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INTRODUCTION: PERSPECTIVES ON IMMIGRATION REFORM

*Kathleen Kim**

The United States is home to almost 40 million immigrants, representing more than 20 percent of the world's entire migrant population.¹ Economic opportunity, religious freedom, and civil and political rights have attracted foreign nationals to the United States for decades. Our country has benefited from this long history of immigration, which has sustained and advanced our economic productivity and increased the vibrancy of our diverse society.

Recent federal governmental policies, however, have had a diluting effect on the positive impact of immigration. Concerns about terrorism and unauthorized migration have fueled stricter enforcement practices at the border and in the interior. Since 2004, the Customs and Border Patrol (CBP) budget grew from \$6 billion to \$10.1 billion to support a doubling in the number of border patrol agents as well as state of the art virtual fencing and surveillance technology.² According to some commentators, the militaristic approach to border enforcement has fueled anti-immigrant hostility, violence, and migrant deaths.³ Yet, government officials regard their

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1. PHILIP MARTIN & ELIZABETH MIDGLEY, POPULATION REFERENCE BUREAU, POPULATION BULLETIN UPDATE: IMMIGRATION IN AMERICA 2010, at 1 (2010), available at <http://www.prb.org/pdf10/immigration-update2010.pdf>.

2. AARTI KOHLI & DEEPA VARMA, BORDERS, JAILS, AND JOBSITES: AN OVERVIEW OF FEDERAL IMMIGRATION ENFORCEMENT PROGRAMS IN THE U.S. 6 (2011), available at http://www.law.berkeley.edu/files/WI_Enforcement_Paper_final_web%282%29.pdf; U.S. Customs & Border Prot., *Securing America's Borders: CBP Fiscal Year 2010 in Review Fact Sheet*, U.S. DEP'T OF HOMELAND SEC. (Mar. 15, 2011), http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/cbp_overview/fy2010_factsheet.xml.

3. See, e.g., Peter Andreas, *The Transformation of Migrant Smuggling Across the U.S.-Mexican Border*, in GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES 107, 112-16 (David Kyle & Rey Koslowski eds., 2001) (remarking on the negative impact of the Immigration Reform and Control Act of 1986 and subsequent acts); WAYNE A. CORNELIUS, IMPACTS OF

border enforcement efforts a success, noting a significant reduction in border arrests to indicate fewer unauthorized crossings.⁴

Beyond the border, Immigration and Customs Enforcement (ICE) continues to aggressively remove unlawfully present individuals and “criminal aliens.” Utilizing local law enforcement through programs such as 287(g)⁵ and Secure Communities,⁶ ICE purports to prioritize the removal of immigrants who have committed dangerous crimes.⁷ But, investigations of these programs reveal that predominantly noncriminal undocumented immigrants and immigrants with nonserious violations have been targeted⁸ and that in implementing these programs, racial profiling⁹

BORDER ENFORCEMENT ON UNAUTHORIZED MEXICAN MIGRATION TO THE UNITED STATES (2006), available at <http://www.bibdaily.com/pdfs/Cornelius%20testimony%208-2-06.pdf> (recognizing that physical border-defense mechanisms constitute the only legislative reform measures that Congress has agreed on and enacted); Wayne A. Cornelius, *Controlling 'Unwanted' Immigration: Lessons From the United States, 1993–2004*, 31 J. ETHNIC & MIGRATION STUD. 775, 776 (2005) (describing the U.S. immigration-control strategy as launched by President Clinton and continued through the presidency of George W. Bush); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121, 127–28 (2001) (outlining Operation Gatekeeper's emphasis on deterrence of unauthorized migration).

4. U.S. Customs & Border Prot., *supra* note 2.

5. 8 U.S.C. § 1357(g) (2006); *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/287g/> (last visited Aug. 17, 2011) (describing the statute previously known as 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act, which gives state or local law enforcement delegated authority for immigration enforcement within their jurisdictions).

6. Tanya Pérez-Brennan, *Illinois Drops Secure Communities as Fierce Opposition Mounts in Massachusetts, Other States*, FOX NEWS LATINO (May 5, 2011), <http://latino.foxnews.com/latino/politics/2011/05/05/illinois-drops-secure-communities-fierce-opposition-mounts-massachusetts/> (illustrating the trend of states, including Massachusetts, that are beginning to withdraw from participating in the federal program that opponents believe is part of an anti-immigration trend); *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Aug. 17, 2011) (describing the program that fingerprints those arrested and booked, and checks them against FBI criminal history records and DHS immigration records; ICE then determines if immigration enforcement action is required, considering the arrestee's immigration status and criminal history as well as the severity of the crime).

7. Memorandum of Agreement Between U.S. Dept. of Homeland Sec. Immigration & Customs Enforcement and State Identification Bureau, available at http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf (last visited Aug. 18, 2011) (template of agreement to create secure communities).

8. DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 13 (2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (stating that the majority of individuals identified by 287(g) and the Criminal Alien Program (CAP) were “non-criminal aliens”—immigrants not convicted of crimes—65 percent for 287(g) and 57 percent for CAP); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES IDENT/IAFIS INOPERABILITY MONTHLY STATISTICS THROUGH APR. 30, 2011, at 2 (2011), available at <http://www.ice.gov/doclib/foia/sc->

and other civil rights violations have taken place.¹⁰ Raids and audits of workplaces have also contributed to significant removals of noncriminal noncitizens, while they have failed to hold some unscrupulous employers accountable for the labor abuses that may have taken place there.¹¹

In total, ICE removed 358,886 individuals in 2008, up from 189,026 in 2001.¹² The number of removals for 2010 was a record-

stats/nationwide_interoperability_stats-fy2011-feb28.pdf (detailing that from 2008 until now, 84 percent of all Alien IDENT matches resulted in the identification of an alien charged with an L2 or L3 lesser crime, which includes traffic and immigration status violations, while only 16 percent were charged with or convicted of an L1 serious crime).

9. AARTI SHAHANI & JUDITH GREENE, JUSTICE STRATEGIES, LOCAL DEMOCRACY ON ICE: WHY STATE AND LOCAL GOVERNMENTS HAVE NO BUSINESS IN FEDERAL IMMIGRATION LAW ENFORCEMENT 2 (2009), available at <http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf> (asserting that race, not crime, propelled 287(g) growth; for example, 61 percent of targeted regions had violent and property crimes lower than the national average, 87 percent of regions targeted had Latino populations higher than the national average, and regions heavily impacted by “criminal illegal alien” activity were not prioritized); DEBORAH M. WEISSMAN ET AL., THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA 29 (2009), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf> (pointing out that 287(g) encourages racial profiling, with Hispanics being disproportionately targeted for minor traffic offenses for the purpose of deportation); *The Persistence of Racial and Ethnic Profiling in the United States*, AM. CIVIL LIBERTIES UNION (June 29, 2009), http://www.aclu.org/human-rights_racial-justice/persistence-racial-and-ethnic-profiling-united-states (explaining that racial minorities continue to be unfairly victimized when authorities investigate, stop, frisk, or search individuals based upon subjective identity-based characteristics rather than on identifiable evidence of illegal activity; victims continue to be racially or ethnically profiled while they work, drive, shop, pray, travel, and stand on the street).

10. AFTON BRANCHE, DRUM MAJOR INST. FOR PUB. POLICY, THE COST OF FAILURE: THE BURDEN OF IMMIGRATION ENFORCEMENT IN AMERICA’S CITIES 18 (2011), available at http://www.drummajorinstitute.org/pdfs/DMI_Cost_of_Failure.pdf (“[I]mmigrants who are merely arrested on the suspicion of having committed a crime can be identified and deported, regardless of their guilt or innocence.”); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 139–44 (2008) (describing detention of non-citizens that can last for months and years without appointed counsel, leading to their loss of liberty and an impairment of their ability to prepare a defense to removal); Bridget Kessler, Comment, *In Jail, No Notice, No Hearing . . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights*, 24 AM. U. INT’L L. REV. 571, 591 (2009) (examining the ambiguous language of custody procedures regulation that allows DHS to detain individuals for extended periods of time without justification).

11. Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247 (2009) (exploring the subversion of civil rights imperatives when immigration enforcement authorities detain and deport undocumented workers who may have experienced workplace exploitation).

12. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2009 ANNUAL REPORT 4 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf.

breaking 392,862.¹³ All the while, backlogs for family- and employment-based immigration applications persist, resulting in processing delays of more than a decade under some circumstances.¹⁴ Numerical limitations on annual visa issuances exacerbate these lengthy waits; an estimated 5.8 million individuals approved for family-based immigrant visas are still waiting to receive them.¹⁵

Meanwhile, anti-immigrant state laws, such as Arizona's SB 1070,¹⁶ complicate efforts toward a fairer and more efficient immigration system by enacting nonuniform standards for immigration-related crimes and mandating inadequately trained state law enforcement officers to act as immigration enforcers. Seven lawsuits, including one from the U.S. Department of Justice,¹⁷ assert that SB 1070 unconstitutionally regulates immigration matters, violating longstanding Supreme Court jurisprudence that establishes the federal government's exclusive authority over immigration.¹⁸ Even after two federal courts ruled significant provisions of the law

13. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ICE TOTAL REMOVALS 1 (2011), available at <http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf>.

14. NAT'L VISA CTR., U.S. DEP'T OF STATE, ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER 2 (2010), available at <http://travel.state.gov/pdf/WaitingListItem.pdf> (indicating that as of October 2010, 4,683,393 family-sponsored and employment-based visa applications were still wait-listed).

15. *Reuniting Families Act*, CONGRESSMAN MIKE HONDA, http://honda.house.gov/index.php?option=com_content&view=article&id=90&Itemid=76 (last visited Mar. 27, 2011) ("There are currently 5.8 million people in the family immigration backlog waiting unconscionable periods of time to reunite with their family members.").

16. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

17. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011); *Order, Escobar v. Brewer*, No. 4:10-cv-00249 (D. Ariz. Aug. 31, 2010); *Judgment of Dismissal in a Civil Case, Frisnacho v. Brewer*, No. 2:10-cv-00926 (D. Ariz. Aug. 24, 2010); *Complaint, League of United Latin Am. Citizens v. Arizona*, No. 2:10-cv-1453 (D. Ariz. July 9, 2010); *Complaint, Friendly House v. Whiting*, No. 2:10-cv-1061 (D. Ariz. May 17, 2010); *Complaint, Nat'l Coal. of Latino Clergy & Christian Leaders v. Arizona*, No. 2:10-cv-00943 (D. Ariz. Apr. 29, 2010); *Complaint, Salgado v. Brewer*, No. 2:10-cv-00951 (D. Ariz. Apr. 29, 2010).

18. *See* U.S. CONST. art. I, § 8, cl. 4 (stating that Congress has the power to establish a uniform rule of naturalization.); *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 603–04 (1889) (declaring that the government has the power to exclude aliens who possess characteristics that Congress forbids, and the power must be exercised to maintain its independence). *But see* *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (holding that Congress's plenary power to create immigration law is subject to important constitutional limitations); *INS v. Chadha*, 462 U.S. 919, 941–42 (1983) (recognizing that although Congress has plenary authority, that authority must not offend other constitutional restrictions and be exercised in a constitutionally permissible manner).

unconstitutional,¹⁹ other states continue to enact similarly punitive laws.²⁰

What has culminated is a deeply emotional and polarized public debate over the rights of immigrants. On one side of the debate, immigration restrictionists favor tougher enforcement measures and may feel that the federal government is not doing enough to keep out newcomers and to remove those here unlawfully. On the other side, immigration liberals argue for less enforcement and additional pathways to legal resident status in the United States. Both seem to agree that the current immigration system is in a state of disrepair and in desperate need of reform.²¹

President Obama has responded by pledging to make immigration reform a top priority. The administration's official platform promotes safe, orderly, and legal migration that protects human rights, asylees, and human trafficking victims and the integration of legal immigrants, while it opposes unregulated and unauthorized migration.²² Yet, some commentators have observed that the administration's current on-the-ground approach to immigration reflects an "enforcement now, enforcement forever" policy without any signs for meaningful reform.²³ Nonetheless,

19. *United States v. Arizona*, 641 F.3d 339.

20. Utah Illegal Immigration Enforcement Act, H.B. 497, 2001 Gen. Sess. (Utah 2011); Julia Preston, *Immigrants Are Focus of Harsh Bill in Alabama*, N.Y. TIMES, June 4, 2011, at A10 (comparing the Alabama immigration bill with Arizona's SB 1070 and noting that Alabama takes immigration enforcement further by, among other things, disallowing illegal immigrant students from attending public colleges, obligating public schools to determine the immigration status of their students, and making it a crime for undocumented workers to apply for work); *Court Blocks Implementation of Utah "Show Me Your Papers Law"*, AM. CIVIL LIBERTIES UNION (May 10, 2011), <http://www.aclu.org/immigrants-rights/court-blocks-implementation-utah-show-me-your-papers-law> (describing the actions of a federal district court in Salt Lake City that blocked implementation of HB 497).

21. N.Y. TIMES & CBS NEWS, POLL: APR. 28–MAY 2, 2010, at 7 (2010), available at <http://documents.nytimes.com/new-york-times-cbs-news-poll-immigration-overhaul> (stating that 89 percent of Americans from both sides of the immigration issue think that fundamental reform is necessary).

22. THE WHITE HOUSE, BUILDING A 21ST CENTURY IMMIGRATION SYSTEM 3 (May 2011), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf (describing the Obama administration's goals for immigration reform with a focus on border security, accountability for businesses that exploit undocumented workers, family unification, encouragement of highly trained and educated immigrants to stay and develop industries, and accountability for those currently living in the United States illegally before they are allowed to be eligible for citizenship).

23. See Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 297–98 (2010) (criticizing Obama for continuing to enforce the harsh Bush-era policies, such as employer sanctions and criminal charges of entry without inspection, rather than focusing on

President Obama has publicly called for congressional action and some members of the legislature have introduced comprehensive immigration reform bills.²⁴ It is therefore imperative for stakeholders to weigh in on the discussion to ensure that any immigration reform measure will accurately reflect the values of our society's changing demographic, while it adheres to our country's tradition of democracy, equality, and due process for all.²⁵

This special law review issue shares the perspectives of five student authors who critically examine and attempt to resolve the perplexing legal and normative dilemmas that key aspects of immigration reform present. Each author has focused on a subtopic within a major component of immigration reform: legal immigration, border enforcement, interior enforcement, immigration detention, and immigration courts.²⁶

We begin with the category of legal immigration, which includes both family-based and employment-based visas. To fulfill the policy objective of family unification, U.S. immigration laws permit some foreign nationals to legally immigrate to the United States through certain familial relationships. U.S. labor demands also provide the underlying rationale for employment-based immigration, permitted when an employer, who is unable to find a citizen employee and also meets other criteria, sponsors an immigrant

reforming the broken immigration system); Kevin R. Johnson, *Obama on Immigration: Enforcement Now, Enforcement Forever?*, IMMIGRATIONPROF BLOG (Aug. 2, 2009), <http://lawprofessors.typepad.com/immigration/2009/08/obama-on-immigration-enforcement-now-enforcement-forever.html> (highlighting protestors who demand a moratorium on the enforcement of Obama's immigration policy, which has been more pervasive and devastating than practices executed under President Bush); see also Marcello Ballve, *Immigrant Advocates Say Immigration Enforcement Worse Under Obama*, ALTERNET (Mar. 8, 2010), http://www.alternet.org/story/145963/immigrant_advocates_say_immigration_enforcement_worse_under_obama (noting immigrant advocates' criticism of Obama's immigration enforcement practices).

24. Comprehensive Immigration Reform Act of 2010, S. 3932.IS, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111s3932is/pdf/BILLS-111s3932is.pdf>; Comprehensive Immigration Reform for America's Security and Prosperity of 2009, HR 4321. 111th Cong. (2009), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4321ih/pdf/BILLS-111hr4321ih.pdf>.

25. MANUEL PASTOR & RHONDA ORTIZ, IMMIGRANT INTEGRATION IN LOS ANGELES: STRATEGIC DIRECTIONS FOR FUNDERS 1-3 (Jan. 2009), available at http://csii.usc.edu/documents/immigrant_integration.pdf (listing the demographics of immigrants in Los Angeles, where more than one-third of the population is foreign-born, nearly half of the workforce is composed of immigrants, and one million of the nation's undocumented immigrants reside).

26. Other areas within the rubric of "comprehensive immigration reform," such as legalization programs, are outside the scope of this issue.

employee.²⁷ Yet, dysfunction in the legal immigration system and low caps on visa numbers²⁸ have left those who have legal authorization to enter our country in a limbo status, sometimes waiting to immigrate for years.²⁹

Others, even those married to U.S. citizens, will never have a legal avenue of entry under the discriminatory peculiarities of current laws, which deny immigration equality to same-sex partners. Jay Strozdas addresses this particularly harsh reality of family-based immigration in his article, *Trendlines: Court Decisions, Proposed Legislation, and Their Likely Impact on Binational Same-Sex Families*. Because spousal immigration sponsorship for foreign partners depends on the federal government's definition of marriage through the Defense of Marriage Act (DOMA), which defines marriage as a legal union between a man and a woman,³⁰ same-sex binational couples are excluded from laws that enable citizens to sponsor their foreign spouses to immigrate.³¹ As a consequence, Strozdas explains that thousands of same-sex couples are forced to live together in exile or separate. Shedding new light on this unsettling aspect of immigration, Strozdas draws from contemporary jurisprudence on marriage equality to advance promising reforms of the family immigration system that would rectify this inequity. Specifically, Strozdas examines three areas of recent doctrinal

27. 8 U.S.C. § 1153 (2006); 8 C.F.R. § 204.5 (2011).

28. INA § 201(c)(1)(A)(i), 8 U.S.C. § 1151(c)(1)(A)(i) (2006) (480,000 baseline for family-sponsored visas); INA § 201(d)(1)(A), 8 U.S.C. § 1151(d)(1)(A) (140,000 baseline for employment-based visas); INA § 201(e), 8 U.S.C. § 1151(e) (55,000 baseline for diversity visas).

29. *Reuniting Families Act*, *supra* note 15.

30. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

31. SCOTT LONG ET AL., FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW (2006), available at <http://www.unhcr.org/refworld/docid/45db016e2.html> (describing current immigration law, which discriminates against same-sex binational couples); Christopher A. Dueñas, *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 813 (2000) (finding that the United States is currently the only industrialized English-speaking country that does not grant same-sex partners immigration preferences); Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. C.R. & C.L. 345, 356 (2007) (illustrating the political landscape where, within days after the passage of DOMA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996), which strengthened procedures to remove immigrants from the United States and created a powerful tool for excluding Lesbian, Gay, Bisexual, and Transgender (LGBT) immigrants in the name of protecting and preserving U.S. values); Cori K. Garland, *Say "I Do": The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples*, 84 IND. L.J. 689, 700–02 (2009) (explaining that same-sex couples cannot benefit from spousal immigration).

development: *Perry v. Schwarzenegger*,³² which examined the constitutionality of Proposition 8, California's prohibition of same-sex marriage; judicial challenges to DOMA; and the Uniting American Families Act (UAFSA), pending legislation that would provide immigration benefits to same-sex partners. Strozdas expounds on the significance of each development, and, in doing so, he extrapolates various strategies to achieve immigration equality for same-sex binational couples.

While legal immigration avenues urgently require change, much of the current rhetoric around immigration policy focuses not on legal immigration but on preventing and punishing unauthorized migration. Immigration enforcement begins at the border, the first point of entry for many migrants, where the government's strategy in recent years has concentrated on an increasingly militarized approach, including high numbers of border guards and virtual fencing, sometimes resembling a war zone.³³ The public has also responded with its own vigilante-style monitoring: the minutemen.³⁴ Yet, while undocumented border crossing has always been a crime,³⁵ most immigrants caught at the border have traditionally been deported through civil removal proceedings rather than through criminal prosecutions.³⁶ Recently, this trend has reversed³⁷ due to enforcement programs like Operation Streamline, which targets

32. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

33. See U.S. CUSTOMS & BORDER PROTECTION, U.S. DEP'T OF HOMELAND SEC., NATIONAL BORDER PATROL STRATEGY (2004), available at http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/border_patrol_ohs/national_bp_strategy.ctt/national_bp_strategy.pdf (outlining the strategy and goals for the U.S. Customs and Border Protection, which include deterrence of illegal entry through technology, personnel, and improved infrastructure).

34. James Duff Lyall, *Vigilante State: Reframing the Minuteman Project in the American Politics and Culture*, 23 GEO. IMMIGR. L.J. 257, 260–61 (2009) (describing the Minutemen, a small vigilante group assembled in 2004 that began a private campaign against Latinos and Latinas by monitoring the border between the United States and Mexico).

35. 8 U.S.C. § 1325 (2006) (outlining penalties for improper entry by alien); *id.* § 1326 (outlining penalties for reentry of removed aliens).

36. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (recognizing that removal proceedings are civil, not criminal, and detention of aliens without process is not punishment).

37. Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135–37 (2009) (noting the increase in migration-related criminal offenses and immigration-related prosecutions in the past decade); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 475–82 (2007) (discussing the “criminalization” of immigration law and how some aspects of criminal enforcement are being used in removals, which the Supreme Court has historically defined as civil proceedings).

popular entry points and refers all undocumented persons caught within those districts to the Department of Justice for en masse criminal prosecution.³⁸ Those charged with unauthorized entry face jail sentences, deportation, and enhanced penalties if they are caught reentering the country.³⁹ Supporters of the program claim that it has effectively deterred unauthorized migration,⁴⁰ while critics contend that Operation Streamline has wasted resources and curtailed the due process rights of border entrants, who are subject to summary criminal proceedings.⁴¹

In her article, *Crossing Over: Assessing Operation Streamline and the Rights of Immigrant Criminal Defendants at the Border*, Edith Nazarian examines the constitutional protection that Operation Streamline endangers and analyzes the normative implications of *United States v. Roblero-Solis*,⁴² a recent court decision that found Operation Streamline's en masse proceedings impermissible under Rule 11 of the Federal Rules of Criminal Procedure rather than on constitutional grounds.⁴³ While Nazarian agrees with the outcome of the case, she critiques the court's rule-based reasoning as an implicit denial of the core constitutional principles that ought to serve to effectuate the rights of immigrant criminal defendants. Nazarian suggests an alternative approach, a theory of territoriality, which would confer full constitutional rights to noncitizens based on their

38. JOANNA LYDGATE, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE (2010), available at http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf. In testimony before the Senate Committee on Homeland Security and Governmental Affairs, Janet Napolitano reported that more than 30,000 prosecutions had occurred under Operation Streamline from April 1, 2010, to March 31, 2011. *Secretary Janet Napolitano, Before the Senate Comm. on Homeland Sec. & Governmental Affairs: "Securing the Border: Progress at the Federal Level"*, U.S. DEP'T OF HOMELAND SEC. (May 4, 2011), http://www.dhs.gov/ynews/testimony/testimony_1304459606805.shtm [hereinafter *Napolitano Testimony*].

39. 8 U.S.C. § 1325 (indicating that a misdemeanor illegal entry carries a six-month maximum sentence); *id.* § 1326 (indicating that a felony reentry can carry a two-year maximum penalty or up to a twenty-year maximum if the migrant has a criminal record).

40. U.S. Customs & Border Prot., *supra* note 2.

41. LYDGATE, *supra* note 38, at 12 ("Despite their best efforts, it is extremely difficult for border jurisdictions to implement Operation Streamline without depriving migrants of procedural due process and effective assistance of counsel."); Ted Robbins, *Claims of Border Program Success Are Unproven*, NAT'L PUB. RADIO (Sept. 13, 2010), <http://www.npr.org/templates/story/story.php?storyId=129827870>.

42. 588 F.3d 692 (9th Cir. 2009).

43. *Id.* at 693–94; *see also* *United States v. Diaz-Ramirez*, No. 10-10230, slip op. at 3 (9th Cir. May 23, 2011) (distinguishing *Roblero-Solis* and its discussion of a violation of Rule 11 from a constitutional violation of due process).

physical presence in the United States. This, Nazarian argues, would better ensure that unlawful border entrants, if they are tried as criminal defendants, receive the same constitutional due process guarantees that apply to citizen criminal defendants. Anything less, Nazarian believes, would contribute to the deterioration of rights for all.

Beyond the border, the government's interior immigration enforcement strategy focuses on preventing unlawful presence⁴⁴ and removing immigration violators.⁴⁵ As discussed above, these efforts have been concentrated on partnerships with local and state law enforcement through programs such as Secure Communities⁴⁶ and 287(g).⁴⁷ The workplace also continues to be a central aspect of the current administration's interior immigration enforcement strategy,⁴⁸ with a focus on employer audits.⁴⁹

Workplace immigration enforcement first became official policy in 1986 with the passage of the Immigration Reform and Control Act (IRCA),⁵⁰ which Congress aimed at curbing unlawful migration by

44. In the agency's first overall strategic plan, ICE noted that one of its primary objectives is to prevent unlawful presence by creating a culture of employer compliance with immigration related employment laws. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ICE STRATEGIC PLAN FY 2010–2014, at 5–6 (2010), available at <http://www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf>.

45. *Id.* at 6–7 (noting that key objectives of the agency include removing criminals, gang members, and aliens who overstay visas, and achieving efficiency in the removal process).

46. *Secure Communities*, *supra* note 6.

47. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited July 17, 2011).

48. Memorandum from Marcy M. Forman, Dir., Office of Investigations, U.S. Immigration & Customs Enforcement, to Assistant Dir., U.S. Immigration & Customs Enforcement, Worksite Enforcement Strategy 2 (Apr. 30, 2009), available at http://www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf (“The criminal prosecution of employers is a priority [for] worksite enforcement . . . and interior enforcement [of immigration laws].” (footnote omitted)).

49. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 44, at 6 (noting that the agency plans to improve its auditing program and hire more auditors); *Napolitano Testimony*, *supra* note 38 (“Since January 2009, ICE has audited more than 4,600 employers suspected of employing unauthorized workers, debarred more than 315 companies and individuals, and imposed approximately \$59 million in financial sanctions—more than the total amount of audits and debarments during the entire previous administration.”).

50. 8 U.S.C. § 1324a (2006). Hiring workers not authorized to work in the United States was not illegal until IRCA passed in 1986. *See* *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892–93 (1984).

detering the employment of undocumented immigrants.⁵¹ IRCA requires employers to screen their employees for work authorization⁵² and sanctions employers who knowingly hire undocumented immigrants.⁵³ Twenty-five years later, IRCA's objectives have not been achieved. IRCA has failed to limit an increasing undocumented population, and, even more disconcerting, some unscrupulous employers have misused their IRCA-conferred immigration screening power to threaten to deport undocumented workers who refuse to comply with exploitive working conditions.⁵⁴ Joseph Layne, in his article, *Fighting a Losing Battle: IRCA's Negative Impact on Law-Abiding Employers*, builds on this unintended consequence to further argue that in addition to facilitating the abuse of undocumented workers, IRCA also hurts employers who desire to follow the law. Examining an underexplored area in the immigrant workers' rights scholarship, Layne focuses on the role of law-abiding employers under the current workplace immigration enforcement regime. Analyzing post-IRCA judicial developments that reinforce the primacy of immigration enforcement objectives over workplace protections,⁵⁵ Layne finds that employers who strictly adhere to employment and labor laws are at a serious market disadvantage as compared to unscrupulous employers, who are ironically empowered by IRCA to abscond labor laws and exploit workers who lack legal immigration status.

Our country's system of border and interior immigration enforcement, which is outlined above, is accompanied by an elaborate detention scheme. Immigrants who have allegedly violated immigration laws and are facing removal proceedings are held in

51. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (citing *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991)) (stating that the IRCA makes "combating the employment of illegal aliens central to '[t]he policy of immigration law'").

52. 8 U.S.C. § 1324a(b).

53. *Id.* § 1324a(e)(4)(A) (civil fines); *id.* § 1324a(f)(1) (criminal prosecution for employers who engage in a pattern practice of violations).

54. REBECCA SMITH ET AL., ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS (2009), available at http://nelp.3cdn.net/75a43e6ae48f67216a_w2m6bp1ak.pdf; Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009); Michael J. Wishnie, *The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389 (2004).

55. See *Hoffman Plastic Compounds*, 535 U.S. at 147.

detention facilities, sometimes indefinitely.⁵⁶ Theoretically, immigrant detention does not constitute punishment for a crime. Yet in practice, detained immigrants experience the loss of freedom similar to that in penal incarceration.⁵⁷ Some argue that the guidelines and conditions of immigrant detention violate basic rights such as access to medical treatment⁵⁸ and due process.⁵⁹ Due to Congress' plenary power over immigration policy, however, immigration issues receive only limited constitutional judicial review.⁶⁰

Whitney Chelgren, in her article, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, undertakes the doctrinal and normative complexities of a dichotomous immigrant detention system, which is civil in theory yet penal in character. Chelgren illustrates the humanitarian and doctrinal problems that current immigrant detention practices raise, including harsh conditions of confinement, unreasonable durations of detention, and other violations of due process. Recognizing the normative premise on which immigrant detention was founded—that of prevention of flight rather than punishment for a crime—Chelgren concentrates her analysis on the

56. Antonio Ginatta, *The Danger of Indefinite Detention*, THE HILL (June 1, 2011, 4:21 PM), <http://thehill.com/blogs/congress-blog/politics/164257-the-danger-of-indefinite-detention> (“The House Judiciary committee plans on Thursday to move forward a bill to create a system of indefinite detention for immigrants in the United States.”).

57. SCHRIRO, *supra* note 8, at 21–25 (discussing the conditions of detention facilities while noting that the majority were built as jails and prisons and that many immigrants are detained in currently functional jails and prisons with pretrial and convicted inmates).

58. SUNITA PATEL & TOM JAWETZ, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES 3 (2007), available at http://www.aclu.org/pdfs/prison/unsr_briefing_materials.pdf (“Among the most common complaint [sic] from detainees across the country is inadequate access to medical care.”); Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. SOC. JUST. 693 (2009).

59. Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 633 (2010) (stating that categories of mandatory detention are vague and that the detention system is “too unfair, inefficient, and expensive to be sustainable”); Kaufman, *supra* note 10, at 139–44.

60. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (finding that while the political branches have plenary power over immigration, that power is “subject to important constitutional limitations”); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365 (2002) (predicting that the plenary power doctrine will continue to be a limit on judicial review of immigration laws); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 926 (1995).

constitutionality of practices at the pre-removal stage of immigrant detention. Drawing parallels with pretrial detention in the criminal justice system, Chelgren finds a complete absence of due process safeguards for immigrants in pre-removal detention, most importantly, a lack of individualized hearings. These constitutional violations prompt Chelgren to recommend an overhaul of the current detention system, which would adopt softer alternatives, such as supervised in-home detention, to better reflect the civil rather than penal theoretical foundation of immigrant detention.

Among those immigrants detained and subject to removal for unlawful presence or other immigration violations, some may make a claim for relief from removal. Such claims are adjudicated by the Executive Office for Immigration Review (EOIR), an agency within the Department of Justice that operates as the nation's immigration court system.⁶¹ EOIR judges conduct civil removal proceedings.⁶² In a typical removal proceeding, the immigration judge determines whether an individual from a foreign country should be allowed to enter or remain in the United States or be removed.⁶³ Immigration judges may also grant asylum, cancellation of removal, adjustment of status, or other forms of relief.⁶⁴ The immigration court is an administrative agency rather than an independent judiciary, and immigration judges are employees of the Department of Justice rather than federally appointed Article III judges.⁶⁵

Widespread agreement exists among judges, practitioners, immigrants, and advocates that the current immigration court system does not have the capacity to ensure the protection of due process rights.⁶⁶ Immigration judges have been characterized as lacking

61. 8 C.F.R. § 1003.0 (2011).

62. 8 U.S.C. § 1229a (2006).

63. 8 C.F.R. §§ 1240.1, 1003.10.

64. *Id.* § 1240.11(a), (c).

65. *See* 8 U.S.C. § 1101(b)(4).

66. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (“[A]djudication of these [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.”); Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 492–93 (2008) (listing federal court decisions that criticize the current immigration court system, and citing anecdotal evidence of impartiality from practitioners); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1639 (2010) (noting that the immigration adjudication system has been criticized by both political parties for decades as being unfair, inaccurate, inconsistent, and inefficient).

impartiality.⁶⁷ Removal proceedings are considered noncriminal and immigrants are therefore not provided with court-appointed counsel.⁶⁸ Poor translation capacity and cultural differences have had the consequence of depriving immigrants of knowledge of their rights.⁶⁹ Finally, increased immigration enforcement has led to an overload of immigration court cases.⁷⁰ Many cases are then appealed up to the U.S. courts of appeals, overburdening the federal appellate court system.⁷¹

Christen Chapman critically responds to the broken immigration court system in *Relief from Deportation: An Unnecessary Battle*. Chapman's investigation into the current state of the immigration courts reveals a system that is corrupted by its increasingly adversarial approach to resolving immigration matters. Chapman notes that immigration courts have failed to implement the due process safeguards necessary for adversarial proceedings. Immigration proceedings, particularly adjudications for asylum or relief from removal, are dominated by the enforcement priorities of the ICE attorney. Noncitizen respondents are then deprived of the opportunity to effectively present the merits of their cases, frequently resulting in denials of relief. Chapman suggests an innovative

67. CTR. FOR IMMIGRANTS' RIGHTS, PENN STATE LAW, PLAYING POLITICS AT THE BENCH: A WHITE PAPER ON THE JUSTICE DEPARTMENT'S INVESTIGATION INTO THE HIRING PRACTICES OF IMMIGRATION JUDGES 57 (2009), available at http://law.psu.edu/_file/Playing%20Politics%20at%20the%20Bench%20101209.pdf (stating that the politicized hiring of unqualified immigration judges threatens necessary impartiality); Benedetto, *supra* note 66.

68. See 8 U.S.C. § 1362 (providing the right to counsel in removal proceedings, but not at the government's expense); OFFICE OF PLANNING, ANALYSIS & TECH., U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK G1 (2011), available at <http://www.justice.gov/eoir/statpub/fy10syb.pdf> (showing that in 2010, aliens were not represented by legal counsel in 57 percent of removal proceedings).

69. See Donna Ackermann, *A Matter of Interpretation: How the Language Barrier and the Trend of Criminalizing Illegal Immigration Caused a Deprivation of Due Process Following the Agriprocessors, Inc. Raids*, 43 COLUM. J.L. & SOC. PROBS. 363 (2010).

70. See *New Judge Hiring Fails to Stem Rising Immigration Case Backlog*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), SYRACUSE UNIV. (June 7, 2011), <http://trac.syr.edu/immigration/reports/250/>.

71. Legomsky, *supra* note 66, at 1646–47 (estimating a 30 percent appeal rate from the Board of Immigration Appeals to federal courts of appeals in fiscal year 2008, which has “created a now well-documented crisis for the federal courts”); *Judicial Emergency Declared in District of Arizona*, U.S. COURTS (Jan. 25, 2011), http://www.uscourts.gov/News/NewsView/11-01-25/Judicial_Emergency_Declared_in_District_of_Arizona.aspx (“The federal court in Arizona has the third highest criminal caseload among the nation’s 94 federal trial courts, driven by illegal immigration and drug smuggling across the U.S.-Mexico border. Criminal cases in that court have increased 65 percent since 2008.”).

proposal—that immigration courts move away from an adversarial system and toward a framework of inquisitorial adjudications. Such a system would eliminate the ICE attorney and place full fact-finding and adjudicatory power in the hands of the immigration judge, who would optimally balance the goals of immigration enforcement against the humanitarian interests of granting immigration relief to the noncitizen respondent. Chapman contends that an inquisitorial immigration court would achieve greater fairness and impartiality, and ensure that the noncitizen’s due process rights are properly protected.

In sum, the five articles in this issue provide doctrinally comprehensive and normatively nuanced examinations of several key aspects of comprehensive immigration reform. Each article is also prescriptive, presenting theoretically unique yet practical, alternatives to current dilemmas in immigration law. These recommendations include the following:

- family-based immigration avenues should incorporate marriage equality for same-sex binational couples;
- unauthorized border entrants who undergo criminal prosecution should receive the due process protections that criminal defendants receive;
- workplace immigration enforcement policies and practices must not only prevent the exploitability of undocumented workers but should also protect law-abiding employers;
- immigrant detention requires softer alternatives to reflect its civil and preventative objectives; and
- immigration courts ought to move away from an adversarial system and toward an inquisitorial system to better ensure fairness and impartiality in adjudications.

As discussions of comprehensive immigration reform continue among lawyers, policymakers, scholars, and advocates, the contributions of these five articles will facilitate the development of immigration reform measures that reflect principles of immigrant inclusion, equality, and democracy for all.

