

THE UNINTENDED EFFECTS OF THE THREE- AND TEN-YEAR UNLAWFUL PRESENCE BARS

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I

INTRODUCTION

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),¹ focusing immigration law and policy on greater enforcement and centering the enforcement system around departures, in an attempt to deter immigrants from overstaying their visas.² One major enforcement tool instituted by IIRIRA was the creation of three- and ten-year “unlawful presence”³ (ULP) bars, which are triggered when an out-of-status alien departs the United States.⁴ Since the law went into effect in 1997, the creation of these bars has had important consequences not only for immigrants, but also for their communities and the United States as a whole. Significantly, many of these effects are directly contrary to Congress’s intended purpose in enacting IIRIRA, as well as longstanding national immigration policy generally.

Many of these harmful effects are fueled by the ULP bars’ significant incentives to immigrants to extend, instead of shorten, their length of stay in the United States. Extended stays consign these immigrants to an undocumented underclass, validating common but largely incorrect stereotypes. Negative community stereotypes then influence legislators and others, fueling harsher immigration legislation and policy (like the ULP bars themselves), thus perpetuating a cycle of harmful stereotyping and stricter enforcement schemes.

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1. Pub. L. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

2. S. Bernard Schwarz, *Unlawful Presence Unlawfully Interpreted*, 79 INTERPRETER RELEASES 509, 515 (2002).

3. The specifics regarding the accrual of unlawful presence is beyond the scope of this note, but some explanation will be given as necessary throughout. For a more complete explanation, see generally Memorandum from Donald Neufeld, Exec. Dir., U.S. Citizenship & Immigration Servs., Lori Scialabba, Assoc. Dir., Refugee, Asylum & Int’l Operations Directorate & Pearl Chang, Acting Chief, Office of Politics & Strategy, U.S. Citizenship & Immigration Servs., to Field Leadership of the U.S. Citizenship & Immigration Servs. (May 6, 2009) [hereinafter Neufeld Memorandum], *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

4. Immigration and Nationality Act (INA) § 212(a)(9)(B), 8 U.S.C § 1182(a)(9)(B) (2006).

The bars also contribute to widespread economic challenges and weighty detrimental impacts on families of both immigrants and citizens.

Of course, a harsher approach to immigration legislation, like that embodied in IIRIRA, has many supporters. For example, some argue that more punitive immigration legislation is necessary “to provide an incentive for prospective immigrants to play by the rules and resist the temptation to flout immigration law en route to a green card.”⁵ These persons often object to immigrants who “cut in line,” rather than waiting and applying through the consular process abroad.⁶ There is much legitimate discussion on these issues, but the general immigration debate is well beyond the scope of this note. The immediate point is that *regardless* of one’s political leanings, the evidence indicates that the ULP bars fall utterly short of achieving their purpose and are also harmful to American citizens (in addition to immigrants).

Even supporters of harsher immigration laws are not pleased with the ULP bars, and for largely the same fundamental reason: The bars are unable to reach immigrants who evade them by simply remaining inside the United States.⁷ This massive loophole incentivizes longer stays and creates significant social, economic, and familial harms to Americans generally, without deterring illegal immigration. That the ULP bars do not deter immigration appears well accepted by most; for some, the correct response is to advocate for stricter enforcement measures, while others push for a softer approach. Either way, the bars are clearly ineffective.⁸ No matter one’s perspective on immigration policy, the ULP bars fail to achieve their desired goals, contravene long-standing national immigration policy, and perpetuate or even worsen these unintended and problematic outcomes. It is therefore imperative that Congress repeal the ULP bars and replace them with a legislative scheme that more effectively achieves its policy goals.

A. Legal Background

Under IIRIRA, undocumented immigrants are barred from reentry into the United States for three years if they accrue more than 180 days but less than one year of unlawful presence and voluntarily depart the United States prior to the commencement of removal proceedings.⁹ Additionally, undocumented immigrants accruing more than one year of unlawful presence are inadmissible

5. Jessica Vaughan, *Bar None: An Evaluation of the 3/10-Year Bar*, CENTER FOR IMMIGR. STUD. (July 2003), <http://www.cis.org/EvaluatingIIRAIRA>.

6. *Id.*

7. *See, e.g., id.* (arguing that the law “only applies to those illegal aliens who don’t know enough not to leave”).

8. *Compare, e.g., id.* (“The point of the [ULP bars] was to punish and deter illegal immigration By every measure, [they have] failed to make a difference.”), with Cain W. Oulahan, *The American Dream Deferred: Family Separation and Immigrant Visa Adjudications at U.S. Consulates Abroad*, 94 MARQ. L. REV. 1351, 1356 (2011) (arguing that the bars break up American families without significantly deterring illegal immigration).

9. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2006).

for ten years after the date of departure.¹⁰ In both cases, the unlawful presence must be accumulated in one “stay” in the United States, which resets any time the immigrant leaves the country.¹¹

Although a waiver of the ULP bars is available, it is both limited in scope and difficult to obtain. To qualify, the immigrant must show that imposition of the ULP bar to reentry would “result in extreme hardship” to the immigrant’s spouse or parents who are citizens or lawful permanent residents.¹² Notably, the extreme-hardship waiver does not account for the immigrant’s citizen children. Also, the standard for “extreme hardship” is high. Section 212(h) of Immigration and Nationality Act (INA), which utilizes the same standard as the ULP waiver, indicates that “extreme hardship” in selecting family members who are citizens may constitute a waiver to inadmissibility.¹³ Courts have interpreted the language of section 212(h) to mean hardship beyond difficulties that would normally be associated with deportation or removal to a new country, and to exclude more minor hardships such as finding new work, uprooting family, or loss of financial support.¹⁴ Additionally, no court has jurisdiction to review the denial of a waiver of the ULP bars.¹⁵

The most powerful effect of the bars, however, is manifested in their interaction with the process for gaining status as a lawful permanent resident. Before IIRIRA, undocumented immigrants living in the United States with the possibility of acquiring legal permanent resident (LPR) status¹⁶ could leave the country for consular processing upon qualification for a visa and then return with LPR status.¹⁷ However, that option is no longer available once an immigrant triggers one of the ULP bars. Because undocumented immigrants are generally out of status (often because of overstaying a visa or entering

10. *Id.* § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2006).

11. Neufeld Memorandum, *supra* note 3, § 4(A). Additionally, a permanent bar is triggered when an immigrant accrues more than one year of unlawful presence in total and attempts to reenter the United States without admission. INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C) (2006). Thus, if the immigrant leaves and returns multiple times, he may not trigger the three- or ten-year bars if his stays are each less than 180 days, but could still be subject to the permanent bar if, in the aggregate, he accrues more than one year of unlawful presence. Neufeld Memorandum, *supra* note 3, § 4(B).

12. INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) (2006).

13. INA § 212(h), 8 U.S.C. § 1182(h) (2006) (waiver for some criminal-related grounds of exclusion).

14. *See, e.g.*, U.S. v. Arce-Hernandez, 163 F.3d 559, 564 (9th Cir. 1998); Shooshtary v. INS, 39 F.3d 1049, 1051 (9th Cir. 1994).

15. INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) (2006).

16. An immigrant becomes a legal permanent resident upon receiving a “green card.” The process can be complicated and is beyond the scope of this note, but for more information, see generally *Green Card (Permanent Residence)*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <http://www.uscis.gov/greencard> (last updated May 13, 2011).

17. For more information on the process for consular processing of LPR status, see generally *Consular Processing*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=62280a5659083210VgnVCM100000082ca60aRCRD&vgnnextchannel=62280a5659083210VgnVCM100000082ca60aRCRD> (last updated Apr. 4, 2011).

without admission), they are not eligible for adjustments of status from within the United States.¹⁸ But after IIRIRA, consular processing outside the United States is no longer an option for undocumented immigrants with sufficient unlawful presence to trigger the ULP bars, because departing the country is precisely what triggers the bars.¹⁹ If immigrants leave to process applications for adjustment of status abroad after acquiring sufficient unlawful presence to trigger the bars, they will be barred from reentry for three or ten years. Therefore, the ULP bars effectively prevent undocumented immigrants who are otherwise eligible for a visa from obtaining lawful status.

Previously, Congress had made available, in INA section 245(i), another option for those who would otherwise qualify for adjustment of status but for the ULP bars. This provision allowed immigrants to apply for adjustment of status from within the United States with the payment of a fee of \$1000 submitted with their application.²⁰ However, the section 245(i) provision expired in January 1998. It was briefly revived through the Legal Immigration Family Equity (LIFE) Act Amendments of 2000, which extended it through April 30, 2001, so that petitions pending before that date were also eligible for consideration.²¹ Attempts at temporary extensions were raised in various bills in the House and the Senate, but did not extend past the end of 2001, leaving undocumented immigrants with no way to legalize their status from within the United States.²²

B. The ULP Bars' Current Reach

Because many immigrants seeking adjustment of status are undocumented, it can be difficult to determine how many people the ULP bars affect. The government and others have tried to track the situation over the last several decades, which provide us with some idea of the extent of the problem. The United States leads the world in total immigrants, with 40.4 million immigrants in 2011 (both documented and undocumented), making up thirteen percent of the population.²³ Although 40.4 million is the highest number of immigrants ever residing in the United States, immigrants made up a greater *percentage* of the population in the period from 1890 to 1920, when fifteen percent of the

18. INA §§ 245(a), (c), 8 U.S.C. §§ 1255(a), (c) (2006); *see also* 8 C.F.R. § 245.1 (2011) (specifically denying adjustment of status under section 245(a) to immigrants who are out of status unless they are immediate family members of U.S. citizens).

19. Evelyn H. Cruz, *Because You're Mine I Walk the Line: The Trials and Tribulations of the Family Visa Program*, 38 FORDHAM URB. L.J. 155, 168 (2010).

20. INA § 245(i), 8 U.S.C. § 1255(i) (2006).

21. 8 U.S.C. § 1255(i)(1)(B) (2006).

22. *See* Julie Mercer, Comment, *The Marriage Myth: Why Mixed-Status Marriages Need an Immigration Remedy*, 38 GOLDEN GATE U. L. REV. 293, 302–03 (2008) (explaining the progress of the attempts to extend the LIFE Act provisions in 2001).

23. PEW HISPANIC CTR., A NATION OF IMMIGRANTS 2 (2013), *available at* http://www.pewhispanic.org/files/2013/01/statistical_portrait_final_jan_29.pdf.

population was composed of immigrants.²⁴ Thus, the current immigration rate is not unusually high, even though the total number of immigrants living in the country has grown.

Estimates for the number of undocumented immigrants in the United States in 2011 range from 11.1 million as reported by the Pew Hispanic Center²⁵ to 11.5 million as reported by the Department of Homeland Security (DHS).²⁶ A comprehensive report by the Pew Hispanic Center based on 2010 data indicates that since 2007, the total number of undocumented immigrants residing in the United States has decreased, as has the number of undocumented immigrants in the workforce.²⁷ Another report, which isolated data for arrivals and departures of undocumented immigrants using a slightly different methodology, reached a different conclusion. It reported that since 2000, a growing number of undocumented immigrants exited the United States, while a decreasing number of undocumented immigrants arrived, resulting in a net *loss* of undocumented immigrants since 2008.²⁸ The decrease in immigrants is mostly due to fewer Mexican immigrants entering the United States.²⁹

However, even with a net loss in unauthorized immigrants, the imposition of the ULP bars still affects millions of people. Another Pew Hispanic Center study found that in 2010, eighty-five percent of undocumented immigrants had been in the United States for five years or longer.³⁰ Many of these immigrants are very likely to have accrued more than one year of unlawful presence in their five or more years in the United States, and would therefore trigger the ten-year bar if they depart. Additionally, the percentage of the foreign-born population that is undocumented has grown since IIRIRA was passed.³¹ In 1995, before the ULP bars went into effect, twenty percent of the foreign-born population was undocumented, but in 2005, nine years after IIRIRA, thirty-one percent of the

24. *Id.*

25. Jeffrey Passel & D'Vera Cohn, *Unauthorized Immigrants: 11.1 Million in 2011*, PEW HISPANIC CTR. (Dec. 6, 2012), <http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011/>.

26. MICHAEL HOEFER, NANCY RYTINA & BRYAN BAKER, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1 (2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

27. JEFFREY PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 2 (2011) [hereinafter PASSEL & COHN, UNAUTHORIZED IMMIGRANT POPULATION], *available at* <http://www.pewhispanic.org/files/reports/133.pdf>.

28. Robert Warren & John Robert Warren, *Unauthorized Immigration to the United States: Annual Estimates and Components of Change, by State, 1990 to 2010*, 47 INT'L MIGRATION R. 296, 314–15 (2013) (“After 2000, the number [of unauthorized immigrants] moving to the U.S. declined sharply, dropping by seventy-two percent from its peak in 2000 to about 400,000 in 2009.”).

29. PASSEL & COHN, UNAUTHORIZED IMMIGRANT POPULATION, *supra* note 27, at 10.

30. PAUL TAYLOR, MARK HUGO LOPEZ, JEFFREY S. PASSEL & SETH MOTEL, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS: LENGTH OF RESIDENCY, PATTERNS OF PARENTHOOD 3 (2011), *available at* <http://www.pewhispanic.org/files/2011/12/Unauthorized-Characteristics.pdf>.

31. JEFFREY S. PASSEL, PEW HISPANIC CTR., GROWING SHARE OF IMMIGRANTS CHOOSING NATURALIZATION, at i (2007), *available at* <http://www.pewhispanic.org/files/reports/74.pdf>.

foreign-born population was undocumented.³² Therefore, after IIRIRA, a greater number of immigrants are out of status, likely accruing unlawful presence, and potentially subject to the ULP bars.

Another noteworthy characteristic of the undocumented immigrant population is the significant number belonging to mixed-status families, in which some member of the family is a citizen or lawful permanent resident and another is undocumented. The Pew Center estimates that over nine million people lived in mixed-status families in 2010.³³ Mixed-status families are especially affected by stricter immigration enforcement, because such enforcement can have very detrimental financial and emotional effects on U.S. citizens, especially if a three- or ten-year bar to reentry is imposed on a family member. And the ULP bars could affect a large percentage of immigrant families. Of babies born in the United States from March 2009 to March 2010 to at least one undocumented immigrant parent, over ninety percent of the parents arrived before 2008.³⁴ The large majority of these parents, who are very likely to have accrued more than one year of unlawful presence in their several years living in the United States, would thus trigger the ten-year bar upon departure.

II

CONGRESS'S INTENDED EFFECTS IN PASSING IIRIRA

Historically, U.S. immigration policy is centered on family unification and meeting national employment needs.³⁵ The Immigration and Nationality Act (INA),³⁶ the foundational federal immigration statute passed in 1952, set up a system of preferences based around employment and family.³⁷ Congress continues to demonstrate its support of family unification in immigration legislation. For example, as discussed above,³⁸ in 1994 Congress passed INA section 245(i), which created a path for immigrants to adjust their status from within the United States, thus avoiding indefinite separation from family during the processing of a visa at a consulate.³⁹ Congress has never explicitly indicated

32. *Id.*

33. TAYLOR ET AL., *supra* note 30, at 6.

34. PASSEL & COHN, UNAUTHORIZED IMMIGRANT POPULATION, *supra* note 27, at 12.

35. LARRY M. EIG & WILLIAM J. KROUSE, CONGRESSIONAL RES. SERV., IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(I), at 2 (1998), *available at* <http://www.policyarchive.org/handle/10207/bitstreams/487.pdf>; RUTH ELLEN WASEM, CONGRESSIONAL RES. SERV., PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW 1 (2012), *available at* <http://www.fas.org/sgp/crs/homsec/R42866.pdf>.

36. INA, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006 & Supp. V 2011)).

37. *See* IMMIGR. POL'Y CTR., HOW THE UNITED STATES IMMIGRATION SYSTEM WORKS: A FACT SHEET (2010), *available at* <http://www.immigrationpolicy.org/just-facts/how-united-states-immigration-system-works-fact-sheet>.

38. *See supra* text accompanying notes 20–22.

39. *See* Mercer, *supra* note 22, at 300–01 (explaining the progress of the attempts to extend the

its intent to move away from a policy favoring families and employment needs. Under the current system, green-card eligibility⁴⁰ is still based around several preference categories, most notably family-based, job- or employment-based, and refugee- or asylum status-based categories.⁴¹

The passage of IIRIRA⁴² in 1996 brought about major changes in the United States' previously profamily immigration policy, although the current preferences system did not change. IIRIRA, instead of focusing on family reunification, focused on deterrence of overstays and punishment for immigration violations, setting up steep penalties through the ULP bars for being unlawfully present in the United States.⁴³ In evaluating Congress's intent, it is important to note that when IIRIRA was originally passed, INA section 245(i) was available to dramatically soften the effect of the new ULP bars.

III

IIRIRA'S CURRENT STATE: THE UNINTENDED EFFECTS

From the time the ULP bars went into force in 1997, they have in practice worked almost completely counter to the United States' long-standing family-unification and employment immigration policies, as well as IIRIRA's more specific goals of deterring overstays and enforcing immigration law more effectively. Due to the large number of undocumented immigrants currently residing in the United States who would likely be subject to the ULP bars upon departure, these effects are not limited to a select number of immigrants or mixed-status families, but reach to American society as a whole. To illustrate these perverse effects, I examine the current state of immigrants in the United States as it relates to immigrants' length of stay, the ULP bars' effect on the perceptions of immigrants in their communities and throughout the United States, economic and employment effects of the ULP bars, and effects of the bars on family.

The root cause of this array of harmful effects is that the ULP bars prevent immigrants from (1) legalizing their status, or (2) freely departing the United States without the imposition of stiff penalties. This leads to possibly the most pernicious effect of the ULP bars—the creation of a mutually reinforcing cycle of negative community perceptions toward immigrants, as well as harsher immigration legislation. This cycle makes it more difficult for immigrants to

LIFE Act provisions in 2001).

40. A green card grants an immigrant legal permanent residence. *See supra* note 16.

41. *Id.*

42. Pub. L. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

43. Zoe Lofgren, *A Decade of Radical Change in Immigration Law*, 16 STAN. L. & POL'Y REV. 349, 355 (2005) (describing IIRIRA as "draconian"); Mercer, *supra* note 22, at 300; Schwarz, *supra* note 2, at 515.

assimilate or participate positively in their communities,⁴⁴ exacerbates the economic harms described below,⁴⁵ and greatly harms citizens belonging to mixed-status families.⁴⁶ Despite these risks, immigrants with strong familial or other ties to the United States will likely choose to stay. But to avoid deportation or other penalties, they will be forced into a shadow culture, isolating themselves from mainstream society.⁴⁷

A. The ULP Bars' Effect on Immigrants' Length of Stay

Despite Congress's intent to deter immigrants from overstaying their visas, the ULP bars actually incentivize longer stays.⁴⁸ Undocumented immigrants strongly prefer to remain under the government radar, making it very difficult to gather data on how long they remain in the United States. The most logical conclusion, though, is that the majority will extend their time in the country, particularly those immigrants with strong ties to the United States. The U.S. Department of Homeland Security (DHS) reported that over eighty-five percent of the undocumented immigrant population in the United States in January of 2011 arrived before 2005.⁴⁹ Because the ten-year ULP bar is triggered upon departure after the accrual of just one year of unlawful presence, the large majority of these immigrants, and many of those arriving after 2005, cannot leave without triggering a ten-year bar to reentry. Immigrants with spouses, children, or other strong ties to the country are very unlikely to voluntarily depart under these circumstances. Instead, they stay even longer because the stakes are too high to leave. And because the ULP bars incentivize staying but offer no opportunity to legalize status, they effectively create an underclass of immigrants who cannot assimilate into their communities and the United States generally, or who choose not to try, for fear of attracting unwanted government attention. The ULP bars' creation and maintenance of this isolated underclass is the driving force behind the other negative effects mentioned here.

44. See discussion *infra* Part III.B.

45. See discussion *infra* Part III.C.

46. See discussion *infra* Part III.D.

47. See M. Kathleen Dingeman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 385 (2010).

48. Bryn Siegel, Note, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291, 299–300 (2008) (arguing that “[b]ecause any attempt to exit the country or apply for status might trigger the bars, an undocumented immigrant successfully avoids the bars by remaining in the United States,” giving immigrants “every incentive to avoid alerting authorities of their presence”); see also Fernando Colon-Navarro, *Familia e Inmigracion: What Happened to Family Unity?*, 19 FLA. J. INT’L L. 491, 495 (2007) (“Rather than returning to their country and filing for a waiver, they choose to forego the process and remain in the United States with their families, even if it means remaining in illegal status.”). Even those advocating *stricter* enforcement of the ULP bars have recognized the perverse incentives for undocumented immigrants to stay longer, stating that “in practice, [the ULP bars have] not only failed to penalize or deter most illegal aliens but [have] actually encouraged illegal aliens to remain here.” Vaughan, *supra* note 5.

49. HOEFER ET AL., *supra* note 26, at 3.

Before the ULP bars, immigrants could voluntarily depart the United States at any time without compromising their ability to reenter, although other standard admission policies and procedures still applied upon returning. This allowed undocumented immigrants with strong ties to the United States, like citizen spouses or children, to remain until they were eligible to apply for legal permanent residency, at which time they could return to their home country for consular processing of their visas. Undocumented immigrants thus had an incentive to work toward legalization of their status; although some spent time in the United States out of status, a process existed by which they could become legal permanent residents. But with the imposition of the ULP bars, undocumented immigrants with sufficient unlawful presence cannot leave the United States through legal means without triggering the bars, even for consular processing. Illegal trips across the border are particularly risky for undocumented immigrants with strong ties to the United States, because the bars raise the stakes if the immigrants are caught or unable to return, potentially keeping them out of the country and ineligible for a visa for a minimum of three or ten years. Thus, they are likely to choose to remain in the United States, or, if they do leave, to return quickly because of their close ties to the United States.

Congress was supportive enough of the pre-ULP process that it passed section 245(i) in 1994,⁵⁰ which helped undocumented immigrants legalize their status by allowing them, for a fee, to apply for adjustment of status from within the United States. From October 1994 to February 1995, forty-five percent of all applications for permanent resident status received by the INS⁵¹ were section 245(i) applications, raising \$49.1 million, or eighty percent of all application fee revenue.⁵² This benefitted both immigrants and U.S. citizens: Immigrants were saved the time and expense of travel, and U.S. taxpayers gained additional revenue.⁵³ Unfortunately, this option is no longer available and the ULP bars instead act as a strong incentive for immigrants to extend their stay.

The situation is further complicated by the frequent confusion surrounding the ULP bars, particularly for undocumented immigrants, who are unlikely to seek out or have access to legal counsel. Some immigrants may unwittingly

50. INA § 245(i), 8 U.S.C. § 1255(i) (2006).

51. The INS was replaced by three different agencies operating under the Department of Homeland Security upon the enactment of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended at 6 U.S.C §§ 101-557 (2006)). These included U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement, and Customs and Border Patrol (CBP). DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, MIGRATION POL'Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 22 (2013); *see also Our History*, U.S. CUSTOMS AND IMMIGRATION SERVS., <http://www.uscis.gov/about-us/our-history> (last updated May 25, 2011).

52. GEN. ACCOUNTING OFFICE, GAO/GGD-95-162FS, INS: INFORMATION ON ALIENS APPLYING FOR PERMANENT RESIDENT STATUS (1995), *available at* <http://www.gao.gov/assets/90/89890.pdf>; Mercer, *supra* note 22, at 300.

53. Mercer, *supra* note 22, at 299.

trigger one of the bars upon departure and be unable to return for the specified duration, even if they have spouses or children in the United States.⁵⁴ Other immigrants may be aware of the ULP bars but not fully understand the law,⁵⁵ and so they may be afraid to leave for fear of triggering the bars and continue accruing unlawful presence. The high-stakes nature of the bars—the potential for years of separation from family and communities or interference with employment—only exacerbates the problem.

Finally, because this area of the law changes periodically, undocumented immigrants may decide to wait, hoping new legislation or a change in policy will offer either a method for adjustment of status from within the United States or a new waiver before they are forced to depart and trigger one of the ULP bars.⁵⁶ Section 245(i),⁵⁷ the Deferred Action for Childhood Arrivals (DACA) program,⁵⁸ and the new provisional waiver for unlawful presence⁵⁹ are all examples supporting this position. The success of these programs is also evidence of undocumented immigrants' willingness and desire to take the necessary steps to move toward legal status when that path is available. For example, from August 15, 2012—when United States Citizenship and Immigration Services (USCIS) first released the necessary forms for DACA applications—to March 14, 2013, USCIS received an average of 3261 DACA requests per day.⁶⁰ This strong response is even more impressive considering that although DACA confers important benefits, including work eligibility, a stay on accrual of unlawful presence, and a deferral of removal actions, it is an executive policy (not a law),⁶¹ does not grant legal status, and must be renewed

54. Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 597–98 (2012).

55. The method used for calculating unlawful presence is not contained in a statute or regulations, but rather in an interoffice memorandum issued by USCIS. See Neufeld Memorandum, *supra* note 3. This is not only confusing but raises some administrative-law concerns that are beyond the scope of this note. See Family, *supra* note 54, at 597–98.

56. Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT'L L. & COM. REG. 483, 488–89 (2002).

57. INA § 245(i), 8 U.S.C. § 1255(i) (2006).

58. Press Release, U.S. Dep't of Homeland Security, Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), available at <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

59. *Provisional Unlawful Presence Waivers*, U.S. CUSTOMS AND IMMIGR. SERVS., <http://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> (last updated May 6, 2013) [hereinafter U.S. Customs and Immigration Servs., *Provisional ULP Waivers*].

60. *Deferred Action for Childhood Arrivals Process*, U.S. CUSTOMS AND IMMIGR. SERVS., <http://www.uscis.gov/U.S.CIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA2-15-13.pdf> (last visited Apr. 24, 2013).

61. DACA's constitutionality was recently challenged by ICE employees in *Crane v. Napolitano*. Complaint at 1–2, *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex. Aug. 23, 2012), ECF No. 1. The district court judge dismissed the case, holding that although “Plaintiffs were likely to succeed on the merits of their claim that the Department of Homeland Security has implemented a program contrary to congressional mandate[.] . . . Congress has precluded Plaintiffs from pursuing their claims in this Court by enacting the [Civil Service Reform Act].” Order at 2, *Crane v. Napolitano*, No. 3:12-cv-03247-

after just two years.⁶² Clearly, many undocumented immigrants are willing to expend time and money, and even risk registering with the government, to be able to live and work legally in the United States for just two years. But while the ULP bars remain in effect, undocumented immigrants are forced into the difficult position of choosing between continuing and indefinite undocumented status and years of separation from family. This results in longer stays without status, contrary to Congress's intent.

B. The ULP Bars' Effect on Community Perceptions

Undocumented immigrants thus increasingly remain in the United States for longer periods of time, which contributes to increasingly negative attitudes toward immigrants. Negative attitudes lead to harsher immigration legislation like IIRIRA, which in turn generates more negative perceptions. Although the United States is commonly described as a nation of immigrants, in reality Americans have always needed time to adjust to newcomers,⁶³ and the ULP bars are another manifestation of this tendency. In part, this is because assimilation itself requires time, both for the immigrants coming to the United States and for the American people who are already in the country. Immigrants may struggle with learning English, finding work, developing ties in the community, and dealing with a myriad of other issues. Thus, the assimilation process may take a full generation to wholly develop.⁶⁴ Immigrants may understandably gravitate toward others of their own culture or country of origin, creating further divisions.⁶⁵ Americans, on the other hand, may be afraid of or uncertain about unfamiliar people, cultures, languages, and customs.⁶⁶ Together, these differences and fears can create tension between the two groups, as witnessed throughout most of the United States' history. The result is a situation today where immigrants are often isolated and even perceived as criminals.

A brief look at American history helps to illustrate this development. Americans in the 1920s were concerned about immigrants from eastern and

O (N.D. Tex. July 31, 2013), ECF No. 75. As this note goes to print, the case is on appeal to the Fifth Circuit. See Notice of Appeal, *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex. Jan. 17, 2014), ECF No. 86.

62. *Frequently Asked Questions*, U.S. CUSTOMS AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=3a4db c4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082c a60aRCRD> (last updated Jan. 18, 2013).

63. NAT'L RES. COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 365* (James P. Smith & Barry Edmonston eds., 1997).

64. *Id.*

65. *Id.* at 365–66.

66. See Nicole Newman, Note, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 437–38 (2008); Robert J. Shulman, *Children of a Lesser God: Should the Fourteenth Amendment Be Altered or Repealed to Deny Automatic Citizenship Rights and Privileges to American Born Children of Illegal Aliens?*, 22 PEPP. L. REV. 669, 675–76 (1995).

southern Europe, and passed legislation restricting their ability to immigrate.⁶⁷ Reasons for opposing immigration were based on fears that the new immigrants would not be able to assimilate into American culture, and even included language of Anglo-Saxon racial superiority.⁶⁸ Over time, fears relating to immigration transferred from European immigrants to Latino, largely Mexican, immigrants. In the 1940s the United States instituted the Bracero program, which brought Mexican farmworkers to the United States to mitigate labor shortages after WWII.⁶⁹ However, in 1954, more than a million of these workers, including documented workers, were deported in “Operation Wetback.”⁷⁰

Despite persistent negative attitudes toward various immigrant groups throughout American history, immigration offenses were generally not considered criminal until the 1980s. The Immigration Reform and Control Act (IRCA) of 1986⁷¹ instituted criminal penalties for knowingly hiring undocumented workers,⁷² and Congress also made fraudulent marriage to evade immigration laws a criminal offense.⁷³ This shift toward criminal penalties for immigration violations has continued to grow, with stronger enforcement policies and more criminal proceedings against immigrants.⁷⁴ Long-standing negative attitudes of many Americans toward immigrants, as evidenced by the xenophobia in the 1920s, and official policies or actions removing immigrants or treating them as criminals, such as the ULP bars, are mutually reinforcing, and so the trend continues.⁷⁵ The most tragic part of this cycle is that the stereotypes are generally wrong, and the policies and perceptions reinforce harmful and incorrect principles.⁷⁶

America’s difficult history with immigration was further accelerated by various terrorist attacks over the past twenty years, including the Langley, Virginia CIA shooting in January of 1993,⁷⁷ the World Trade Center bombing in February of 1993,⁷⁸ and most notably the terrorist attacks of September 11,

67. NAT’L RES. COUNCIL, *supra* note 63, at 364.

68. *Id.* at 364 n.2.

69. Jamie Longazel & Benjamin Fleury-Steiner, *Exploiting Borders: The Political Economy of Local Backlash Against Undocumented Immigrants*, 30 CHICANA/O-LATINA/O L. REV. 43, 46 (2011).

70. *Id.*

71. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

72. Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1721 (2009) (citing IRCA, 100 Stat. 3359).

73. *Id.*

74. *Id.* at 1722–25.

75. T. Alexander Aleinikoff & Rubén G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 21 (1998).

76. *Id.*

77. See Tim Weiner, *Pakistani Convicted of Killing 2 Outside C.I.A. Headquarters*, N.Y. TIMES, Nov. 11, 1997, at A19.

78. STEVEN A. CAMAROTA, THE OPEN DOOR: HOW MILITANT ISLAMIC TERRORISTS ENTERED AND REMAINED IN THE UNITED STATES, 1993-2001, at 6–7, 15 (2002), available at <http://www.cis.org/sites/cis.org/files/articles/2002/theopendoor.pdf> (tracing immigration status of conspirators of the 1993 World Trade Center bombing).

2001.⁷⁹ Enforcement of immigration law has become an even greater priority, and much of immigration law has merged with national-security concerns. Examples of legislation directed at immigrants and national security include the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996⁸⁰ and the U.S.A. PATRIOT Act in 2001.⁸¹ Additionally, and importantly in the context of the ULP bars, a further extension of INA section 245(i), which would have provided a method for immigrants to attain legal status without triggering the ULP bars, failed to pass shortly after the attacks of 9/11.⁸² Over time, the attachment of immigration to terrorism as well as crime has worsened the mutually reinforcing nature of immigration policy and general attitudes toward immigrants in the United States. The ULP bars are a particularly important manifestation of that connection because they serve to maintain undocumented immigrants in what many perceive negatively as their “unlawful” or “illegal” status.⁸³

This mutually reinforcing cycle of public perception of immigrants and immigration policy is particularly evident today with Latino, and specifically Mexican, immigrants. Although they are not the only immigrant population to face negative community stereotypes or immigration policies, Mexicans are the largest and one of the most visible groups of undocumented immigrants, and are regularly seen as a major source of the “immigration problem.”⁸⁴ A significant reason for this perception is the sheer number of undocumented Mexican immigrants in the United States. In 2008, Mexicans accounted for fifty-nine percent of the total population of undocumented immigrants, with over seven million undocumented immigrants in the United States.⁸⁵ These

79. Mercer, *supra* note 22, at 303; *see also* CAMAROTA, *supra* note 78, at 5, 16.

80. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code). Among other things, AEDPA addressed immigration consequences for terrorists and immigrants who have committed crimes. CHARLES DOYLE, AM. L. DIV., CONGRESSIONAL RES. SERV., ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: A SUMMARY (1996), available at <http://www.fas.org/irp/crs/96-499.htm>.

81. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code). The controversial act, which was enacted after the terrorist attacks of September 11, 2001, “significantly increased the surveillance and investigative powers of law enforcement agencies” without “provid[ing] for the system of checks and balances that traditionally safeguards civil liberties in the face of such legislation.” *Introduction, U.S.A. Patriot Act*, ELEC. INFO. PRIVACY CTR., <http://epic.org/privacy/terrorism/usapatriot/#introduction> (last visited Apr. 24, 2013).

82. Cruz, *supra* note 19, at 168; Mercer, *supra* note 22, at 303.

83. Audrey J.S. Carrión & Matthew M. Somers, *A Case for the Undocumented Immigrant*, MD. B.J., July 2011, at 30, 32–33 (2012) (arguing that use of language such as “illegal” and “unlawful” to refer to immigrants who entered the U.S. without documentation contributes to public perceptions of undocumented immigrants as criminals).

84. *See, e.g.*, Jeffrey M. Timberlake & Rhys H. Williams, *Stereotypes of U.S. Immigrants from Four Global Regions*, 93 SOC. SCI. Q. 867, 887 (2012) (reporting results of a study that indicate news and other media have created a perception of undocumented immigrants, and in particular Mexican immigrants, as a threat to national security and national identity).

85. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF

immigrants are most highly concentrated in the western part of the country: In 2008, ninety percent of the undocumented immigrant population of Arizona, New Mexico, and Wyoming were Mexican immigrants.⁸⁶ Because there are so many undocumented Mexican immigrants, it is also highly likely that millions have accrued sufficient unlawful presence to be subject to the ULP bars upon departure, and so are forced to either stay in the country without documentation or leave for a minimum of three or ten years. These undocumented immigrants are subject to the myriad of economic and familial challenges discussed below.⁸⁷ For example, in 2007, Mexican undocumented immigrants' median income was even lower than other undocumented immigrants, and they also had received less education.⁸⁸ This further reinforces the negative community perceptions of undocumented Latino immigrants.

Most stereotypes of Latino immigrants are both harsh and inaccurate. Latino immigrants are often characterized or perceived as “crime-prone, anti-assimilationist (i.e., refusing to speak English), and determined to demolish American cultural values and reclaim territory that was once their own.”⁸⁹ For example, results of the 2000 General Social Survey by the National Opinion Research Center indicate that most Americans connect immigration with increased crime, sixty percent of Americans believe immigrants lead to the loss of American jobs, and fifty-six percent believe immigrants contribute to problems of national disunity.⁹⁰ Many of these stereotypes play directly on fears held by native-born Americans that immigrants are a threat to their safety, economic well-being, and national culture.⁹¹ Thus, “[f]ear may trump facts, even as facts debunk enduring stereotypes.”⁹² The ULP bars reinforce and perpetuate these false stereotypes, preventing undocumented immigrants with strong American ties from truly assimilating and positively influencing American culture and society.

One especially egregious and long-standing public misconception of undocumented immigrants, particularly Latino immigrants, is that they have higher crime rates than American citizens. In 1926 a scholar commented that “[m]ost of our attention to crime among immigrants has not been due to a desire to try to understand crime. Our judgments have been colored by our

UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 21 (2009) [hereinafter PASSEL & COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS], available at <http://www.pewhispanic.org/files/reports/107.pdf>.

86. *Id.* at 21–22.

87. See discussion *infra* Parts III.C, III.D.

88. PASSEL & COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS, *supra* note 85, at 22.

89. Longazel & Fleury-Steiner, *supra* note 69, at 47; see also *id.* at 48 (examples of rhetoric used in describing Latino immigrants).

90. Dingeman & Rumbaut, *supra* note 47, at 365 (citing Rubén G. Rumbaut & Richard D. Alba, Perceptions of Group Size and Group Position in “Multi-Ethnic United States,” Presentation Before the Annual Meeting of the American Sociological Association (Aug. 2003)).

91. See, e.g., Dingeman & Rumbaut, *supra* note 47, at 365–67; Longazel & Fleury-Steiner, *supra* note 69, at 43–44.

92. Dingeman & Rumbaut, *supra* note 47, at 383.

prejudices . . . and evidence to the contrary is neither sought nor welcome.”⁹³ In the 2000 General Social Survey by the National Opinion Research Center, almost three-quarters of Americans, when asked whether “more immigrants cause higher crime rates,” saw a causal connection.⁹⁴ However, despite this common belief, evidence indicates there is generally a negative correlation between immigration rates (especially undocumented-immigration rates) and crime rates over the last twenty years.⁹⁵ Additionally, a study by the National Academy of Sciences published in 1997 found that noncitizens actually have a lower rate of incarceration for violent crimes and property crimes.⁹⁶ Of course, there are serious limitations to evaluating crime rates by the number incarcerated,⁹⁷ but it is noteworthy that if anything, the evidence indicates that immigrants commit *fewer* crimes than citizens, and certainly does not support the conclusion that increased immigration increases crime.

The effects of the enforcement-based immigration policy exemplified by the ULP bars, which reinforce many of the incorrect and unfavorable community perceptions of undocumented immigrants, are harmful to all involved. Undocumented immigrants are forced under the radar to minimize the likelihood of removal, which makes it more difficult for them to assimilate and participate positively in their communities, and may even lead to their alienation.⁹⁸ Concerns about deportation—either their own or that of a friend or family member—affect over half of all Latino adults in the United States, regardless of citizenship status.⁹⁹ The ULP bars have undoubtedly increased the severity of this worry by raising the stakes: When someone is deported, that person is unable to return for a significant period of time, greatly affecting friends and family remaining in the United States.

Some scholars go even further and argue that fears that immigrants will not be able to assimilate appropriately into American culture, although incorrect, fuel anti-immigration sentiment.¹⁰⁰ A 1992 study shows that generally, children of immigrants self-identify as American more frequently as they acculturate linguistically, culturally, and economically, and as they experience less

93. *Id.* at 363 (quoting Carl Kelsey, *Immigration and Crime*, 125 ANNALS AM. ACAD. POL. & SOC. SCI. 165, 166 (1926)).

94. *Id.* at 365 (citing Rubén G. Rumbaut & Richard D. Alba, Perceptions of Group Size and Group Position in “Multi-Ethnic United States,” Presentation Before the Annual Meeting of the American Sociological Association (Aug. 2003)).

95. *Id.* at 372–74.

96. NAT’L RES. COUNCIL, *supra* note 63, at 388.

97. *Id.* at 386–87.

98. Dingeman & Rumbaut, *supra* note 47, at 385.

99. PEW HISPANIC CTR., 2007 NATIONAL SURVEY OF LATINOS: AS ILLEGAL IMMIGRATION ISSUE HEATS UP, HISPANICS FEEL A CHILL 1 (2007), available at <http://www.pewhispanic.org/files/reports/84.pdf>.

100. See Aleinikoff & Rumbaut, *supra* note 75, at 7–10 (arguing that Americans fear that assimilation of immigrants cannot be successful, thus affecting their “model of membership,” or the people to whom the United States allows legal entry).

discrimination.¹⁰¹ Two years after this study, the people of California adopted proposition 187, thus enacting a harsh immigration enforcement regime that even went so far as to deny access to schools for undocumented immigrant children, although this denial of education was later declared unconstitutional.¹⁰² Then, in a 1995 follow-up study focused on the national self-identification of the same immigrant children, it was found that despite the children's assimilation into American society, including linguistic and cultural assimilation, their self-identification had moved back toward their native ethnic groups.¹⁰³ In what was probably a reaction to the harshness of the widely publicized California immigration initiative and the accompanying discrimination, immigrants were pushed away from mainstream American culture and further marginalized by an initiative motivated principally by misplaced fears and stereotypes. The ULP bars, passed the following year, likely exacerbated this effect.

C. The ULP Bars' Economic Effects

The economic effects of the ULP bars on the U.S. economy as a whole have also run counter to U.S. interests. There is much dispute over the economic effects of immigration generally and illegal immigration in particular, with economists firmly on both sides of the issue.¹⁰⁴ Most agree, however, that it is not a small problem. In March 2010, there were eight million undocumented immigrants working in the United States, making up 5.2% of the workforce, down from a peak of 8.4 million in 2007.¹⁰⁵ In particular, when viewed from the perspective of the ULP bars, which tend to lengthen undocumented immigrants' duration of stay while preventing them from legalizing their status,¹⁰⁶ the economic effects are more clearly opposed to U.S. policy and economic interests. Although there are a variety of reasons for this negative economic effect, most are related to the maintenance of undocumented immigrants in an illegitimate underclass in which they are unable to progress or even live openly because they fear removal.

Several well-respected reports published over the last fifteen years indicate that immigration has a generally positive effect on the U.S. economy. In 2007, the White House Council of Economic Advisors published a report in which they found that "immigrants not only help fuel the Nation's economic growth,

101. *Id.* at 16–17.

102. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995), *amended by* 997 F. Supp. 1244 (C.D. Cal. 1997) (including the full text of the initiative and a summary of its history).

103. Aleinikoff & Rumbaut, *supra* note 75, at 19.

104. *See, e.g.*, Steven A. Camarota, *Immigration and the U.S. Economy, Testimony Prepared for House Judiciary Committee, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law*, CTR. FOR IMMIGR. STUDIES (Sept. 30, 2010), <http://www.cis.org/node/2294>; *cf.*, *e.g.*, *Immigration's Economic Impact*, COUNCIL OF ECON. ADVISORS (June 20, 2007), http://georgewbush-whitehouse.archives.gov/cea/cea_immigration_062007.html.

105. PASSEL & COHN, UNAUTHORIZED IMMIGRANT POPULATION, *supra* note 27, at 17.

106. *See* discussion *supra* Part III.A.

but also have an overall positive effect on the income of native-born workers.”¹⁰⁷ The report points to the benefits of more workers producing goods, the higher entrepreneurial tendencies of immigrants, and immigrants’ net-positive contributions into government programs like Social Security and Medicare.¹⁰⁸ A report published by the National Research Council in 1997 that deals extensively with the economic effects of immigration echoes this conclusion, stating that “immigration produces net economic gains for domestic residents.”¹⁰⁹ In 2005 the Congressional Budget Office authored a report stating that as baby boomers exit the workforce, “it is likely that most of the growth in the U.S. labor force will come from immigration by the middle of the century.”¹¹⁰

Of course, these are overall economic gains, and some individual American citizens or smaller groups may still be negatively affected. For example, high-school dropouts are more likely to be affected by competition from undocumented immigrant workers, who frequently compete with these citizens for jobs targeting low-skilled workers.¹¹¹ As a result, high school dropouts more frequently experience undercut wages or unemployment.¹¹² Even then, however, this competition may also result in increased jobs and wages for higher-skilled, complementary work.¹¹³ And for low-skilled American workers, the effect of competition from immigrants is relatively small.¹¹⁴ A blanket policy discouraging immigration to benefit low-paid native-born workers would be an overly broad solution to a fairly specific problem.¹¹⁵

Additionally, because the ULP bars prevent undocumented immigrants from achieving legal status, their own economic well-being is limited, ultimately hurting the U.S. economy as a whole. This is most clearly demonstrated by studies of the immigrants who gained legal status after the passage of IRCA in 1986.¹¹⁶ Studies found that once immigrants gained legal status, their wages increased, thereby increasing their state and local taxes and their buying power,

107. *Immigration’s Economic Impact*, COUNCIL OF ECON. ADVISORS (June 20, 2007), http://georgewbush-whitehouse.archives.gov/cea/cea_immigration_062007.html.

108. *Id.*

109. NAT’L RES. COUNCIL, *supra* note 63, at 4.

110. CONG. BUDGET OFFICE, *THE ROLE OF IMMIGRANTS IN THE U.S. LABOR MARKET 25* (2005), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/68xx/doc6853/11-10-immigration.pdf>.

111. See NAT’L RES. COUNCIL, *supra* note 63, at 7; PASSEL & COHN, *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS*, *supra* note 85, at 14 (comparing the percentage of U.S. and undocumented immigrant workers in low-skilled jobs).

112. NAT’L RES. COUNCIL, *supra* note 63, at 7, 137.

113. *Id.* at 137–39.

114. GORDON H. HANSEN, *MIGRATION POL’Y INST., THE ECONOMICS AND POLICY OF ILLEGAL IMMIGRATION IN THE UNITED STATES 9–11* (2009), available at <http://www.migrationpolicy.org/pubs/hanson-dec09.pdf>; see also NAT’L RES. COUNCIL, *supra* note 63, at 137–39.

115. *Immigration’s Economic Impact*, COUNCIL OF ECON. ADVISORS (June 20, 2007), http://georgewbush-whitehouse.archives.gov/cea/cea_immigration_062007.html.

116. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

while at the same time decreasing dependence on public assistance programs (for mixed-status families) as well as immigration enforcement costs.¹¹⁷ Although increased wages can result in increased prices for goods due to increased production costs, this effect is small.¹¹⁸ Additionally, most of the benefit of lower prices based on lower wages paid to undocumented immigrant workers goes to more educated families, who are more likely to consume those products and services.¹¹⁹ Finally, significant ethical considerations make intentionally maintaining an undocumented, underpaid class of workers outside the protections of the law in order to maintain lower prices an unacceptable choice.

The economic consequences of the ULP bars also directly affect American taxpayers through the more than nine million people living in mixed-status families,¹²⁰ in which some member of the family is a U.S. citizen and is thus potentially eligible for public assistance. In such cases, when the undocumented family member is the breadwinner or the primary caretaker of the children, the family may require public assistance if the undocumented family member is deported, placing a further burden on American taxpayers.¹²¹ Even if the undocumented family member is not deported, without the ability to earn a living wage due to the lower wages typically earned by undocumented immigrants, government assistance may still be necessary. For example, in 2007, households with at least one undocumented immigrant spouse had a median income of just \$36,000, compared to a median income of \$50,000 for households with no undocumented immigrants.¹²² Twenty-one percent of undocumented immigrant households are living in poverty.¹²³ Households with undocumented immigrants are also less likely than other households to make economic gains over time.¹²⁴ Thus, the ULP bars, which effectively block an undocumented immigrant's ability to gain legal status, even if married to an American citizen, ultimately hurt U.S. taxpayers by increasing the potential need for public benefits paid to mixed-status families.

The ULP bars also contribute to much higher healthcare costs due to an incredibly inefficient healthcare system for undocumented immigrants. The majority of undocumented adult immigrants were without health insurance in 2007.¹²⁵ The children of these immigrants often were also without health insurance, including twenty-five percent of children who were U.S. citizens by

117. See IMMIGR. POL'Y CTR., AN IMMIGRATION STIMULUS: THE ECONOMIC BENEFITS OF A LEGALIZATION PROGRAM (2013), available at <http://www.immigrationpolicy.org/just-facts/immigration-stimulus-economic-benefits-legalization-program>.

118. NAT'L RES. COUNCIL, *supra* note 63, at 143–44.

119. HANSEN, *supra* note 114, at 232–33.

120. See *supra* text accompanying note 33.

121. Cruz, *supra* note 19, at 167; Mercer, *supra* note 22, at 317.

122. PASSEL & COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS, *supra* note 85, at 16.

123. *Id.* at 17.

124. *Id.*

125. *Id.* at 18.

birth and forty-five percent of children who were immigrants themselves.¹²⁶ Because many immigrants are uninsured, they are unlikely to have access to preventative care or a primary-care physician, and their only remaining access to medical care is through emergency-care services. Under the Emergency Medical Treatment and Active Labor Act (EMTALA),¹²⁷ hospitals must provide emergency care regardless of citizenship or ability to pay. Although it is difficult to know how much of the cost of uncompensated medical care is attributable to undocumented immigrants,¹²⁸ in 2011 the American Medical Association estimated that the total uncompensated care cost was \$41.1 million, making up 5.9% of the total expenses of registered hospitals.¹²⁹ Much of this cost is likely attributable to undocumented immigrants, who made up 47.4% of the almost 48 million people without health insurance in 2011.¹³⁰

Finally, the administrative costs of enforcement of the ULP bars are high and rising. In fiscal year 2012, U.S. Immigration and Customs Enforcement (ICE),¹³¹ U.S. Customs and Border Protection (CBP),¹³² and US-VISIT,¹³³ a program providing the biometric technology used for border protection under the Department of Homeland Security, spent nearly \$18 billion.¹³⁴ This is more than the combined total spent by the FBI, DEA, Secret Service, U.S. Marshal's Service, and ATF.¹³⁵ The spending levels are not just high; they are rising. Even accounting for inflation, in 2012 spending levels were fifteen times what they were for the INS in 1986 when IRCA was passed.¹³⁶ Increased enforcement measures with significant *negative* effects, such as the ULP bars, are certainly not worth the extensive resources necessary to enforce them. Additionally, there is evidence that an option like section 245(i) would alleviate many of these perverse effects while concurrently raising significant revenue for the United States.¹³⁷

126. *Id.*

127. EMTALA § 9121(b), 42 U.S.C. § 1395dd (2006).

128. It is notable, however, that undocumented immigrants make up seventeen percent of uninsured Americans, "more than three times their representation in the population." PASSEL & COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS, *supra* note 85, at 19.

129. AM. HOSPITAL ASS'N, UNCOMPENSATED HOSPITAL CARE COST FACT SHEET 3 (2013), available at <http://www.aha.org/content/13/1-2013-uncompensated-care-fs.pdf>.

130. SETH MOTEL & EILEEN PATTEN, PEW HISPANIC CTR., STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES 2011, at tbl. 38 (2013), available at <http://www.pewhispanic.org/files/2013/01/PHC-2011-FB-Stat-Profiles.pdf> (Persons Without Health Insurance, by Age, Nativity, and Citizenship: 2011).

131. *Overview*, ICE, <http://www.ice.gov/about/overview/> (last visited Apr. 24, 2013).

132. *About CBP*, CBP.GOV, <http://www.cbp.gov/xp/cgov/about/> (last visited Apr. 24, 2013).

133. *Office of US-VISIT*, U.S. DEP'T OF HOMELAND SEC., <http://www.dhs.gov/us-visit-office> (last visited Apr. 24, 2013).

134. MEISSNER ET AL., *supra* note 51, at 22.

135. The combined total for these agencies was \$14.4 billion. *Id.*

136. *Id.*

137. *Supra* text accompanying note 52.

D. The ULP Bars' Effect on Family

In addition to the economic losses incurred by the imposition of the ULP bars, the bars have also had severe negative effects on families, in direct opposition to the United States' longstanding and well-established family-reunification immigration policy. Congress has recognized over the past fifty years of immigration legislation that family unity is a vital feature of immigration policy, and brings with it benefits to American society as a whole.¹³⁸ In 1981, the Select Commission on Immigration and Refugee Policy stated,

[Family] reunification... serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States.¹³⁹

The Supreme Court has also forcefully articulated the importance of families in immigration policy, stating in a case reversing a deportation order that "deportation is a drastic sanction, one which can destroy lives and disrupt families."¹⁴⁰ The ULP bars illustrate a departure from this long-recognized policy.

The ULP bars disrupt this important policy objective by placing undocumented immigrants who have families in the United States but who are subject to the ULP bars in a position in which they must choose between either facing the consequences of remaining without status in the United States, or separating themselves from their families for a minimum of three or ten years.¹⁴¹ This choice can be especially difficult if the undocumented immigrant is the primary breadwinner of the family or if there are young children at home. In such cases, many would agree it is the more ethical choice to stay with and support one's family, even if that means living without legal status.¹⁴² Unfortunately, the undocumented immigrants with the strongest familial pull to remain in the United States are likely those who belong to a mixed-status family and, absent the ULP bars, would otherwise have an eventual legal route to status because they belong to one of the visa preference categories.¹⁴³ However, because they cannot adjust their status from within the country¹⁴⁴ or leave without triggering the bars, they are left without a process by which they can benefit from their preferred status. And although a waiver to the ULP bars based on extreme hardship to citizen spouses or parents of undocumented immigrants is available to possibly soften the impact of the bars on immigrant

138. See Colon-Navarro, *supra* note 48, at 496–97.

139. U.S. SELECT COMM. ON IMMIGR. & REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS 112 (1981).

140. *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963).

141. See *Mercer*, *supra* note 22, at 306–07 (relating specifically to mixed-status marriages).

142. Cruz, *supra* note 19, at 167.

143. IMMIGR. POL'Y CTR., *supra* note 37.

144. See *supra* text accompanying notes 18–19.

families, the waiver is difficult to obtain and cannot be relied on in such a high-stakes situation.¹⁴⁵

IV RECOMMENDATIONS

The obvious solution to the far-reaching, unintended, and harmful effects of the ULP bars is to remove the bars. This would allow undocumented immigrants to return home when they are eligible for legal status to process their visas and return as legal residents. This is not a shortcut; immigrants would still have to qualify for a visa and would be subject to all other visa requirements. Although it would be time consuming and a financial burden on immigrants to return to their home country to process their applications, it is very likely they would be willing to do so. Acquiring legal status would help them avoid or minimize the many challenges facing undocumented immigrants illustrated throughout this note, and undocumented immigrants have demonstrated their willingness to pay fines or filing fees under previous opportunities for legal status, such as DACA and INA section 245(i). As legal residents, they would be more able to avoid the negative economic and familial effects of the ULP bars as well as to more fully assimilate into American culture and self-identify as Americans. Thus, this softening of immigration policy could go far in reversing the widespread negative perceptions of immigrants and in diminishing the negative economic and familial effects on American society generally.

Surprisingly, a search for supporters of the ULP bars yields few, if any, results. Scholarly literature presents many challenges to the bars,¹⁴⁶ but supporters are difficult to find, even among anti-immigration groups.¹⁴⁷ Yet even without clear supporters and despite evidence of significant and harmful consequences to American citizens, the ULP bars remain law. A significant reason for the bars' staying power may lie more in the politics surrounding this controversial issue than in any debate on the merits of the law itself. Supporters of harsher immigration legislation would be expected to support such a law, and so are likely hesitant to support the repeal of the bars, because of the associated political cost. This is true even though people on both sides of the debate agree the law is ineffective,¹⁴⁸ and the harmful effects of the law stretch beyond immigrants to American citizens. Until the issue is correctly framed as a straightforward evaluation of consequences, rather than a political statement, or the harmful effects become so severe they can no longer be ignored, the problems will likely continue.

145. See *supra* text accompanying notes 12–15.

146. See, e.g., Colon-Navarro, *supra* note 48, at 495–96; Cruz, *supra* note 19, at 167–68; Mercer, *supra* note 22, at 319.

147. Even the Center for Immigration Studies, which generally supports harsher immigration laws, last wrote about the ULP bars ten years ago, in 2003. See Vaughan, *supra* note 5.

148. See *supra* text accompanying note 8.

Because the bars do not deter immigration, but instead encourage undocumented immigrants to extend their stays in the United States, they create significant cultural, economic, and familial harm to American citizens (in addition to the harm to the immigrants themselves). Of course, repealing the bars does not solve America's immigration problem. Much more extensive work is necessary to address the full reach of the immigration issue in the United States. But the ULP bars are counterproductive to national (and party) goals and detrimental to American society, no matter where one is on the political spectrum, and should thus be repealed.

In the event it is not feasible to repeal the bars, attempts to soften or work around them may be possible. Two possibilities for working around the bars are INA section 245(i), a statutory solution, and I-601A, a regulatory response. As discussed earlier, section 245(i) would allow undocumented immigrants who qualify for visas to pay a fee to process their visas from within the United States, instead of at a consulate abroad.¹⁴⁹ By not departing the country, immigrants can avoid the harsh effects of the ULP bars. Additionally, the revenue from the fees can be substantial.¹⁵⁰ Of course, Congress would need to reinstate this legislation. This is likely to be more feasible than a simple repeal of the bars, however, in part because in paying a fee, the immigrants are punished for their unlawful presence, allowing proponents of harsh immigration policy to save face politically.

The I-601A provisional waiver, which was instituted in regulations issued by USCIS, is similar to the traditional ULP waiver,¹⁵¹ but it allows undocumented immigrants who qualify for a visa to apply for a provisional waiver to the ULP bars *before* leaving the country.¹⁵² Although immigrants must still travel to their home countries and go through the consular process (often at great inconvenience and expense), they know the ULP bar will be waived upon their return. However, the I-601A waiver is very limited in its application. Like the traditional waiver, the provisional waiver has a high bar. For example, the immigrant must be an immediate family member (spouse, child, or parent) of an American citizen and must demonstrate that removal would cause extreme hardship to a citizen spouse or parent, and the ULP bar must be the only bar to admission.¹⁵³ Like the traditional waiver, the provisional waiver does not account for extreme hardship to children.

Because the provisional waiver was first made available on March 4, 2013,¹⁵⁴ it is still unclear how useful it will be in providing undocumented immigrants

149. See *supra* text accompanying notes 20–22.

150. See *supra* text accompanying notes 51–53.

151. See *supra* text accompanying notes 12–15.

152. 8 C.F.R. § 212.7(e) (2013); see also U.S. Customs and Immigration Servs., *Provisional ULP Waivers*, *supra* note 59.

153. 8 C.F.R. § 212.7(e)(3)–(4) (2013); see also U.S. Customs and Immigration Servs., *Provisional ULP Waivers*, *supra* note 59, at *Eligibility Requirements*.

154. U.S. Customs and Immigration Servs., *Provisional ULP Waivers*, *supra* note 59.

with a method for legalizing their status, but early reports indicate a high level of denials to I-601A waiver applications.¹⁵⁵ The benefit of this approach is that it negates the harshest effects of the ULP bars, but still requires immigrants to travel abroad for consular processing to receive a visa. Like section 245(i), this may seem like an appropriate punishment for undocumented immigrants, but in this case the economic benefits of the “punishment” do not flow to the United States. Also, as a regulation, the I-601A provisional waiver has less legitimacy and staying power than a law, further contributing to the uncertainty already present in immigration law.

In addition to legislative or regulatory options, the Obama administration has also recently adopted DACA, a new policy that softens the effects of the ULP bars. DACA is beneficial because it temporarily suspends the accrual of unlawful presence, which is particularly useful for undocumented immigrants who have just turned eighteen and would otherwise begin accruing it. However, its influence is limited because DACA only applies to certain undocumented immigrants who meet very specific qualifications. For example, the applicant must have arrived in the United States before her sixteenth birthday, have been under the age of thirty-one and present in the country on June 15, 2012, and not have been convicted of a felony or significant misdemeanors.¹⁵⁶ Additionally, a DACA application requires registration with the government, but only defers potential prosecution and the accrual of unlawful presence for two years. Finally, although it is subject to renewal, the terms of the renewal have not yet been detailed.¹⁵⁷ Although helpful, because DACA is a policy change and policies are less stable and particularly vulnerable to changes of administration, it is not an effective long-term solution. For example, DACA was announced on June 15, 2012, less than five months before the presidential election.¹⁵⁸ Many potential DACA applicants expressed concern over the consequences to the policy if Obama lost the November election.¹⁵⁹ Additionally, it may be vulnerable to constitutional challenges claiming the policy is outside the bounds of the executive’s constitutional authority.¹⁶⁰

155. Ann Cun, *I-601A Provisional Waivers a Tough Sell to USCIS*, LAWLOGIX (Sept. 4, 2013), <http://www.lawlogix.com/blog/i601aprovisionalwaiverstoughselluscis>; *USCIS Denying Many I-601A Provisional Waiver Requests Because of Possible Other Grounds of Inadmissibility*, NOLO (July 2, 2013), <http://www.nolo.com/legal-update/uscis-denying-many-i-601a-provisional-waiver-requests-because-possible-other-grounds-inadmissib>.

156. *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CUSTOMS AND IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process> (last updated July 2, 2013) [hereinafter U.S. Customs and Immigration Servs., *Consideration of Deferred Action for Childhood Arrivals Process*].

157. U.S. Customs and Immigration Servs., *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 156, at *Renewing Deferred Action Under This Process*.

158. U.S. Customs and Immigration Servs., *Consideration of Deferred Action for Childhood Arrivals Process*, *supra* note 156.

159. Stacey Delikat, *Local ‘DREAMers’ Have Questions on New Immigration Policy and Romney’s Stance*, AZFAMILY.COM (June 22, 2012), <http://www.azfamily.com/news/local/Local-Dreamers-have-questions-on-new-immigration-policy-and-Romneys-stance-159971825.html>.

160. DACA may also be vulnerable to constitutional challenges. *See supra* note 61.

V

CONCLUSION

The challenges of establishing effective and beneficial immigration law and policy are unlikely to disappear anytime soon, but removing the ULP bars and their accompanying harmful effects is a good place to start. Such a change would benefit Americans economically, socially, and culturally, and would provide valuable help to immigrants as well. Because the ULP bars incentivize undocumented immigrants to lengthen their stay in the United States, repealing them could break the cycle of negative community perceptions and harsh immigration legislation, decreasing the harmful economic and familial consequences for both immigrants and American citizens. When combined with other important immigration reforms, such a policy could decrease tensions between different ethnic groups in the United States without sacrificing national security or the well-being of American citizens.