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## CROSSING THE RUBICON: UNDERSTANDING KEY COMPLEXITIES OF CONTEMPORARY U.S. IMMIGRATION LAW

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**CROSSING THE RUBICON:  
UNDERSTANDING KEY COMPLEXITIES OF  
CONTEMPORARY U.S. IMMIGRATION LAW**

*Robert Steinbuch\**

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## I. INTRODUCTION

Immigration law is often an emotional topic, too often quickly leading to acrimony notwithstanding that the sentiment behind a generous immigration policy represents one of the highest moral ideals that the citizens and government of this country can embody. Indeed, the American munificence towards foreigners and refugees affected me greatly.<sup>1</sup> Following World War II, my father and his

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<sup>1</sup> Then-Senator Mike DeWine described my family's history on the floor of the Senate as follows:

After six million Jews were murdered in World War II, surviving Jews from across Europe and Asia made the trek to the holy land. They sought their homeland and peace. They obtained the former, but not the latter. One such man seeking a homeland and peace was Mark Steinbuch, the late father of one of my Judiciary staffers, Robert Steinbuch. Born in Poland, Mark and his family lived under Nazi occupation, relocated to Siberia shortly after the start of World War II, and then traveled for two weeks by cattle car to live in Soviet Kazakhstan. [His] extended family faced some horrific challenges. Many were killed by the Nazis. His cousins—the Hershenfis family—were forced into labor in the Pionki ghetto in Poland. In 1941, the family was shipped off to Auschwitz. Hanna and her brother Harry were separated from each other and from their parents Fay and Harvey. Fay and Harvey never made it out of the death camp. Hanna, tattooed with the number A14699, was shipped to an intermediate camp and then Bergen-Belsen. Harry—B416 to the Nazis—worked hard labor in Auschwitz for four years and in 1944 was sent to another camp called Mauthausen. On May 3, 1945, the Nazis fled the camp. That night the skies opened and sent down a rainfall as if the world was being cleansed from the horrors that it had seen. The next morning, the Americans arrived and the 11th Armored Division liberated the camp. Three days later, Harry turned 26. After five weeks in an American hospital, Harry spent the next three years in a displaced persons camp in Austria. In 1949, Harry's wishes were answered, and he set off for America. Four years later, when Hanna also came to the United States, the siblings were reunited for the first time since they were shipped

family fled to the Americans in Germany, who were there rebuilding Germany and managing displaced persons. My family immigrated to Israel while it was a mandate of Great Britain, and eventually moved to the United States and became citizens; as such, I truly appreciate, understand and empathize when persecuted people flee for America.<sup>2</sup> While my father was never in a concentration camp, other family members tragically were.<sup>3</sup>

The enduring question that the controversial debate over immigration has still failed to answer is: what are and what should be the limits to our ideals and how should we enforce those limits, whatever they may be?<sup>4</sup> Evaluating all of the complexities of

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off to Auschwitz 13 years prior. . . . Upon the defeat of the Nazis, [my father's] immediate family went to Germany, because, as [he] described it, "that is where the Americans were, and *if you wanted to live, you went to the Americans.*" From there, Mark joined the Zionist Youth Movement and set off for Israel. That, however, was no easy task. Traveling across Europe, often on foot to a southern port, he, his brother, and many others like them boarded an overloaded freighter renamed the Theodore Hertzl after the founder of Zionist Movement. Upon the ship's arrival in Israel, the British quickly arrested its passengers and sent them to a holding camp in Cyprus. Months later, Mark and the others were allowed to enter Israel. Upon the joyous declaration of independence, seven Arab nations invaded Israel and Mark quickly joined the Army. Under-aged and flatfooted, he fought for the independence of this nascent democracy. Mark's story is by no means unique. It not only represented the goals and desires of the Jews of post-war Europe, but the dreams of a nation of people dispersed from their homeland for millennia.

Statement of Senator Mike DeWine (R. OH) on Israeli Independence Day, May 12, 2015, <https://votesmart.org/public-statement/95133/floor-statement-israeli-independence#.XTHAEzdOkwD> (last visited Dec. 4, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> See Robert Steinbuch, *3 Common Arguments for Overlooking Illegal Immigration That Don't Hold Water*, THE FEDERALIST (July 24, 2019), <https://thefederalist.com/2019/07/24/3-common-arguments-overlooking-illegal-immigration-dont-hold-water/> (last visited Dec. 4, 2021).

<sup>4</sup> *Id.*

immigration law in the United States, even if possible, would be a daunting task indeed—one well beyond the capacity of any article.

Instead, I seek to address two issues that have permeated the more-recent debate on immigration, with the hope of providing some necessary background and analysis of these questions. The goal is not to solve the immigration crisis, but rather to help cabin the discussion in an historical and analytical framework. As such, I intend to focus on two issues:

- (1) understanding how and why we wound up where we are regarding family separation and the treatment of unaccompanied minors, and
- (2) fairly measuring and analyzing the impact of certain costs of immigration, both monetary and social.

I seek to analyze some of the legal challenges, as well as the policy arguments, on both sides of these topics with the hope that the information will aid in engaging with these matters in an informed and clear-headed fashion.

## II. UNDOCUMENTED IMMIGRATION

There are three main ways a person can become an undocumented immigrant.<sup>5</sup> One is by entering the country legally with a legitimate visa but staying past that visa's expiration.<sup>6</sup> Between 30%–50% of undocumented immigrants each year enter the country this way.<sup>7</sup> Another, and the least common of the three

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<sup>5</sup> See *3 of the Most Common Ways People Migrate Illegally*, POZO GOLDSTEIN, LLP ATTORNEYS AT LAW (May 07, 2017), <https://www.pozogoldsteinny.com/illegal-immigration/>; see also *Modes of Entry for the Unauthorized Migrant Population*, PEW RESEARCH CENTER (May 22, 2006) <https://www.pewresearch.org/hispanic/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/> (last visited Dec. 4, 2021).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; see also *Modes of Entry for the Unauthorized Migrant Population*, *supra* note 5 (putting the estimate at forty to fifty percent in 2006).

methods of undocumented immigration, is for an immigrant to stay past the expiration of his or her border-crossing card.<sup>8</sup> Unlike a visa, which authorizes entry to the United States for a specified length of stay, a border-crossing card allows the holder to cross the border at will for a certain number of years, typically ten.<sup>9</sup> The third and most controversial way an undocumented immigrant can enter the country is through unauthorized entry—i.e., crossing the border without entering through a checkpoint.<sup>10</sup> Though exact estimates are difficult, it seems that a little over half of the undocumented immigrants residing in the United States entered through the latter method.<sup>11</sup> Needless to say, in addition to this being the most controversial method of entry, it has also presented the greatest difficulty in dealing with immigration policy.

### A. *Flores and its Effect on Family Separation*

Perhaps the greatest controversy in immigration policy has surrounded the separation of families at the border.<sup>12</sup> This separation is largely due to a court-enforced settlement known as the *Flores* Settlement,<sup>13</sup> which was, ironically, intended to safeguard

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<sup>8</sup> See 3 of the *Most Common Ways People Migrate Illegally*, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See 3 of the *Most Common Ways People Migrate Illegally*, *supra* note 5 (“In 2016, the illegal immigrant population in America amounted to almost 11 million people . . . [e]ach year, an estimated 500,000 people enter the country illegally, accounting for about 6.5 million of the undocumented immigrants currently residing in the United States.”); see also *Modes of Entry for the Unauthorized Migrant Population*, *supra* note 5 (in 2006 it was estimated that “somewhat more than half [of the illegal immigrant population in the US] entered the country illegally.”).

<sup>12</sup> See Carrie F. Cordero, Heidi L. Feldman, & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUMAN RIGHTS L. REV. 432 (2020); see also Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019).

<sup>13</sup> See generally Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), <https://www.hsgac.senate.gov/imo/media/doc/2018.08.15%20PSI%20UAC%20Report%20Appendix.pdf>.

immigrant children; of course, the results did not match the intentions of the settlement.<sup>14</sup> An understanding of the history and effects of the *Flores* Settlement is essential in dealing with the ongoing issue of family separation.

While some family separations cannot be avoided,<sup>15</sup> i.e., when some family members receive deportation orders but others do not, this is not the primary controversy.<sup>16</sup> The enduring images that stained the news showed families being separated upon crossing the border and the poor conditions under which the children of these families were kept. This produces both a bad outcome and bad optics for our nation.<sup>17</sup> The far more acceptable approach, we generally recognize, is that family units apprehended together entering the country could, and should, be kept together while asylum or removal proceedings are pending. Unfortunately, the *Flores* Settlement makes that legally impossible.<sup>18</sup> Understanding this perverse outcome requires an examination of the events leading up to, as well as the contents of, the *Flores* Settlement.

The controversy began in 1984 when, in response to an influx of unaccompanied minor-aged children crossing the southern border, the Immigration and Naturalization Service (INS) declared that these unaccompanied minors could only be released to a “parent or lawful guardian” in order to best protect the wellbeing of the children.<sup>19</sup> This rule became the focal point of Jenny Flores’s eponymous class action suit brought by immigration activists in

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<sup>14</sup> Sarah Herman Peck & Ben Harrington, *The “Flores Settlement” and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions*, CONGRESSIONAL RESEARCH SERVICE, 9 (upd. 2018), <https://fas.org/sgp/crs/homsec/R45297.pdf> (last visited Dec. 4, 2021).

<sup>15</sup> Steinbuch, *supra* note 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Matthew Sussis, *History of The Flores Settlement*, CENTER FOR IMMIGRATION STUDIES (Feb. 11, 2019), <https://cis.org/Report/History-Flores-Settlement> (last visited Dec. 4, 2021).

<sup>19</sup> Peck & Harrington, *supra* note 14, at 6.

1985.<sup>20</sup> The petitioners argued for the release of the detained minors to other “responsible adults” when their “parent or legal guardian fails to personally appear to take custody of them” and for better conditions in border detention facilities where the children awaited their judicial proceedings if there was no suitable adult to receive them.<sup>21</sup> The suit came before the Supreme Court of the United States in 1993 after a nearly decade-long battle.<sup>22</sup> The Supreme Court remanded the case to the District Court to the Central District

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<sup>20</sup> See *Reno v. Flores*, 507 U.S. 292, 296 (1993). See also Peck & Harrington, *supra* note 14, at 6. Jenny Flores was the daughter of an illegal immigrant. The mother could not pick up Jenny herself because she feared her own deportation. Matthew Sussis, *History of The Flores Settlement*, CENTER FOR IMMIGRATION STUDIES (Feb. 11, 2019), <https://cis.org/Report/History-Flores-Settlement> (citing *The History Of The Flores Settlement And Its Effects On Immigration*, NPR (June 22, 2018)). Instead, the family wanted cousins to pick up Jenny. *Id.* INS would not allow release to the cousins because they were not Jenny’s legal guardians. *Id.* The mother’s employer was a Hollywood actor and notified an immigration attorney on behalf of Jenny. *Id.*

<sup>21</sup> Peck & Harrington, *supra* note 14, at 6; *Flores*, 507 U.S. at 296.

<sup>22</sup> Peck & Harrington, *supra* note 14, at 6-7. When the suit was first litigated in district court, the court granted INS summary judgment on many of the plaintiffs’ claims. *Flores*, 507 U.S. at 296. However, it granted the plaintiffs summary judgment on their equal protection claim since INS allowed minors in exclusion proceedings to be released to any relative or friend while requiring minors in deportation proceedings to be released only to a parent or guardian. *Id.* Following the district court finding, INS instituted a national policy allowing minors in both exclusion and deportation proceedings to be released to a parent, legal guardian, or other family member. *Id.* at 296-98. Flores continued with litigation even under this new rule. *Id.* at 298. Only a week after the rule was in effect, the district court ruled in favor of Flores, vaguely citing due process concerns, and issued an order that largely invalidated the new regulation. *Id.* 298-99. The Court of Appeals three judge panel reversed the district court’s decision, but that holding was short lived. *Id.* at 299. The Ninth Circuit voted to rehear the case, and an eleven-judge panel “affirmed the District Court Order in all respects.” *Id.*

of California, where the parties stipulated to the “*Flores* Settlement.”<sup>23</sup>

The *Flores* Settlement laid out the national policy for the detention and release of unaccompanied minors in custody at border-detention facilities, scrapping any existing INS policy inconsistent with the Settlement.<sup>24</sup> Addressing confinement conditions, the Settlement detailed amenities and accommodations that the government must provide to minors, while also establishing guidelines for respectful treatment of minors, including protocols to protect minors’ dignity.<sup>25</sup> The INS was required to move newly apprehended minors from the initial holding facility to a licensed care facility within three days if they were apprehended “in an INS district in which a licensed program is located,” and five days if they were not.<sup>26</sup> The time limit on placement could be extended in times

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<sup>23</sup> Peck & Harrington, *supra* note 14, at 7. The parties expressed concern about the length and cost of moving forward with litigation, and the parties stated they both felt the settlement was in the best interest of justice. Stipulated Settlement Agreement, *supra* note 13, at 1-2.

<sup>24</sup> Stipulated Settlement Agreement, *supra* note 13, at 1-3; Peck & Harrington, *supra* note 14, at 7.

<sup>25</sup> “Facilities will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor.” Stipulated Settlement Agreement, *supra* note 13, at 4. In addition to maintaining the minor’s dignity, INS was also required to be respectful of that minor’s particular vulnerabilities. Stipulated Settlement Agreement, *Id.* at 4, 18.

<sup>26</sup> Stipulated Settlement Agreement, *supra* note 13, at 4-5. The settlement defined “licensed care facility” as “any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors.” *Id.* at 2.

of an influx of unaccompanied minors, so long as the transfer occurred as “expeditiously as possible.”<sup>27</sup>

Importantly, if the minors were not a danger to themselves or others, and there was no danger of them not showing up to their immigration hearing, they had to be released to a family member, legal guardian, or individual designated by the family, notwithstanding that the adult family members with whom they entered the country might still be subject to detention.<sup>28</sup> If the minors were a danger or a flight risk, then they stayed in one of the previously mentioned licensed-care programs until their proceedings were finished or until they were no longer a danger or a flight risk.<sup>29</sup> The INS had legal custody of all minors in INS facilities.<sup>30</sup>

The theme of the *Flores* Settlement is that minor-aged children should be “in the least restrictive setting appropriate for the minor’s age and special needs.”<sup>31</sup> The overarching idea was that children were to be reunited with their families, and if that was not achievable, they were to be treated with the utmost humane care while awaiting a hearing.<sup>32</sup>

The parties to the *Flores* Settlement intended the settlement to be temporary, binding only until legislation was passed to

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<sup>27</sup> *Id.* at 5. (“[I]n the event of an emergency or influx of minors into the United States, in which case the INS shall place all minors pursuant to Paragraph 19 as expeditiously as possible...”). The settlement defines an influx as “those circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program under Paragraph 19, including those who have been so placed or are awaiting such placement.” *Id.*; Peck & Harrington, *supra* note 14, at 7 (summarizing the circumstances warranting an exception).

<sup>28</sup> Stipulated Settlement Agreement, *supra* note 13, at 6.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 18.

<sup>32</sup> See Peck & Harrington, *supra* note 14, at 7.

implement it.<sup>33</sup> Until that time, the district court was charged with overseeing that the Settlement was carried out.<sup>34</sup> Congress did implement some, but not all, of the *Flores* Settlement under the Homeland Security Act (HSA) in 2002 and Trafficking Victims Protection Reauthorization Act (TVRPA) in 2008.<sup>35</sup> The HSA abolished the INS and replaced it with the Department of Homeland Security (DHS), transferring responsibilities related to the care and custody of unaccompanied minors from INS to the Office of Refugee Resettlement (ORR).<sup>36</sup> The ORR was charged with collaborating with other agencies to place the child according to his or her best interest.<sup>37</sup> In 2008, the TVRPA addressed the treatment of unaccompanied minors and gave ORR further responsibilities with regards to minors' placement and treatment.<sup>38</sup> Aligned with the *Flores* Settlement, the TVRPA acknowledged that the ORR must place the minor in the least restrictive setting possible.<sup>39</sup> Also, pursuant to the *Flores* Settlement, the TVRPA required that the minor go with a suitable guardian or, if none is available, to a specialized facility.<sup>40</sup> However, because these laws did not

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<sup>33</sup> Originally, the settlement was to terminate either five years after it was approved or three years after INS came into "substantial compliance," whichever was sooner. Stipulated Settlement Agreement, *supra* note 13, at 14. In 2001, the parties agreed that the settlement would remain in effect until forty-five days after the government published final regulations pursuant to the Settlement. *Flores v. Sessions*, 862 F.3d 863, 869 (9th Cir. 2017). Peck & Harrington, *supra* note 14, at 6. (explaining that the settlement was still in effect and that a district court judge in California presided over the settlement).

<sup>34</sup> Peck & Harrington, *supra* note 14, at 1.

<sup>35</sup> *Id.* at 5–6; *Flores*, 862 F.3d at 870–71.

<sup>36</sup> See Peck & Harrington, *supra* note 14, at 5. *Flores*, 862 F.3d at 870 (citing 6 U.S.C. §§ 111, 251, 291, then citing 6 U.S.C. § 279(a), (b)(1)(A), (g)(2)).

<sup>37</sup> *Flores*, 862 F.3d at 870 (citing 6 U.S.C. § 279(b)(1)(B)).

<sup>38</sup> Peck & Harrington, *supra* note 14, at 5; *Flores*, 862 F.3d at 871 (citing first *Flores v. Lynch*, 828 F.3d at 904, then citing 8 U.S.C. § 1232 (b)(1)).

<sup>39</sup> Peck & Harrington, *supra* note 14, at 5; *Flores*, 862 F.3d at 871 (citing 8 U.S.C. § 1232(b)(3)).

<sup>40</sup> *Id.*

implement all aspects of the *Flores* Settlement, parts of the original Settlement were still binding to all minor detainees.<sup>41</sup>

Beginning in 2014, apprehensions at the southern border increased, bringing the *Flores* Settlement back into the spotlight.<sup>42</sup> In 2016, the Ninth Circuit Court of Appeals found that the *Flores* Settlement applied to both accompanied and unaccompanied minors.<sup>43</sup> This was after the passage of the HSA and TVRPA, which only addressed unaccompanied minors.<sup>44</sup> Thus, the original *Flores* Settlement still governs the handling of accompanied minors while only parts of the original settlement govern unaccompanied minors.<sup>45</sup>

Because there has been no further legislation or amendment to the Settlement, there are now only two ways to process a minor crossing into the United States at the southern border, all depending on whether the child is accompanied or unaccompanied.<sup>46</sup> Notably, both processes are a present-day basis for separation at the southern border when a family unit crosses with minor children.

When a family unit crosses the southern border with a minor child, that child is considered accompanied for the purpose of

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<sup>41</sup> *Flores*, 862 F.3d at 870-71.

<sup>42</sup> U.S. CUSTOMS AND BORDER PROTECTION, *U.S. Border Patrol Total Monthly UAC Apprehensions by Sector (FY 2010 - FY 2019)*, (Jan. 2020) (showing that apprehensions of unaccompanied minors at the southern border increased from 38,759 in FY 2013 to 68,541 in FY 2014. The numbers for FY 2013 were already a part of an upward trend in unaccompanied minors, but it was FY 2014 where that number skyrocketed. Though subsequent years have fluctuated widely, as of FY 2019 the numbers have never gone below those for FY 2013).

<sup>43</sup> *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016). See also Alex Nowrasteh, *DECLINING DEPORTATION AND INCREASING CRIMINAL ALIEN RELEASES*, CATO INSTITUTE (May 19, 2016) (reporting in 2016 that unaccompanied minors crossing the southern border reached a peak in 2014 making up 14% of the apprehensions that year); Peck & Harrington, *supra* note 14, at 14 (citing *Lynch* when calling 2014 a “migrant crisis”).

<sup>44</sup> Peck & Harrington, *supra* note 14, at 8.

<sup>45</sup> *Id.*

<sup>46</sup> Peck & Harrington, *supra* note 14, at 8. See also *Ms. L v. U.S. Immigr. & Customs Enf’t*, 310 F.Supp.3d 1133, 1139 (9th Cir. 2018).

processing the minor.<sup>47</sup> However, there are three ways for an accompanied minor to become unaccompanied: (1) if the DHS cannot determine if the minor and adults are actually related, (2) if the DHS determines the minor is at risk if he or she stays with the adult, and (3) if the adult is referred for criminal prosecution.<sup>48</sup> If any of these three events takes place, the now-unaccompanied minor must be transferred within seventy-two hours of apprehension to the HHS pursuant to the TVPRA.<sup>49</sup>

Alternatively, if the minor remains accompanied and the family unit is detained together, the clock begins to tick on when the minor must transfer to a licensed facility, pursuant to the *Flores* Settlement.<sup>50</sup> The *Flores* Settlement exception allowing for a longer period before transfer during times of influx is currently in effect, and the judge presiding over the Settlement has ruled that approximately twenty days is the maximum amount of time the minor can remain in an unlicensed facility.<sup>51</sup> Therefore, if the family proceedings take longer than twenty days, as they commonly do, the child must be transferred.<sup>52</sup> Families are consequently separated because there are currently no licensed facilities that can hold families, preventing the family from being transferred together.<sup>53</sup>

The *Flores* Settlement does not protect against family separation. While the Ninth Circuit Court of Appeals ruled in 2016 that, by the plain language of the Settlement, it applies to accompanied minors as well as unaccompanied minors, the court

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<sup>47</sup> Peck & Harrington, *supra* note 14, at 8.

<sup>48</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, MYTH VS. FACT: DHS ZERO-TOLERANCE POLICY (June 18, 2018).

<sup>49</sup> *Id.*

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

<sup>51</sup> MYTH VS. FACT, *supra* note 48; Peck & Harrington, *supra* note 14, at 9. See also *supra* note 26 (describing how the *Flores* Settlement defines “licensed care facility.”)

<sup>52</sup> MYTH VS. FACT, *supra* note 48. (noting that the alternative to transfer is release.)

<sup>53</sup> *Id.* (Noting also that the alternative is to release the entire family); Peck & Harrington, *supra* note 14, at 12–13.

refused to recognize any rights for accompanied minors' parents implied in the Settlement.<sup>54</sup> Even though the *Flores* Settlement makes release to a parent the first choice for a minor, juveniles who were detained with their parents can be released without their parents.<sup>55</sup> In the court's words, "the fact that the Settlement grants [minors] a right to preferential release to a parent over others does not mean that the government must also make a parent available; it simply means that, if available, a parent is the first choice."<sup>56</sup> Thus, the ruling that the *Flores* Settlement applies to accompanied minors did nothing to mitigate family separation.

### B. FLORES TODAY

On April 6, 2018, then-Attorney General Jeff Sessions announced that the United States would be invoking a "zero tolerance policy":

I have put in place a "zero tolerance" policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It's that simple. If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law. If you make false statements to an immigration officer or file a fraudulent asylum claim, that's a felony. If you help others to do so, that's a felony, too. You're going to jail. So if you're going to come to this country, come here legally. Don't come here illegally.<sup>57</sup>

Because the policy called for immediate prosecution, any family unit with minor children crossing the border illegally was separated within seventy-two hours pursuant to the TVPRA, because the minor was considered unaccompanied as soon as the

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<sup>54</sup> *Lynch*, 828 F.3d at 905–08 (9th Cir. 2016).

<sup>55</sup> *Id.* at 908–09.

<sup>56</sup> *Id.* at 908.

<sup>57</sup> Press Release 18-417, Department of Justice Office of Public Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry, (Apr. 6, 2018); Peck & Harrington, *supra* note 14, at 11.

parents were prosecuted.<sup>58</sup> Further, if the family crossed legally claiming, for example, asylum, and the family still had to await judicial proceedings regarding their claim, when the waiting period exceeded twenty days, families either had to be separated or the family released in its entirety.<sup>59</sup>

The massive family separation caused such intense political uproar that on June 20, 2018, President Donald Trump signed an Executive Order (EO) requiring family units to stay together during prosecution proceedings to the “extent permitted by law.”<sup>60</sup> To avoid family separation or the alternative of releasing the entire family, on June 21, 2018, the Trump administration filed an Application for Relief from the *Flores* Settlement.<sup>61</sup> However, the Ninth Circuit held the EO did not go far enough, and on June 26, 2018, in *Ms. L v. ICE*, the judge granted an injunction that required families to stay together and all separated families be reunited.<sup>62</sup> Further, the court did not allow the administration to hold the minor children together with their families for the entirety of the prosecutorial proceedings because that would not comply with the *Flores* Settlement.<sup>63</sup> On July 9, 2018, the application for relief was denied.<sup>64</sup>

### C. PROSECUTORIAL DISCRETION

The Obama administration previously sought to mitigate family separation for family units already in the country by only removing immigrants convicted of a violent crime when it replaced Secure Communities (S-COMM) with the Priority Enforcement Program

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<sup>58</sup> Peck & Harrington, *supra* note 14, at 12; MYTH VS. FACT, *supra* note 48.

<sup>59</sup> MYTH VS. FACT, *supra* note 58.

<sup>60</sup> Peck & Harrington, *supra* note 14, at 11; *Ms. L. v. ICE*, 310 F. Supp. 3d 1140, 1140 (S.D. Cal. 2018).

<sup>61</sup> *Id.* at 13.

<sup>62</sup> Peck & Harrington, *supra* note 14, at 10; *Ms. L.*, 310 F. Supp. 3d at 1149.

<sup>63</sup> *Id.* at 10.

<sup>64</sup> *Id.* at 13.

(PEP).<sup>65</sup> When establishing the prioritization program, Jeh Johnson, then-DHS Secretary, explained that the program affected immigration policy across the board, including the discretion used to decide whether and how to apprehend, detain, and remove illegal aliens.<sup>66</sup> Johnson explained that the policy should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: (i) who to stop, question, and arrest; (ii) who to detain or release; (iii) whether to settle, dismiss, appeal, or join in a motion on a case; and (iv) whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case.<sup>67</sup> Johnson went on to describe the three levels of the prioritization program.<sup>68</sup> The policy mandated the non-enforcement of certain

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<sup>65</sup> The primary goal of S-COMM was “to identify and process *all* criminal aliens amendable for removal *while in federal, state and local custody*.” Jessica Vaughn, *Public Safety Impact of Obama Administration’s Priority Enforcement Program*, CENTER FOR IMMIGRATION STUDIES (Mar. 31, 2016), <https://cis.org/Public-Safety-Impact-Obama-Administrations-Priority-Enforcement-Program> (quoting U.S. Immigration and Customs Enforcement, “1st Quarterly Status Report (Apr.-June 2008) for Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens” (Aug. 2008). However, the Secretary summed up the transition to PEP by stating, “unless the alien poses a demonstrable risk to national security, enforcement actions through the new program will only be taken against aliens who are convicted of specifically enumerated crimes.” Jeh Johnson, *Memorandum for Secure Communities*, DEP’T OF HOMELAND SEC. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf).

<sup>66</sup> Jeh Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, DEP’T OF HOMELAND SEC. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) (last visited Dec. 4, 2021).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 3-4.

Priority 1 illegal aliens were:

- (a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;

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- (b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;
  - (c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;
  - (d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and
  - (e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the *Immigration and Nationality Act* at the time of the conviction.

Priority Number 2 illegal aliens were:

- (a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status, provided the offenses arise out of three separate incidents;
- (b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence; sexual abuse or exploitation; burglary; un[]lawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);
- (c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and
- (d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

Priority 3 illegal aliens:

Priority 3 aliens are those who have been issued a final order of removal on or after January 1, 2014. Aliens described in this

aspects of the country's immigration laws. Some critics of S-COMM felt that the PEP did not go far enough.<sup>69</sup>

Under both S-COMM and the PEP, enforcement started at the state or local level. When an individual was arrested and fingerprinted during intake, those fingerprints could be matched against an immigration database and alert U.S. Immigration and Customs Enforcement (ICE) to the illegal alien's custody.<sup>70</sup> One major difference between the two programs is how drastically the PEP narrowed the population of immigrants that could be detained

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priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

<sup>69</sup> These critics argue that PEP was not a "new" policy but rather a "rebrand[ing]" of S-COMM. Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 601 (2016). The main critiques of S-COMM were the immigrants being targeted by the program and the way these people were being rounded up. *Id.* at 621. Essentially, critics of S-COMM did not like that seemingly minor offenders were being deported instead of and alongside more serious offenders, despite the fact that both parties were in the country illegally and therefore criminals. *See id.* at 622. In turn, these critics felt PEP did not affect enough meaningful change and that there would still be too large a number of immigrants deported. *Id.* at 23. These critics' second critique of S-COMM was that they disagreed with the required information sharing between local law enforcement and ICE. *Id.* Consequently, critics of PEP felt that this issue was not sufficiently addressed by the new policy, and in turn actually began efforts to warn immigrants of possible attempts to be captured by ICE. *Id.* at 626.

<sup>70</sup> *See Priority Enforcement Program*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/pep> (last visited Dec. 4, 2021); *Immigration Detainers Under the Priority Enforcement Program*, AMERICAN IMMIGR. COUNCIL (Jan. 25, 2017), <https://www.americanimmigrationcouncil.org/research/immigration-detainers-under-priority-enforcement-program>.

for removal proceedings.<sup>71</sup> Under S-COMM, ICE could request a detainer against a person who was, first, *charged* with an offense by a state or local law enforcement agency and, second, the immigration officer had reason to believe was subject to ICE removal proceedings.<sup>72</sup> Thus, an immigrant with no criminal history other than his or her entrance into the country could be detained for removal proceedings.<sup>73</sup> By contrast, under the PEP, an individual must first be *convicted* of an offense.<sup>74</sup> Whether or not that individual will be subject to removal proceedings after his or her conviction depends on the ranking of the convicted offense on the PEP priority list, whether the offense pertained to gang activity, and if the individual is a threat to national security.<sup>75</sup>

The presence of minors in a situation can skew proceedings under the PEP. Logically, minors, particularly young children, are less likely than adults to be a high priority. For example, one of the Priority 1 categories specifically did not apply to any individual under the age of sixteen.<sup>76</sup> Another category, “aliens convicted of

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<sup>71</sup> *Priority Enforcement Program*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/pep> (last visited Dec. 4, 2021); Jessica Vaughn, *Concerns About the New Priority Enforcement Program*, CTR. FOR IMMIGR. STUD. (Aug. 6, 2019), <https://cis.org/Vaughan/Concerns-About-New-Priority-Enforcement-Program> (last visited Dec. 4, 2021); *Immigration Detainers Under the Priority Enforcement Program*, AM. IMMIGR. COUNCIL (Jan. 25, 2019), <https://www.americanimmigrationcouncil.org/research/immigration-detainers-under-priority-enforcement-program> (last visited Dec. 4, 2021); *Priority Enforcement Program—How DHS is Focusing on Deporting Felons*, DEP’T OF HOMELAND SEC. (July 30, 2019); Vaughn, *Public Safety Impact*, *supra* note 65.

<sup>72</sup> *Priority Enforcement Program*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/pep> (last visited Dec. 4, 2021).

<sup>73</sup> *See id.*

<sup>74</sup> *Id.* *See also* Vaughn, *Public Safety Impact*, *supra* note 65 (describing an example of how the conviction requirement can lead to the release of even prioritized immigrants).

<sup>75</sup> Johnson, *supra* note 66, at 2.

<sup>76</sup> *Id.* at 3 (“aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang”).

an offense classified as a felony in the convicting jurisdiction,” will often exclude juveniles by virtue of states’ juvenile delinquency laws, which may not define any offenses as felonies unless the perpetrator is an adult.<sup>77</sup> Once in the United States, minors affect other removal proceeding decisions, in which DHS personnel are directed to consider family in the United States and young children as factors in deciding removal.<sup>78</sup>

Notably, the only time convicted individuals were subject to removal proceedings solely based on their status is when they were apprehended at the border, not in the United States interior.<sup>79</sup> This policy under the PEP established that “ICE will no longer seek transfer of individuals with civil immigration offenses alone.”<sup>80</sup>

Limiting the categories of immigrants subject to removal was not the only way the program changed the practice. The PEP also limited how and whether ICE could get custody, even if it was considered a priority.<sup>81</sup> Part of the cited reason for implementing the PEP was because certain cities and jurisdictions did not agree

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<sup>77</sup> Johnson, *supra* note 66, at 3. *See, e.g.*, ARK. CODE ANN. § 9-27-303(15) (defining a “delinquent juvenile” to include “A juvenile ten (10) years old or older who: Has committed an act . . . that, *if the act had been committed by an adult*, would subject the adult to prosecution for a felony”) (emphasis added). The juvenile may be tried as an adult if the juvenile is at least sixteen and charged with a felony, or for certain specified offenses when the juvenile is fourteen or fifteen. ARK. CODE ANN. § 9-27-318(b-c).

<sup>78</sup> Johnson, *supra* note 66, at 6.

<sup>79</sup> *See id.* at 3. “[A]liens apprehended at the border or ports of entry while attempting to unlawfully enter the United States...”

<sup>80</sup> *Priority Enforcement Program*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/pep> (last visited Dec. 4, 2021).

<sup>81</sup> *See id.*; *see also* Vaughn, *Public Safety Impact*, *supra* note 65; Vaughn, *Concerns About the New Priority Enforcement Program*, *supra* note 71; *see also Immigration Detainers Under the Priority Enforcement Program*, AM. IMMIGR. COUNCIL (Jan. 25, 2019), <https://www.americanimmigrationcouncil.org/research/immigration-detainers-under-priority-enforcement-program> (last visited Dec. 4, 2021).

with the work of ICE and were refusing to comply.<sup>82</sup> The Obama administration felt the PEP would relieve these tensions.<sup>83</sup> The PEP expressly acknowledges that transfer to ICE is contingent on local cooperation, stating:

Nothing in this memorandum shall prevent ICE from seeking the transfer of an alien from a state or local law enforcement agency when ICE has otherwise determined that the alien is a priority under the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum *and the state or locality agrees to cooperate with such transfer*.<sup>84</sup>

Further, under S-COMM, ICE could request the individual be detained in custody at the initial booking, allowing no chance for the alien to avoid ICE.<sup>85</sup> However, under the PEP, ICE could not act until an individual was convicted.<sup>86</sup> This could lead, albeit rarely, to an individual who is convicted of a priority offense but sentenced to time already served, being released before ICE arrived.<sup>87</sup> Also of note, under S-COMM, ICE issued a request to detain; however,

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<sup>82</sup> *Priority Enforcement Program—How DHS is Focusing on Deporting Felons*, DEP'T OF HOMELAND SEC. (July 30, 2019), <https://cis.org/Public-Safety-Impact-Obama-Administrations-Priority-Enforcement-Program> (last visited Dec. 4, 2021). *See e.g.* Cházaro, *supra* note 69, at 627 (discussing the Trust Act and how it limited local law enforcement cooperation with ICE under S-COMM).

<sup>83</sup> *See Priority Enforcement Program—How DHS is Focusing on Deporting Felons*, DEP'T OF HOMELAND SEC. (July 30, 2019).

<sup>84</sup> Jeh Johnson, *Memorandum for Secure Communities*, DEP'T OF HOMELAND SEC. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) (last visited Dec. 4, 2021). *See also* Vaughn, *Public Safety Impact*, *supra* note 65 (quoting Jeh Johnson, *Memorandum for Secure Communities*, DEP'T OF HOMELAND SEC. (Nov. 20, 2014) (highlighting how this allows sanctuary cities to continue noncompliance).

<sup>85</sup> *See Priority Enforcement Program*, U.S. IMMIGR. AND CUSTOMS ENF'T, <https://www.ice.gov/pep> (last visited Dec. 4, 2021).

<sup>86</sup> *See Vaughn, Concerns About the New Priority Enforcement Program*, *supra* note 71.

<sup>87</sup> *Id.*

under the PEP, the request was for notification by law enforcement when the individual was to be released.<sup>88</sup>

The service-of-detainer requirement was another way the local enforcement agency interacted with ICE regarding removals under PEP.<sup>89</sup> S-COMM encouraged, but did not require, that local law enforcement serve the individual with a copy of the detainer notice in order for it to be effective; under PEP, however, if the individual was not served with the request, ICE could not carry it out, rendering the request void.<sup>90</sup> It was local law enforcement's responsibility to serve the notice before ICE could intercede.<sup>91</sup>

Additionally, the PEP narrowed the 48-hour holding limitation.<sup>92</sup> Under a detainer request issued under either S-COMM or the PEP, an individual could only be held for 48 hours beyond the time served under the law enforcement agency.<sup>93</sup> The PEP, however, included Saturdays, Sundays and holidays in the 48-hour period, whereas S-COMM had excluded them from the calculation.<sup>94</sup>

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<sup>88</sup> Jeh Johnson, *Memorandum re Secure Communities 2*, DEP'T OF HOMELAND SEC. (Nov. 20, 2014); *see also* 8 C.F.R. 287.7(d) ("Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department."). The decision to replace detention requests with notification requests was designed, at least in part, to address constitutional issues with detention requests that were not based on probable cause. *See* Johnson, *supra*, at 2, fn.1 (collecting cases holding that detention requests without probable cause violated the Fourth Amendment).

<sup>89</sup> *See Priority Enforcement Program*, U.S. IMMIGR. AND CUSTOMS ENF'T, <https://www.ice.gov/pep> (last visited Dec. 4, 2021) (breaking down the new procedural obstacles that LEA now had to follow under PEP).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* ("Detainer form **requires** that [the arresting local Law Enforcement Agency] provide a copy to the individual subject to the detainer **in order for the request to be effective.**") (emphasis in original).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

The PEP led to some increase in the number of individuals released despite being eligible for removal.<sup>95</sup> It has been reported that “[t]wo-thirds of those releases were legally required rather than the result of ICE’s use of discretion.”<sup>96</sup> The Washington Post also reported this effect, citing DHS officials.<sup>97</sup>

One argument in favor of the relaxed enforcement, however, that was not terribly persuasive is that immigrants commit fewer crimes than citizens.<sup>98</sup> First, this claim is difficult to substantiate because immigrant crime studies fail to distinguish immigration status.<sup>99</sup> Only one state records the immigration status of those convicted or in their local prisons, and the State Criminal Alien Assistance Program, a means to collect federal data on immigrants in state and local prisons, cannot accurately report on incarceration numbers because it is incomparable to any other measure of data.<sup>100</sup>

Moreover, this is not the relevant metric. Such a comparison would only matter if we were analyzing which group to allow into the country. But, of course, that is not the debate, as there is no claim that immigrants would somehow displace legal residents in

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<sup>95</sup> Alex Nowrasteh, *Declining Deportations and Increasing Criminal Alien Releases—The Lawless Immigration Policies of the Obama Administration*, CATO INSTITUTE, (May 19, 2016), <https://www.cato.org/publications/testimony/declining-deportations-increasing-criminal-alien-releases-lawless-immigration> (last visited Dec. 4, 2021).

<sup>96</sup> *Id.*

<sup>97</sup> Jason Markon, *Obama Administration Scales Back Deportations in Policy Shift*, THE WASHINGTON POST (July 2, 2015) [https://www.washingtonpost.com/politics/dhs-scales-back-deportations-aims-to-integrate-illegal-immigrants-into-society/2015/07/02/890960d2-1b56-11e5-93b7-5eddc056ad8a\\_story.html?utm\\_term=.45aaa03bb59e](https://www.washingtonpost.com/politics/dhs-scales-back-deportations-aims-to-integrate-illegal-immigrants-into-society/2015/07/02/890960d2-1b56-11e5-93b7-5eddc056ad8a_story.html?utm_term=.45aaa03bb59e) (last visited Dec. 4, 2021).

<sup>98</sup> Alex Nowrasteh, *Illegal Immigrants and Crime—Assessing the Evidence*, THE CATO INSTITUTE (Mar. 4, 2019), <https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence?queryID=286cdf689fbbce058f3a3bb25fd99cd> (last visited Dec. 4, 2021).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

the overall level of crime in the United States. Even if immigrants helped reduce the overall crime *rate*, they would undoubtedly increase the absolute quantity of crime, given the increase in population.

#### D. ASYLUM CLAIMS

The question of whether releasing entire family units into the country pending the outcome of asylum claims requires a look at the likelihood of success of those petitions, because a low likelihood increases the chances that unqualified individuals will remain in country after crossing the border. Looking specifically at those who were apprehended after unauthorized entry and made an asylum claim based on credible fear (i.e., fear of persecution or torture should they be returned to their home country), twelve percent of such individuals were granted asylum in the fiscal year 2019.<sup>101</sup> This is very close to the long-running average; from the fiscal year 2008 to the fiscal year 2019, 14% of such claims were granted.<sup>102</sup> For that same period, 55% of credible-fear claimants were either immediately found to have no credible fear or failed to apply for asylum after making a credible-fear claim.<sup>103</sup> Out of those with a credible-fear claim who actually apply for asylum, more than two thirds are denied.<sup>104</sup> Furthermore, statistics from U.S. immigration courts indicate that over half of U.S. immigration judges have an asylum denial rate of 70% or higher, and one-in five have an asylum

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<sup>101</sup> DEPARTMENT OF JUSTICE, *Credible Fear and Asylum, FY 19 Q4*, (2019).

<sup>102</sup> EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, *CREDIBLE FEAR AND ASYLUM PROCESS: FISCAL YEAR (FY) 2008 – FY 2019*, (2019).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (This document looks at a representative group of one hundred credible fear claimants to better demonstrate the relevant percentages. Out of those one hundred original claimants, thirty-one had a credible fear claim and applied for asylum but were denied. Dividing that number by the total number of claimants with a credible fear claim who then applied for asylum, forty-five, and accounting for significant figures, shows that sixty-nine percent of asylum claims made by applicants with a valid credible fear claim are denied).

denial rate of over 80%.<sup>105</sup> This is despite the fact that the total number of asylum claims began to climb precipitously in 2015.<sup>106</sup> The annual number of total claims stayed around 40,000 from 2008 to 2014, but reached 63,744 in 2015 and went all the way up to 213,320 in 2019.<sup>107</sup> Asylum denial rates have gone up in similar proportion since 2015.<sup>108</sup>

Of course, only half of the equation is the likelihood of success on asylum claims. The other half is the probability that the asylum seekers show up for their post-entry hearings. To the extent that they do not, these individuals both violate the law and skirt the immigration and asylum processes. Almost half of those with pending asylum cases do not appear for trial, choosing instead to stay in the country illegally.<sup>109</sup>

### III. THE COSTS OF IMMIGRATION

An honest analysis of immigration must account for costs as well as benefits. Such a complicated issue clearly cannot be all good or all bad, as some on each side of the debate seem to suggest. The costs can be broadly divided into economic costs and social costs.

#### A. ECONOMIC COSTS

Much debate has been made about whether immigration provides a net positive or net negative effect on national wealth. Of

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<sup>105</sup> *Asylum Success Varies Widely Among Immigration Judges*, TRAC IMMIGRATION (Dec. 9, 2021), <https://trac.syr.edu/immigration/reports/670/#:~:text=Based%20on%20TRAC's%20updated%20data,of%20less%20than%2010%20percent> (last visited Mar. 13, 2022).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Salvador Rizzo, *How Many Migrants Show Up for Immigration Court Hearings?* THE WASHINGTON POST, (June 26, 2019), <https://www.washingtonpost.com/politics/2019/06/26/how-many-migrants-show-up-immigration-court-hearings/> (last visited Dec. 4, 2021).

course, the United States has often pursued policies that have significant economic costs. So, to be clear, a net negative cost is not dispositive on any immigration policy. However, the facts need to be understood in order to fairly evaluate this important metric.

### 1. *Tax Contributions*

Immigrants clearly provide economic value and tax revenue to the communities in which they live.<sup>110</sup> While this is true, such claims suggest that immigrants generate substantial tax revenue, which is likely untrue.<sup>111</sup> Because these immigrants typically only make modest incomes, estimates generally conclude that these immigrants have a relatively small financial impact on overall tax revenues.<sup>112</sup> Also, one must take into consideration those who work off-the-books and thereby evade paying taxes all together.<sup>113</sup>

The immigrant working class typically secures low-skilled jobs, often jobs that are hard to fill with the available domestic

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<sup>110</sup> Steinbuch, *3 Common Arguments for Overlooking Illegal Immigration*, *supra* note 3.

<sup>111</sup> *See id.* *See* Matthew O'Brien, Spencer Raley, & Jack Marin, *The Fiscal Burden of Illegal Immigration on United States Taxpayers*, FEDERATION FOR AMERICAN IMMIGRATION REFORM 1-2 (2017), <https://www.fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf> (last visited Dec. 4, 2021). (pointing out common flaws in the various reports that show illegal immigrants actually contribute taxes to their communities. These flaws include, but are not limited to, the fact that these studies oftentimes narrowly define what an undocumented immigrant is, these studies fail to examine what the tax revenue would be if an American employee held the same job, and these studies fail to analyze tax refunds.)

<sup>112</sup> *See* Cong. Budget Office, *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments* 1, 3 (CONG. BUDGET OFFICE, 2007) <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-6-immigration.pdf> (last visited Dec. 4, 2021).

<sup>113</sup> *See* Jon Feere, *The Myth of the "Otherwise Law-Abiding" Illegal Alien*, CENTER FOR IMMIGRATION STUDIES, 11 (Oct. 7, 2013) <https://cis.org/Report/Myth-Otherwise-LawAbiding-Illegal-Alien> ("Approximately seven to eight million illegal aliens are holding jobs, and approximately 45 to 50 percent of them are estimated to be working off the books.").

workforce.<sup>114</sup> These occupations pay low wages, and some of these workers and their children receive government assistance.<sup>115</sup> Like United States citizens who make only modest incomes, many

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<sup>114</sup> See Steven A. Camarota, *Enforcing Immigration Law is Cost Effective*, CENTER FOR IMMIGRATION STUDIES (Oct. 28, 2018), <https://cis.org/Camarota/Enforcing-Immigration-Law-Cost-Effective>; see Steven A. Camarota, *Deportation vs. The Cost of Letting Illegal Immigrants Stay*, CENTER FOR IMMIGRATION STUDIES (Aug. 3, 2017), <https://cis.org/Report/Deportation-vs-Cost-Letting-Illegal-Immigrants-Stay>; See O'Brien, Raley, & Marin, *supra* note 111, at 27, 57 (explaining how only very few illegal aliens are able to secure high skilled work) (reporting that there were approximately 12.5 million illegal aliens in the US and approximately 4.2 million citizen children of illegal aliens who were born in the United States).

<sup>115</sup> See Camarota, *Deportation vs. The Cost*, *supra* note 103 (citing Jason Richwine & Robert Rector, *The Fiscal Cost of Unlawful Immigrants and Amnesty to the US Taxpayer*, THE HERITAGE FOUNDATION (May 6, 2013), <https://www.heritage.org/immigration/report/the-fiscal-cost-unlawful-immigrants-and-amnesty-the-us-taxpayer> (last visited Dec. 4, 2021)); See Steven A. Camarota, *Immigrants in the United States*, CENTER FOR IMMIGRATION STUDIES (Aug. 2012) <https://cis.org/sites/cis.org/files/articles/2012/immigrants-in-the-united-states-2012.pdf>; See Jeffery S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISPANIC CENTER (Apr. 14, 2009), <https://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/> (last visited Dec. 4, 2021) (reporting an estimate of 49% of illegal aliens have not completed high school, 28% only have a high school education, 11% have some college, and 3% have a college degree and reporting on the fiscal drain of illegal immigrants, excluding their children, based on education level); see O'Brien, Raley, & Marin, *supra* note 111, at 27, 57 (citing Richwine & Rector, *supra*; Passel & Cohn, *supra*; Steven A. Camarota, *Welfare Use by Legal and Illegal Immigrant Households*, CENTER FOR IMMIGRATION STUDIES (Sept. 2015), <http://cis.org/Welfare-Use-Legal-Illegal-Immigrant-Households> (last visited Dec. 4, 2021) (reporting the average illegal alien household makes \$36,000 and explaining how illegal aliens only bring in modest wages from low skilled work and how adding in children increases the fiscal burden). See also Jason Richwine, *The Cost of Welfare Use by Immigrant and Native Households*, CENTER FOR IMMIGRATION STUDIES (May. 9, 2016) <https://cis.org/Report/Cost-Welfare-Use-Immigrant-and-Native-Households> (last visited Dec. 4, 2021).

immigrants do not pay federal income taxes; moreover, those using valid identification may qualify for tax refunds through programs such as the Additional Child Tax Credit or an Earned Income Tax Credit.<sup>116</sup> By one estimate, the government pays immigrants, as a group, more money back in federal income tax refunds than they pay in.<sup>117</sup> State income taxes are subject to the same variables as federal income tax. It is noteworthy that, unlike with federal taxes, the immigrant work force likely pays more in state income tax than it receives back in state tax refunds,<sup>118</sup> however this net contribution in state income tax likely does not exceed the deficit created in federal income taxes.<sup>119</sup>

Income taxes, of course, are not the only taxes to which immigrant workers are subject.<sup>120</sup> Working on-the-books will

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<sup>116</sup> See O'Brien, Raley, & Marin, *supra* note 111, at 27-31 (stating that an Additional Child Tax Credit (ACTC) is a "lump sum paid by the U.S. Treasury to low income workers with children."). See *id.* at 29. (stating that illegal aliens not using a fraudulent Social Security number are able to file for these credits with an Individual Tax Identification Number (ITIN), a tax processing number given out to foreign nationals regardless of their immigration status.) See *id.* ("The Earned Income Tax Credit (EITC) is refundable tax credit available to low- and moderate- income individuals who are employed." See *id.* (stating that the average income of an illegal immigrant household coupled with children would likely meet the requirements of an EITC.) See *id.* at 30. (arguing that illegal aliens are supposed to be blocked from receiving these credits.) See *id.* (stating that doesn't seem to be stopping illegal aliens because they are either using fraudulent SSN or the IRS erroneously issued ITIN holders an EITC.) See *id.* (citing *Without Expanded Error Correction Authority, Billions of Dollars in Identified Potentially Erroneous Earned Income Credit Claims Will Continue to Go Unaddressed Each Year*, U.S. TREASURY INSPECTOR GENERAL REPORT NO. 2016-40-036, (2016)).

<sup>117</sup> See O'Brien, Raley, & Marin, *supra* note 111, at 31 (reporting an illegal alien federal income tax deficit of \$3,541,600,000).

<sup>118</sup> See *id.* at 52.

<sup>119</sup> See *id.* at 31, 52. (stating that FAIR reports a \$3,541,600,000 federal tax deficit and a \$1,050,000,000 net state tax revenue. Notably, the latter number excludes EITCs.).

<sup>120</sup> See *id.* at 31-33, 52-54.

subject workers to Social Security and Medicare taxes.<sup>121</sup> Further, whether working on-the-books or off, all immigrant workers are subject to various federal excise taxes, as well as state property, sales, and gas taxes.<sup>122</sup> Factoring in these various other taxes that immigrant workers pay increases their tax contribution to society.<sup>123</sup> However, then considering the amount of government assistance and use of public facilities (such as roads for which gas taxes are generally collected) immigrant workers as a group benefit from suggests that their tax contribution is likely surpassed by expenditures to create a deficit.<sup>124</sup> Specifically, the largest state and local expenditure on services provide to immigrants is education, more than twice what is spent on the next highest: Medicaid

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<sup>121</sup> *See id.* at 31 (stating that FAIR estimates that illegal aliens, matched by their employers, contribute \$18,490,000,000 through Social Security and Medicare Taxes).

<sup>122</sup> *See id.* at 32 (stating that the excise taxes include taxes on fuel, tobacco, alcohol and airline tickets). *See id.* at 52–53 (stating that the excise taxes estimated for illegal aliens totaled \$401,140,000. FAIR estimates that illegal aliens pay \$918,000,000 in property taxes, \$598,600,000 in fuel taxes and \$1 billion dollars in sales tax).

<sup>123</sup> *See generally id.* at 55. *See also*, Camarota, *Deportation vs. The Cost*, *supra* note 103 (citing THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION 289, Francine D. Blau and Christopher Mackie, eds., 2016) (reporting an estimated lifetime net fiscal drain of illegal immigrants, excluding their children, at \$65.3 billion per million illegal immigrants. A subsequent study by the CIS adjusted the previous report to allow for inflation in 2018.) *See also* Camarota *Enforcing Immigration Law*, *supra* note 114 (reporting a \$69.6 billion net fiscal drain per every million illegal immigrants).

<sup>124</sup> *See* O'Brien, Raley, & Marin, *supra* note 111, at 57. *See also* Camarota, *Deportation vs. The Cost*, *supra* note 114 (reporting on the difference between taxes paid by illegal immigrants and the services they enjoy); *See also* Camarota, *Enforcing Immigration Law*, *supra* note 103 (offering updated figures on the difference between the taxes immigrants pay and the services they enjoy). *See generally* Richwine, *The Cost of Welfare*, *supra* note 106 (reporting on the volume of welfare that immigrants consume).

benefits.<sup>125</sup> In addition, per capita the cost of policing and judicial proceedings contributes to the balance sheet.<sup>126</sup>

## 2. *Education Costs*

Education rings up a hefty bill both in federal and state budgets.<sup>127</sup> It is the largest expenditure in state and local spending.<sup>128</sup> It is also the largest category of cost related to immigration at the state and local level.<sup>129</sup> Since *Plyler v. Doe*, legal precedent has mandated that public schools accept immigrant students.<sup>130</sup> As of 2007, an estimated five million of the 53.3 million school-age children in the United States were either unauthorized immigrants or the children of unauthorized immigrants.<sup>131</sup>

Localities throughout the country have felt the impact on their education systems. In 2014, several counties in northern Virginia received resettled unaccompanied minors, including 1,131 children in Fairfax County, 417 in Prince William County, and 227 in

<sup>125</sup> See Cong. Budget Office, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 3, 11 (CONG. BUDGET OFFICE, 2007) <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-6-immigration.pdf>.

<sup>126</sup> See *id.* at 14–18 (stating that judicial costs include federal incarceration, The Office of Enforcement and Removal Operations, Customs and Border Patrol (CBP), other ICE agencies and operations, State Criminal Alien Assistance Program, Executive Office for Immigration Review, costs associated with unaccompanied minor children’s care, and Byrne Grants.) See *id.* at 44 (stating that states bordering migrant countries allocate some of their security budgets to border security). See also *supra*, Part I.

<sup>127</sup> See O’Brien, Raley, & Marin, *supra* note 111, at 8–24, 37–48.

<sup>128</sup> See Cong. Budget Office, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS, 7 (CONG. BUDGET OFFICE, 2007) <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-6-immigration.pdf> (last visited Dec. 4, 2021).

<sup>129</sup> See O’Brien, Raley, & Marin, *supra* note 111, at 37–39.

<sup>130</sup> O’Brien, Raley, & Marin, *supra* note 111, at 37; *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>131</sup> CONG. BUDGET OFF., *supra* note 112, at 7–8.

Loudon County.<sup>132</sup> Concerned about the additional cost of educating the influx of new students and the burden on local tax payers, several county officials and school board members joined in asking the federal government to reimburse the cost.<sup>133</sup> While exact numbers on the cost of education were not available, one county supervisor estimated that Fairfax County would spend over \$14 million to educate the new unaccompanied minors over the course of a full school year.<sup>134</sup>

In secondary education, immigrants cannot receive government-funded financial aid for college; however, several states have passed laws that help ease that burden and make college education possible.<sup>135</sup> For example, seven states have begun offering scholarships to immigrants.<sup>136</sup> Eighteen states allow undocumented students to get in-state tuition.<sup>137</sup>

### 3. Medicaid and Other Welfare Costs

While immigrants generally are not formally eligible for most federal or state healthcare, they nonetheless often receive medical care and their children often do qualify for government-assisted healthcare.<sup>138</sup> For example, immigrants can receive government-

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<sup>132</sup> Julie Zauzmer & Moriah Balingit, *Counties Look at Cost of Educating Unaccompanied Minors Who Crossed Border*, THE WASHINGTON POST Post (Oct. 9, 2014), [https://www.washingtonpost.com/local/education/counties-look-at-cost-of-educating-unaccompanied-minors-who-crossed-border/2014/10/09/1f883fdc-4e6c-11e4-8c24-487e92bc997b\\_story.html](https://www.washingtonpost.com/local/education/counties-look-at-cost-of-educating-unaccompanied-minors-who-crossed-border/2014/10/09/1f883fdc-4e6c-11e4-8c24-487e92bc997b_story.html) (last visited Dec. 4, 2021); Caitlin Gibson, *Loudoun to Gather Information on Undocumented Child Immigrants*, THE WASHINGTON POST (Oct. 3, 2014), [https://www.washingtonpost.com/local/loudoun-to-gather-information-on-undocumented-child-immigrants/2014/10/03/599dbd56-4989-11e4-891d-713f052086a0\\_story.html](https://www.washingtonpost.com/local/loudoun-to-gather-information-on-undocumented-child-immigrants/2014/10/03/599dbd56-4989-11e4-891d-713f052086a0_story.html) (last visited Dec. 4, 2021).

<sup>133</sup> Zauzmer & Balingit, *supra* note 132.

<sup>134</sup> *Id.*

<sup>135</sup> O'Brien, Raley, & Marin, *supra* note 111 at 38.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 10–13, 40–41.

funded healthcare through uncompensated hospital expenditures, Medicaid-financed births, and improper Medicaid payments.<sup>139</sup>

As with healthcare, immigrants are not eligible for certain welfare programs such as Supplemental Nutrition Assistance Program (SNAP), although again their U.S.-citizen children can be eligible.<sup>140</sup> However, when U.S.-born children of immigrants receive government assistance it is reasonable to consider these payments as a related cost of immigration since there would have been no expenditure of U.S. funds if not for the parent's immigration.<sup>141</sup>

Immigrants are directly eligible for some benefits such as Women Infants and Children (WIC).<sup>142</sup> Among the benefits that U.S.-born citizens can receive while living with their illegal-immigrant parents are SNAP, Temporary Assistance for Needy Families (TANF), and Supplemental Security Income (SSI).<sup>143</sup> Likewise, immigrants do not qualify for federal public housing; their presence in a household does not bar receipt of such benefits, but rather causes the government to distribute them in a prorated fashion.<sup>144</sup> However, at least one state, Massachusetts, does allow immigrants access to state and local housing assistance.<sup>145</sup> The

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<sup>139</sup> *Id.* at 10-12. Uncompensated medical care is when an uninsured individual receives medical care that they do not pay for, *see id.* at 10. Medicaid births are . . . what their name suggests: a birth funded by Medicaid, *see id.* at 11. Improper Medicaid payments include improper payouts to illegal immigrants or Medicaid fraud, *see id.* at 12.

<sup>140</sup> *Id.* at 21.

<sup>141</sup> *See id.* at 20.

<sup>142</sup> *Id.* at 21.

<sup>143</sup> *Id.* at 21-23. SNAP is best known as food stamps. *Id.* at 21. TANF temporarily provides "cash assistance to supplement their earned income;" illegal aliens can receive TANF funds if the child that they are supporting is a U.S. citizen. *Id.* at 22-23. SSI provides support to U.S. citizens with mental or physical disabilities. *Id.* at 23.

<sup>144</sup> *Id.* at 23 (citing MAGGIE McCARTY & ALISON SISKIN, CONG. RSCH. SERV., RL31753, IMMIGRATION: NON-CITIZEN ELIGIBILITY FOR NEEDS-BASED HOUSING PROGRAMS (2008)).

<sup>145</sup> *Eligibility*, MASSLEGALHELP, <https://www.masslegalhelp.org/housing/eligibility> (last visited Dec. 4, 2021).

exact amount of housing assistance that is actually spent as a result of immigration is difficult to calculate, however, due to a lack of hard data on the phenomenon.<sup>146</sup>

## B. SOCIAL COSTS

Another important consideration are the social costs associated with the violations of law that accompany immigration under the current immigration system.<sup>147</sup> Having a system wherein (a) large numbers of immigrants have no choice but to violate law and (b) large expenses are incurred in the criminal justice system because of those violations is not tenable long term. It is important to account for and reduce these social costs.

### I. Driver Licenses

There are a number of federal and state statutes that immigrants confront.<sup>148</sup> One concern that state governments have tried to

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<sup>146</sup> See O'Brien, Raley, & Marin, *supra* note 111, at 23-24.

<sup>147</sup> See Steinbuch, *supra* note 3; see also Feere, *supra* note 113.

<sup>148</sup> Feere, *supra* note 113, at 4-7 (quoting 8 U.S.C. § 1325):

“An alien violates 8 U.S.C. § 1325 if he or she: (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.”

See *id.* at 4 (quoting 8 U.S.C. § 1325(a)) (“An alien is deportable under 8 U.S.C. § 1227(a)(1)(B) and (C)(i) if the alien’s visa status has changed, or the alien has failed to maintain ‘nonimmigrant’ status”). See also Feere, *supra* note 113, at 5-6 (quoting 8 U.S.C. § 1253):

“An alien violates 8 U.S.C. § 1253 when he or she:

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

address is driver safety among immigrant populations, specifically with driver license regulations. Immigrants, particularly undocumented immigrants, will often inevitably violate documentation laws, such as driving without a valid driver's license.<sup>149</sup> In response to this problem, fifteen states and D.C. have enacted "Green Light" laws, which require county clerks to issue driver licenses to certain immigrants under specific circumstances.<sup>150</sup> Advocates have suggested that these laws promote road safety;<sup>151</sup> since immigrants are driving anyway, the

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(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order."

*See also* Feere, *supra* note 113, at 6.

<sup>149</sup> *Id.* at 7. Other additional offenses include 8 U.S.C. § 1302: all aliens, including illegal aliens, have to register their presence in the U.S. within thirty days. *Id.* at 4. Aliens are also likely to be driving without insurance or driving without valid vehicle registration. *Id.* at 7.

<sup>150</sup> *States Offering Driver's Licenses to Immigrants*, NATIONAL CONFERENCE OF STATE LEGISLATURES, (Feb. 6, 2020) <https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx> (last visited Dec. 4, 2021) ("These states—California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Utah, Vermont and Washington—issue a license if an applicant provides certain documentation, such as a foreign birth certificate, foreign passport, or consular card and evidence of current residency in the state.").

<sup>151</sup> *See e.g.* Chaiyaporn Baokaew, *Licenses For Undocumented Immigrants Would Make Roads Safer*, *Lawmakers Say*, WGBH NEWS, (Jan. 23, 2019), <https://www.wgbh.org/news/local-news/2019/01/23/licenses-for-undocumented-immigrants-would-make-roads-safer-lawmakers-say> (last visited Dec. 4, 2021); *see also* Mary Duan, *Should States Give Driver's Licenses to Unauthorized Residents?*, *INSIGHTS BY STANFORD BUSINESS*,

licensing process will ensure they know how to operate their vehicles safely.<sup>152</sup> While the policy may produce some positive results, the claims have suggested positive benefits that are greater than those likely to occur.

First, the idea that driver licenses are safety devices rather than a government revenue-driving tool is at least somewhat dubious.<sup>153</sup> More importantly, the belief that immigrants, or anyone for that matter, will drive regardless of legal access to licenses would also imply that those failing the exam will simply drive without licenses as well. Thus, the premise that underlies Green Light laws—that licensing does not affect willingness to drive—is problematic because it leads to the conclusion that immigrants will drive regardless of whether or not they obtain driver licenses.<sup>154</sup> If true, the availability of driver licenses to immigrants will have no effect on their willingness to drive and thus no effect on safety.<sup>155</sup>

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(Apr. 3, 2017), <https://www.gsb.stanford.edu/insights/should-states-give-drivers-licenses-unauthorized-residents> (last visited Dec. 4, 2021); see also Chris Burrell, *Licensed Undocumented Immigrants May Lead To Safer Roads, Connecticut Finds*, NPR, (7:04 A.M. ET, May 24, 2019), <https://www.npr.org/2019/05/24/719959760/licensed-undocumented-immigrants-may-lead-to-safer-roads-connecticut-finds> (last visited Dec. 4 2021).

<sup>152</sup> Baokaew, *supra* note 151.

<sup>153</sup> *Contra id.* (Stating that driver's licenses ensure motorists have the necessary eyesight and skills to drive).

<sup>154</sup> Duan, *supra* note 151. (showing that once California granted licenses to illegal aliens, the overall number of accidents in the state did not change despite there being 600,000 more licensed drivers from when the law became effective in 2015 to the time of the study).

<sup>155</sup> *But see id.* (While this study found that California's law granting licenses to illegal immigrants did not have an impact on the overall number of accidents, it did show a ten percent reduction in hit and run incidents. The researchers attributed this to a licensed illegal immigrant's decreased propensity to flee the scene of an accident before police arrive).

In reality, at least some of those without licenses will not drive.<sup>156</sup> The idea that legal prohibitions do not at least partially affect behavior is belied by an economic analysis of law.<sup>157</sup> If licensure didn't affect outcomes, then we would not limit licenses to those who are of-age or suspend licenses of drunk drivers.<sup>158</sup> Indeed, to assert the alternative—that immigrants will drive regardless of whether they have licenses—suggests an insidious bias against, or a benign contempt for, those would-be beneficiaries who allegedly are willing, *en masse*, to violate laws beyond those relating to immigration status.<sup>159</sup>

As for hard statistical support either for or against increased safety from Green Light licenses, there does not seem to be any comprehensive survey on the topic, though there are some simple trend lines.<sup>160</sup> For example, four years after Connecticut enacted its Green Light legislation, supporters pointed to a decrease in the number of hit and runs statewide as evidence that the measures were increasing safety.<sup>161</sup> A particular article in NPR focused on the four

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<sup>156</sup> See Katie Rooney, *Revoking Licenses Deters Drunk Driving*, TIME, (July 25, 2007), <http://content.time.com/time/health/article/0,8599,1646906,00.html> (last visited Dec. 4, 2021).

<sup>157</sup> Jacob Bogage, *Yes, Stricter Driving Laws Really Do Make Us Safer*, THE WASHINGTON POST, (July 14, 2016, 6:00 a.m.), <https://www.washingtonpost.com/news/wonk/wp/2016/07/14/yes-stricter-driving-laws-really-do-make-us-safer/> (last visited Dec. 4, 2021). (discussing how driving laws with strict penalties demonstrably reduce whatever the targeted activity is of particular interest is the effect of restricting access to driver's licenses for teens. There we see that restricting a particular demographics' access to driver's licenses reduces their use of a vehicle overall.)

<sup>158</sup> See *id.*; see Rooney, *supra* note 156.

<sup>159</sup> President George W. Bush, Speech to NAACP's 91st Annual Convention (July 10, 2000) (speaking about the dangers of "the soft bigotry of low expectations" in the context of academic achievement. Proponents of Green Light laws demonstrate a similar "soft bigotry," implying that unlawful immigrants are the type of people who will always ignore laws prohibiting unlicensed driving).

<sup>160</sup> Burrel, *supra* note 151.

<sup>161</sup> *Id.*

cities that issued the most Green Light licenses in that time frame: Bridgeport, Norwalk, Danbury, and Stamford.<sup>162</sup> Of those four, Bridgeport and Stamford both saw a decrease in the number of hit and runs from 2016 to 2018, while Norwalk and Danbury saw an increase.<sup>163</sup> Supporters of the law touted this, alongside a nine percent statewide drop in hit and runs, as evidence of the law's effectiveness.<sup>164</sup> Indeed, it was positive news; however, it was for this data only.

However, when we expand the data set from 2016-2018 to 2016-2020 (to exclude any changes caused by reduced travel from COVID-19 shutdowns),<sup>165</sup> Bridgeport, Danbury, and Stamford show a slight downward trend in the number of hit-and-runs while Norwalk has a slight upward trend.<sup>166</sup> Furthermore, this data leaves out 2015 statistics, even though Connecticut's Green Light-style regulations were enacted on January 2, 2015. If the data set begins in 2015, we see that Bridgeport and Norwalk show an upward trend while Stamford and Danbury show a downward trend.<sup>167</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (“[Connecticut Transportation Safety Research Center Crash Data Liaison Charles] Grasso said undocumented immigrant drivers are confident they won't be charged with unlicensed driving and are less likely to flee a crash.”).

<sup>165</sup> *COVID-19: Governor Lamont's Executive Orders for the State of Connecticut*, SHIPMAN & GOODWIN, <https://www.shipmangoodwin.com/covid-19-governor-lamonts-executive-orders-for-the-state-of-connecticut.html> (last visited Dec. 4, 2021).

<sup>166</sup> *See infra* Figure 1.

<sup>167</sup> *See infra* Figure 2.

Figure 1

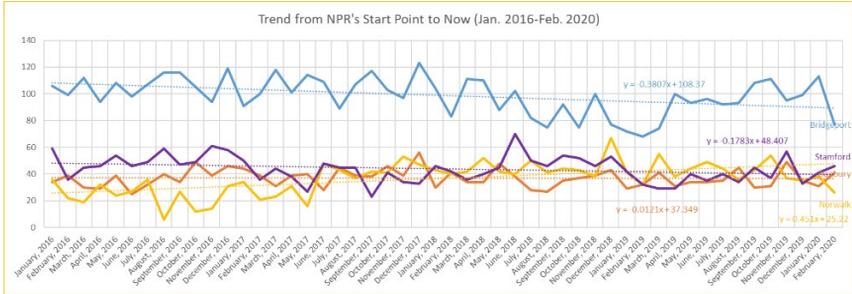
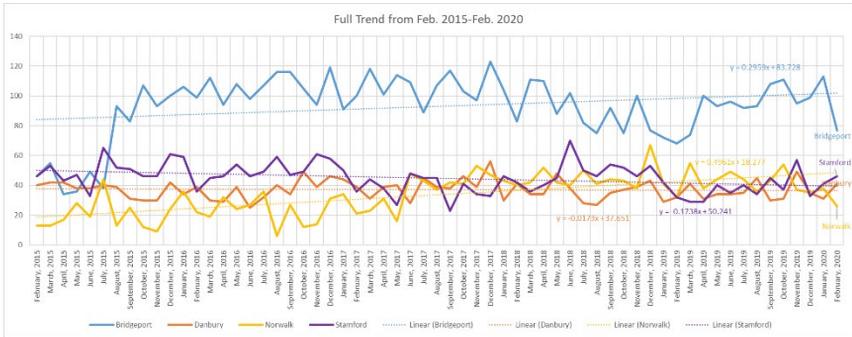


Figure 2



Neither of these data sets conclusively determine the effect of Green Light laws on safety as measured by the number of hit-and-runs. Answering that question would require crafting a comprehensive statistical model that considers all other factors that could affect the number of hit-and-runs. This would be beyond the scope of this article. However, it would be a compelling case for further study, especially since Connecticut crash data is so easily accessible to the general public.<sup>168</sup> Without further research into drivers-safety statistics and the measurable effects of driving safety

<sup>168</sup> See CONNECTICUT CRASH DATA REPOSITORY, <https://www.ctrash.uconn.edu/> (last visited Dec. 4, 2021).

regulations, we do not know if these laws provide the social benefit the advocates of these laws claim they do.

## 2. *Employment-Related Law*

The 1986 Immigration Reform and Control Act (IRCA) made it illegal for employers to hire undocumented immigrants.<sup>169</sup> Under the IRCA, employers are subject to penalties for hiring undocumented immigrants, and enough routine violations can land an employer in prison.<sup>170</sup> There is, however, a legal defense if the employer made a good faith effort to comply with the law, meaning that the employer truly did not know that the immigrant's legal status.<sup>171</sup> To work in the United States, one must have a Social Security number.<sup>172</sup> Accordingly, the employer's good faith effort requires that the employer examine various forms of identification that purport to confirm the immigration status that the immigrant is claiming.<sup>173</sup> If an employer is blameless, then the immigrant must have lied about citizenship or immigration status and presented the employer with falsified documents, including a Social Security number.<sup>174</sup> This happens often: the Office of the Chief Actuary

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<sup>169</sup> Feere, *supra* note 113, at 7; Immigration Reform and Control Act of 1986, Pub.L. 99-603, Nov. 6, 1986.

<sup>170</sup> *Id.* at 7-8; *See also* 8 U.S.C. § 1324a.

<sup>171</sup> 8 U.S.C. § 1324a(a)(3).

<sup>172</sup> SOC. SEC. ADMIN., PUB. NO. 05-10107, *Foreign Workers and Social Security Numbers* (2017), <https://www.ssa.gov/pubs/EN-05-10107.pdf> (last visited Dec. 4, 2021); SOC. SEC. ADMIN., PUB. NO. 05-10096, *Social Security Numbers for Noncitizens* (2018), <https://www.ssa.gov/pubs/EN-05-10096.pdf> (last visited Dec. 4, 2021).

<sup>173</sup> 8 U.S.C. § 1324a(b). An employer must verify an employee's authorization status with either (1) a US passport, resident alien card, alien registration card, or other document issued by the Attorney General or (2) a combination a SSN or authorized employment document and a driver's license or similar document. *Id.* Option (1) still requires the alien get a SSN. SOC. SEC. ADMIN., *supra* note 172. "While you wait for your Social Security number, your employer can use a letter from us stating you applied for a number, and your immigration documents can prove your authorization to work in the United States." *Id.*

<sup>174</sup> SOC. SEC. ADMIN., *supra* note 172.

estimated that in 2010, approximately 700,000 unauthorized immigrants had Social Security numbers obtained using fraudulent birth certificates, and an additional 1.8 million were working under Social Security numbers that did not match their names.<sup>175</sup> Even if an immigrant did not claim citizenship but rather claimed that he or she was legally permitted to work in the United States, a Social Security number is still required, and a failure to produce a Social Security number should put the employer on alert.<sup>176</sup> As a result, if an undocumented immigrant is working in the United States, unless the employer is also breaking the law, the immigrant must be working under a fake or stolen Social Security number.<sup>177</sup>

Further, a working undocumented immigrant has no option but to prevaricate when filling out the required I-9 form that mandates the employee verify which legal citizenship or immigrant status defines the employee.<sup>178</sup> An undocumented immigrant has no truthful choice on the form, meaning that when the undocumented immigrant fills the form out, he or she has made a false statement or fraudulent act on a government form.<sup>179</sup> An immigrant who gives a false Social Security number subjects himself or herself to 42 U.S.C. § 408, penalties for committing Social Security fraud, and

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<sup>175</sup> Stephen Goss et al., Soc. Sec. Admin., Office of the Chief Actuary, *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds* (Apr. 2013), available at [https://www.ssa.gov/oact/NOTES/pdf\\_notes/note151.pdf](https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf) (last visited Dec. 4, 2021).

<sup>176</sup> Feere, *supra* note 113, at 1; 8 U.S.C. § 1324a(a)(3).

<sup>177</sup> SOC. SEC. ADMIN., *supra* note 172.

<sup>178</sup> Feere, *supra* note 113, at 8-9. The available options for the alien to choose on the I-9 form are, a citizen of the US, a noncitizen nation of the US, a lawful permanent resident, or an alien authorized to work. *Id.* (citing U.S. Citizenship and Immigration Services, *Employment Eligibility Verification Form I-9*, DEP'T OF HOMELAND SEC., <https://www.uscis.gov/sites/default/files/document/forms/i-9-paper-version.pdf> (last visited Dec. 4, 2021)).

<sup>179</sup> *Id.* (first citing 18 U.S.C § 1001) (then citing U.S. Citizenship and Immigration Services, *Employment Eligibility Verification Form I-9*, DEP'T OF HOMELAND SEC.). The available options for the alien to choose on the I-9 form are, a citizen of the US, a noncitizen nation of the US, a lawful permanent resident, or an alien authorized to work. *Id.*

potentially 18 U.S.C. § 1028A, aggravated identify theft if the forged Social Security number belongs to another individual.<sup>180</sup> Additionally, in presenting immigration documents to either the Social Security Administration or the employer to secure a job, the undocumented immigrant has violated 18 U.S.C. § 1546, fraud and misuse of visas, permits, and other documents, 8 U.S.C. § 1324(c) penalties for document fraud, or both.<sup>181</sup> Depending on the types of falsified documents the undocumented immigrant presents or possesses, they could violate numerous other documentation offenses.<sup>182</sup> If at any time the undocumented immigrant presents himself or herself as a United States citizen, they have committed a felony.<sup>183</sup>

If the employer hires the undocumented immigrant off-the-book, this does not somehow remove the employee from violating work-related offenses. If the undocumented immigrant has been in the United States for 183 days, the government considers the undocumented immigrant a resident alien and is therefore required to pay taxes like a U.S. citizen.<sup>184</sup> If the undocumented immigrant is working off-the-books and therefore not paying taxes, the undocumented immigrant violates 26 U.S.C. § 7203 by willfully failing to file a return, supply information, or pay taxes.<sup>185</sup>

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<sup>180</sup> *Id.*; See also 42 U.S.C. § 408 (describing various ways to improperly and deceptively obtain or possess a social security card); 18 U.S.C. § 1028A.

<sup>181</sup> See Feere, *supra* note 113, at 9-10; see also 18 U.S.C. § 1546; 8 U.S.C. § 1324c.

<sup>182</sup> Feere, *supra* note 113, at 12-13 (describing several additional laws that an alien breaks if the alien expands on his “legal” façade with various other falsities such as falsified citizenship documents).

<sup>183</sup> *Id.* (citing 8 U.S.C. § 911).

<sup>184</sup> *Id.*, at 11 (first citing *Introduction to Residency Under U.S. Tax Law*, I.R.S., <https://www.irs.gov/individuals/international-taxpayers/introduction-to-residency-under-us-tax-law>, then citing *Taxation of U. S. Resident Aliens*, I.R.S., <https://www.irs.gov/individuals/international-taxpayers/taxation-of-resident-aliens>).

<sup>185</sup> *Id.*, at 11-12; 26 U.S.C. § 7203.

Having a system wherein (a) large numbers of immigrants have no choice but to violate the law and (b) large expenses are incurred in the criminal justice system because of the above-described legal issues is not tenable long term. These social costs must be accounted for.

#### IV. CONCLUSION

Understandably, immigration law is often an emotional topic, but unfortunately, debates about it too often quickly lead to hostility, notwithstanding that the United States' immigration policy represents one of the highest moral ideals that the citizens and government of this country can embody. Two of the most intractable questions that we have confronted in the contemporary immigration debate is understanding (1) how and why we wound up where we are regarding family separation and the treatment of unaccompanied minors, and (2) how to measure monetary and social costs of immigration fairly. This article has presented an objective look at these two critical issues with the hope that the analysis will allow for a better evaluation of the complicated immigration questions we collectively face.

