</sup> The public and governmental

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<sup>144</sup> Interview by David Gregory with Raul Labrador, Congressman, Idaho (July 6, 2014), available at <http://www.nbcnews.com/watch/meet-the-press/full-raul-labrador-interview-on-meet-the-press-297785923834>.

<sup>145</sup> See, e.g., Hannah Rappleye & Lisa Riordan Seville, *Flood of Immigration Families at Border Revives Dormant Detention Program*, NBC NEWS (July 25, 2014, 5:39 AM), <http://www.nbcnews.com/storyline/immigration-border-crisis/flood-immigrant-families-border-revives-dormant-detention-program-n164461> (describing the increase in women and children immigrants) (“Figures released last week by Customs and Border Protection show more than 55,000 ‘family units’—at least one adult relative traveling with one or more children—were apprehended crossing the border in fiscal 2014. That figure is an increase of nearly 500 percent from the previous year and dwarfs the 106 percent spike in unaccompanied children—to more than 57,000—that has received so much attention in recent months. Now the Obama administration is rushing to open up detention centers to hold the families—mostly women with children from El Salvador, Guatemala and Honduras—and is working out streamlined procedures to quickly send them back to their homelands, a turnabout in policy that is being widely panned by immigrant advocates.”); Rebecca Kaplan, *Surge in Unaccompanied Child Immigrants Spurs White House Reaction*, CBS NEWS (June 2, 2014, 8:26 PM), <http://www.cbsnews.com/news/surge-in-unaccompanied-child-immigrants-spurs-white-house-reaction/> (“Cecelia Munoz, the White House Director of Domestic Policy, said the impetus for the emergency measures by the administration was an increase in the number of the arrivals that was ‘much larger than anticipated’—more than 90 percent compared to last year. There are also rising numbers of girls and children under the age of 13, she said.”); Jana Winter, *Endless Wave of Illegal Immigrants Floods Rio Grande Valley*, FOX NEWS (July 14, 2014), <http://www.foxnews.com/us/2014/07/14/night-time-on-border-endless-wave-illegal-immigrants-floods-rio-grande-valley/> (discussing recent efforts at the Mexico-Texas border to capture migrants) (“The Border Patrol agents loaded and unloaded their vehicles packed with the newly-arrived illegal immigrants—including women pregnant or nursing infants, and small, unaccompanied children—throughout the evening and early morning hours. At first, they were mostly teenagers, ages 14 to 17, arriving with their mother or brothers or no one at all. Then came the pregnant women. A mother nursing her infant. A small girl with wide eyes clutching a doll.”).

<sup>146</sup> See, e.g., DAN RESTREPO & ANN GARCIA, CTR. FOR AM. PROGRESS, THE SURGE OF UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA 1 (2014), available at <http://cdn.americanprogress.org/wp-content/uploads/2014/07/CentAmerChildren3.pdf> (“Already in fiscal year 2014, more than 57,000 children have arrived in the United States, double the number who made it to the U.S. southern border in FY 2013. The number of families arriving at the border, consisting mostly of mothers with infants and toddlers, has

response to the humanitarian crisis of tens of thousands of children arriving at our borders has been, at times, vitriolic.<sup>147</sup> But perhaps more disturbing is the reaction from United States Citizenship and Immigration Services (USCIS) and other administrative authorities, who have focused their responses on the expedient removal of the immigrants, apparently whether or not they have valid claims for lawful status, including asylum.<sup>148</sup> Though accounts from the U.S. border and from the “family detention centers,” where the immigrants are detained pending their release or removal, paint a bleak picture that can only be deemed a humanitarian crisis involving the most vulnerable of populations,<sup>149</sup> calls for legislative answers focus on quick removal absent due process protections.<sup>150</sup>

Advocates for immigration law reform that encompasses gender equality thus face an increasingly hostile political and public climate. While the voices speaking up for these women and children immigrants are also strong, even proponents of humanitarian immigration reform are grappling with the effects

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increased in similar proportions. In fiscal year 2013, the U.S. Department of Homeland Security, or DHS, apprehended fewer than 10,000 families per year; yet, more than 55,000 families were apprehended in the first nine months of fiscal year 2014 alone.”).

<sup>147</sup> See, e.g., Andrew Kaczynski, *GOP Congressman: Kids at Border ‘Gang Members’ From Culture of ‘Rape’*, BUZZFEED POL. (July 15, 2014), <http://www.buzzfeed.com/andrewkaczynski/gop-congressman-kids-at-border-gang-members-from-culture-of> (quoting radio interview with Representative Rich Nugent (R-FL)) (“These kids have been brought up in a culture of thievery. A culture of murder, of rape. And now we are going to infuse them into the American culture. It’s just ludicrous.”); Halimah Abdullah, *Not in My Backyard: Communities Protest Surge of Immigrant Kids*, CNN POL. (July 16, 2014, 9:46 AM), <http://www.cnn.com/2014/07/15/politics/immigration-not-in-my-backyard/> (detailing protests in cities against the influx of children immigrants, including in Murrieta, California where anti-immigrant protesters held up signs reading “Return to Sender” when vehicles transporting the children arrived).

<sup>148</sup> See, e.g., Julia Preston, *As U.S. Speeds the Path to Deportation, Distress Fills New Family Detention Centers*, N.Y. TIMES, Aug. 6, 2014 at A10, available at [http://www.nytimes.com/2014/08/06/us/seeking-to-stop-migrants-from-risking-trip-us-speeds-the-path-to-deportation-for-families.html?\\_r=0](http://www.nytimes.com/2014/08/06/us/seeking-to-stop-migrants-from-risking-trip-us-speeds-the-path-to-deportation-for-families.html?_r=0) (discussing how the Obama administration works to deter more arrivals by placing those caught on a fast track to deportation, many times without providing opportunities for asylum cases or bonds to those that qualify); *Obama Official Says at Border: ‘We’ll Send You Back’*, CNN (July 11, 2014, 10:58 PM), <http://www.cnn.com/2014/07/11/politics/immigration-border/> (quoting DHS Secretary Jeh Johnson’s message to incoming immigrants: “Our message to those who are coming here illegally, to those who are contemplating coming here illegally: ‘We will send you back.’”).

<sup>149</sup> See, e.g., Dara Lind, *14 Facts that Help Explain America’s Child-Migrant Crisis*, VOX (July 29, 2014, 11:43 AM), <http://www.vox.com/2014/6/16/5813406/explain-child-migrant-crisis-central-america-unaccompanied-children-immigrants-daca> (detailing the reason migrant children and families are crossing the U.S. border and the government’s response to this humanitarian crisis); Susan Carroll, *Feds Will House Immigrant Families at Detention Center Near San Antonio*, HOUS. CHRON. (July 26, 2014, 10:00 PM), <http://www.chron.com/news/article/Feds-will-house-immigrant-families-at-detention-5630925.php> (deportation process at Karnes County, Texas family detention center is performed many times without the presence of an attorney to help the detained women and children).

<sup>150</sup> See *supra* note 148.

of the latest wave of migrant children.<sup>151</sup> The fact that the targets of the debate are, indeed, children—infants traveling with their mothers,<sup>152</sup> and children as young as five traveling alone<sup>153</sup>—is telling. In some respects, there could be no more vulnerable of a population deserving of empathy, compassion, and humanitarian immigration relief. Instead, they are met with derision and calls for their swift removal and harsh treatment while in detention. In fact, by *virtue* of their identity as women and children—mothers with their children, to be precise—the migrants are placed in a specialized detention center and, until volunteer lawyers sued for access to the center so as to provide legal assistance, were denied basic due process while enduring poor living conditions.<sup>154</sup>

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<sup>151</sup> See, e.g., Rebecca Kaplan, *For Unaccompanied Immigrant Children, a Shortage of Lawyers*, CBS NEWS (Aug. 7, 2014, 6:00 AM), <http://www.cbsnews.com/news/for-unaccompanied-immigrant-children-a-shortage-of-lawyers/> (noting that with the increase of deportation procedures for unaccompanied minors by the Obama administration, organizations have begun to scramble in their search for pro bono attorneys for these individuals); Fox, *supra* note 142 (“Even politicians who have voiced sympathy for the kids have tried to keep migrant children out of their own backyards. Maryland Gov. Martin O’Malley, a Democrat, said sending kids back to their home countries meant they could face ‘certain death.’ Then, he turned around and asked the Obama administration not to send any kids to a Westminster, Maryland, facility because he feared they would not be welcomed. The facility in question had been vandalized with a message that read, ‘NO ILLEAGLES [sic] HERE. NO UNDOCUMENTED DEMOCRATS.’”).

<sup>152</sup> See, e.g., Catherine E. Shoichet, *Getting There*, CNN (July 2014), <http://www.cnn.com/interactive/2014/07/us/beyond-the-border-getting-there/> (chronicling the journey of a Guatemalan mother and son from a bus station in Arizona to her husband’s house in Mississippi and speaking to the conditions that brought her to America, the trials and tribulations they encountered in the detention center, and the increase of mothers traveling to the United States with their children); Cindy Carcamo, *U.S. Sends Planeload of Moms, Children Back to Honduras*, L.A. TIMES (July 14, 2014, 9:40 PM), <http://www.latimes.com/world/mexico-americas/la-fg-honduras-deportees-20140714-story.html#page=1> (describing the scene when a flight carrying only mothers and children deported from the United States arrived in Honduras).

<sup>153</sup> See Molly Hennessy-Fiske, *Report: 117% Increase in Children 12 and Younger Crossing Border Alone*, L.A. TIMES (July 25, 2014, 7:00 AM) <http://www.latimes.com/nation/nationnow/la-na-illegal-immigration-unaccompanied-minors-20140724-story.html#page=1> (“Although the increase among migrants ages 6 to 12 was significant, they made up only 14% of total youths apprehended at the border, according to the Pew report, which provides the first detailed portrait of the age and nationality of child migrants detained . . . Fewer than 1% of children caught this year were younger than 1 year old, and only about 2% were 5 or younger.”).

<sup>154</sup> See Cindy Carcamo, *Nearly 300 Women, Children Deported from Immigration Detention Centers*, L.A. TIMES (Aug. 21, 2014, 7:30 AM), <http://www.latimes.com/nation/nationnow/la-na-nn-ff-new-mexico-immigration-deportation-20140821-story.html> (“[T]he Department of Homeland Security’s inspector general report has cited various other problems—inadequate amounts of food, inconsistent temperatures and unsanitary conditions—at various immigration holding facilities for children. Also, immigration officials have been accused of not allowing the mothers and children due process as the U.S. speeds up the processing of the thousands of single parents with children who have fled Central America and entered the U.S.”); Julia Preston, *In Remote Detention Center, a Battle on Fast Deportations*, N.Y. TIMES, Sept. 6, 2014, at A1 (“Women and their children from El Salvador, Guatemala and Honduras are housed in dark bunk rooms with eight people each. There are balls and toys for the children and stacks of diapers for babies. But

In such an environment, the 2013 Border Security Bill—despite its flaws that would result in disparate negative effects on women—could have potentially provided much better protections to women and other vulnerable populations than whatever is likely to be borne from this recent immigration debacle. Moreover, as one of the most subordinated populations, women<sup>155</sup>—and especially poor women of color, which characterize part of the immigrant population<sup>156</sup>—suffer some of the harshest effects of the historical degradation of their rights. As a result, when women seek gains through legislation aimed specifically at improving their status and increasing measures of gender equality, the legislative process seemingly stalls. Indeed, even previously noncontroversial legislation may fall victim to the politics of subordination.<sup>157</sup>

Moreover, as detailed above,<sup>158</sup> history teaches that immigration law and policy have long positioned women at a disadvantage in procuring and retaining immigration benefits. From the formalized doctrine of coverture to the stripping of women's citizenship due to marriage to a foreign national, immigration law has explicitly treated women as second-class citizens. And beyond the formalized discrimination, policies that resulted in disparate negative effects for women—like the IMFA provisions and the IRCA legalization provisions—continued in more contemporary reform efforts, including the 2013 Border Security Bill. Thus, given the current environment of angry sentiment against children and women migrants fleeing violence, coupled with the history of gender oppression in early and contemporary times, advocates may wonder if the struggle for equality is still a worthwhile endeavor.

I argue that the push for equality remains vital and meaningful. True gender equality remains elusive in immigration law in effect and implementation, but positive strides have certainly improved the lives of immigrant women since the earliest days of legislation. As gender equality permeated other areas of law, and women won the rights that once belonged to only men, the effects have reached immigration law and policy. Thus, a similar wave can create positive ripples of improvement in more far-reaching and nuanced ways in future

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in a report this week, the inspector general of the Department of Homeland Security found 'unsanitary conditions' in some dormitories because many detainees were ill.”).

<sup>155</sup> See Olivares, *supra* note 13 at 34–39 (describing and analyzing the legacy of subordination of women in immigration law).

<sup>156</sup> See *id.* at 29–31 (describing and analyzing the subordination of racial minority immigrants in immigration law).

<sup>157</sup> See *id.*

<sup>158</sup> See *supra* Part I.

reform efforts. While it may seem benign to write about—and even fight for—such change, the alternative of doing nothing is an even more toxic answer.