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Regrouping America: Immigration Policies and the Reduction of Prejudice

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REGROUPING AMERICA: IMMIGRATION POLICIES AND THE REDUCTION OF PREJUDICE

Fatma E. Marouf¹

TABLE OF CONTENTS

INTRODUCTION	130
I. CONSTRUCTING FUZZY CATEGORIES BASED ON IMMIGRATION STATUS AND THE POROUS BOUNDARIES BETWEEN THEM	133
II. SOCIAL CATEGORIZATION AND INTERGROUP RELATIONS	138
A. <i>The Relationship Between Social Categorization and Intergroup Bias, and Intergroup Conflict</i>	138
B. <i>Categorization-Based Strategies for Reducing Intergroup Bias</i>	142
III. EXAMINING U.S. IMMIGRATION POLICIES THROUGH THE LENS OF CATEGORIZATION-BASED STRATEGIES FOR REDUCING INTERGROUP BIAS	144
A. <i>Decategorization</i>	144
1. <i>Immigration Policies that Reinforce Collective Anonymity</i>	145
2. <i>From Mass Deportation to Prosecutorial Discretion: Entering a New Era of Individualized Enforcement?</i>	151
B. <i>Recategorization</i>	155
1. <i>The Challenge of Creating an Inclusive “American” Identity</i>	157
2. <i>Past Legalization Programs as Partial Attempts at Recategorization</i>	163
C. <i>Crossed Categorization</i>	168
1. <i>The Limitations of Relying on Victimhood as an Alternative Social Identity</i>	172
2. <i>Moving Past the Victim/Criminal Dichotomy</i>	175
a. <i>Worker-Based Identities</i>	175

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<i>b. Student-Based Identities</i>	178
IV. CONCLUSION	181

INTRODUCTION

Over the past two decades, the increasing diversity of immigrants has fueled fears over the fragmentation of America. Some commentators have taken extreme positions explicitly criticizing the changing racial composition of the United States, such as Peter Brimelow, who contends that immigrants undermine the nation's White "ethnic core."² Others, like Samuel P. Huntington, have avoided the crucible of race by framing arguments in terms of culture, warning that Mexican immigration threatens a cohesive "American" national identity defined by "Anglo Protestant culture."³ While these arguments ring of racism, reflecting an all too familiar angst that aliens are splintering America,⁴ concerns about social cohesion have also been raised by liberal academics, such as political scientist Robert Putnam, author of the bestseller *Bowling Alone*, who argues that "immigration and ethnic diversity challenge social solidarity and inhibit social capital."⁵ Even the general public seems concerned with social cohesion, as nearly half the U.S. population agrees that "the growing number of newcomers from other countries threaten traditional American customs and values."⁶

Anxiety over the social fragmentation of America has become apparent not only through popular books, social science research, and public polls, but also through the Supreme Court's equal protection jurisprudence. The

² PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* 10, 232 (1995) (arguing that "the central challenge for modern, diversifying societies" is the creation "of a new, broader sense of 'we'").

³ SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* 221-56 (2005) (blaming Latinos, especially Mexican-Americans, for the "cultural bifurcation" of the United States); see also ARTHUR M. SCHLESINGER JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1992) (arguing that multiculturalism is tearing apart the nation); PATRICK J. BUCHANAN, *THE DEATH OF THE WEST: HOW DYING POPULATIONS AND IMMIGRANT INVASIONS IMPERIL OUR COUNTRY AND CIVILIZATION* (2002); PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* (2006).

⁴ Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347 (2005) (critiquing Samuel Huntington's book, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY*); Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1951 (1996) (book review) (reviewing Peter Brimelow's book, *Alien Nation*, and arguing that "us[ing] immigration policy to make America more white . . . will splinter America like nothing else").

⁵ ROBERT D. PUTNAM, *BOWLING ALONE* 138, 148, 150-51 (2000).

⁶ Benjamin Richard Knoll, *Understanding the "New Nativism": Causes and Consequences for Immigration Policy Attitudes in the United States* (2010) (unpublished Ph.D. dissertation, University of Iowa), available at <http://ir.uiowa.edu/etd/532> (citing a 2006 study by the Pew Research Center and Pew Hispanic Center). Forty eight percent of respondents agreed with this statement. *Id.* (citing same Pew study). Moreover, 50% of respondents agreed that "our American way of life needs to be protected against foreign influence." *Id.* (citing same Pew study).

Court has long decried classifications that “‘lead to a politics of racial hostility,’”⁷ with swing Justices in particular voicing this concern. For example, Justice O’Connor has cautioned that benign racial classifications contribute to “an escalation of racial hostility and conflict”⁸ and that “[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.”⁹ These statements echo Justice Powell’s concerns in *Bakke* that affirmative action would “exacerbate racial and ethnic antagonisms rather than alleviate them.”¹⁰ Drawing on such opinions, Reva Sigel highlights a novel perspective on equal protection that is “concerned with threats to social cohesion,” which she calls “the antibalkanization perspective.”¹¹

This perspective has also emerged in the context of classifications based on immigration status. In *Plyler v. Doe*, which held that undocumented immigrant children have the right to an elementary public education, the Supreme Court relied heavily on a social cohesion rationale, reasoning that public schools help “maintain[] the fabric of our society,”¹² serving as “an important socializing institution, imparting those shared values through which social order and stability are maintained.”¹³ While concerns over balkanization appear primarily within equal protection cases, Kenji Yoshino shows how the same concern with social cohesion manifests on a much larger scale. He describes a broad shift by the Supreme Court away from traditional equal protection analysis altogether and towards a liberty-dignity analysis as a response to “pluralism anxiety” – anxiety about too many “new” and “newly visible” groups.¹⁴

Since concerns about cohesion based on race and based on immigration tend to go hand in hand, immigration scholars have long noted the need to take them seriously.¹⁵ This Article contributes to an emerging body of scholarship related to the integration of immigrants by examining how current immigration policies deepen or diminish social divides and presenting a framework for analyzing proposed immigration reforms in terms of their impact on social cohesion.¹⁶ Specifically, the Article draws on social psy-

⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

⁸ *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 603 (1990) (O’Connor, J., dissenting) (holding that intermediate scrutiny should be applied to benign racial classifications), *overruled by Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995) (holding that strict scrutiny should be applied to federal laws using benign racial classifications).

⁹ *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

¹⁰ *Regents of University of California v. Bakke*, 438 U.S. 265, 298-99 (1978).

¹¹ Reva B. Sigel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L. J.* 1278, 1278 (2011).

¹² *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

¹³ *Id.* at 222 n.20.

¹⁴ Kenji Yoshino, *The New Equal Protection*, 124 *HARV. L. REV.* 747 (2011).

¹⁵ See, e.g., Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 *CAL. L. REV.* 863, 869 (1993) (arguing that “[d]espite tactical exaggerations by assimilationists, conflict and separatism cannot simply be brushed aside”).

¹⁶ See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006); Lauren Gilbert, *Citizenship, Civic Virtue, and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 *YALE L.*

chological research regarding the relationship between social categorization and intergroup relations to propose a method for analyzing how immigration reforms might impact intergroup bias.

Part II of the Article frames immigration law as a system of social categorization, arguing that categories based on “legal” and “illegal” immigration status are fuzzy and fluid, but enforcement policies such as militarization of the border, criminalization of immigration violations, and expansion of removal operations render the boundary between these categories more salient. This approach contravenes most categorization-based approaches to reducing intergroup bias, which emphasize *decreasing* the salience of categorical boundaries.

Part III explains the relationship between social categorization and intergroup bias, drawing on social psychological research to argue that ingroup favoritism is particularly likely to lead to outgroup hostility in the U.S. immigration context. This Part then sets forth three categorization-based strategies for reducing intergroup bias that involve reducing the salience of category boundaries: (1) decategorization, which proposes eroding or erasing group boundaries so that people perceive each other as individuals rather than as members of any given group; (2) recategorization, which proposes recombining group members as part of a new, more inclusive “superordinate” group and thereby replacing “us” and “them” with a shared sense of “we”; and (3) crossed-categorization, which proposes bringing out multiple group identities in order to undermine the usefulness of simple categorizations.¹⁷

Part IV analyzes how specific immigration policies contravene or support these three categorization-based strategies. Specifically, Part IV(A) argues that immigration policies in recent decades have generally promoted collective anonymity and depersonalization of undocumented immigrants, but recent policy changes encouraging prosecutorial discretion represent a shift towards greater individuation and a first step towards decategorization. Part IV(B) explores the idea of recategorization through the creation of a common “American” identity, focusing on the challenge posed by the persistent association between American identity and Whiteness. This robust association between nationality and race underscores the limitations of legalization programs that alter only legal status as a means of recategorization. Part IV(C) examines how past immigration reforms have supported a narrow form of crossed categorization by creating special categories for “victims” who are treated as distinct from the general category of “illegal aliens.”

& POL'Y REV. 335 (2009); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2071-74 (2008); Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219 (2007); Laura Spitz, *The Evolving Architecture of North American Integration*, 80 U. COLO. L. REV. 735 (2009).

¹⁷ Samuel L. Gaertner, John F. Dovidio, & Melissa A. Houlette, *Social Categorization*, in THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION, 530-38 (John F. Dovidio, Miles Hewstone, Peter Glick, & Victoria M. Esses, eds., 2010); Richard Crisp, *Prejudice and Perceiving Multiple Identities*, in *id.* at 510-21.

This section critiques the limitations inherent in this approach, which endorses a victim/criminal dichotomy, and proposes pursuing crossed categorization by highlighting other types of social identities, including worker-based and student-based identities, as ways to destabilize the concept of “illegal” personhood. The Article contends that immigration reforms that promote the labor rights of undocumented immigrants and their access to education promote crossed categorization and thereby have the potential to reduce intergroup bias.

In sum, applying social categorization theories to the context of U.S. immigration paints a nuanced picture of how the social categories that we create through our immigration laws shape our identity as a nation. While immigration reforms are often discussed in terms of tit for tat compromises between different factions, the present approach provides a more coherent way of analyzing prospective reforms and invites further exploration about how different reforms may work together – simultaneously or sequentially – to improve social cohesion. The social psychological perspective presented in this Article may also help legal scholars and policy makers generate completely new proposals for immigration reforms that improve intergroup relations.

I. CONSTRUCTING FUZZY CATEGORIES BASED ON IMMIGRATION STATUS AND THE POROUS BOUNDARIES BETWEEN THEM

Since the term “illegal” normally refers to specific acts and not to the person who commits them, the concept of “illegal aliens” is inherently elusive.¹⁸ Various scholars have traced how the category of “illegal aliens” began to emerge as a social identity in the 1920s and 1930s through actions such as the more rigid demarcation of the boundary between the U.S. and Mexico, the criminalization of entry into the U.S. at non-designated locations in 1929, and the mass deportation of Mexicans that same year.¹⁹ Mexico also participated in this process by constructing U.S. citizens as “the other” and taking steps to reinforce Mexican national identity in the border region, such as by implementing programs to prevent the encroachment of the English language.²⁰ Legal status and race became intertwined in this process of constructing difference. Mexican immigrants, following in the footsteps of immigrants from China and other parts of Asia, became “racialized in ways that emphasized the group’s foreignness, racial inferiority and

¹⁸ See ROXANNE LYNN DOTY, *ANTI-IMMIGRANTISM IN WESTERN DEMOCRACIES: STATECRAFT, DESIRE AND THE POLITICS OF EXCLUSION* 41 (2003) (noting that using the term “illegal” in this way suggests the exclusion of people from the very realm of rights).

¹⁹ *Id.* at 67-69; JOSEPH NEVINS, *OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” AND THE REMAKING OF THE U.S.-MEXICO BORDER* 12 (2010) (explaining that the U.S. government “helped to create the illegal through the construction of the boundary and the expansion of the federal government’s enforcement capacity”).

²⁰ DOTY, *supra* note 18, at 69.

racial unassimilability.”²¹ As Lina Newton explains, the term “illegals” came to be understood as referring to Mexicans who “crossed the border in violation of the law and with the intent or likelihood of violating further laws.”²² By 1950, the concept of “illegal aliens” had infiltrated the courts, resulting in the first judicial decisions that used the term “illegal” in reference to immigrants.²³

Our current immigration scheme, based on the Immigration and Nationality Act of 1952 (“INA”), maps out multiple tiers of legal status. The most basic classifications include U.S. citizens, permanent residents, and temporary immigrants (technically called “nonimmigrants”). Comprising the negative space of this design are the twelve million individuals without any legal status living in the U.S., whom this article refers to as “undocumented immigrants.” One can view these different statuses as points along a spectrum of social membership, with citizens obviously having the highest level of membership and undocumented immigrants having the lowest. Other forms of immigration status, such as asylum, temporary protected status, and withholding of removal, also fit somewhere along this spectrum, although their locations are harder to pin down. This spectrum represents a sliding scale, as individuals are able to both gain and lose status in a variety of ways.

While it is difficult for undocumented immigrants to gain legal status, especially if they entered the United States without inspection, limited channels for legalization do exist. Those who initially entered the U.S. lawfully and then lost their status (for example, by overstaying a visa) can still adjust their status to permanent residents if they have a spouse, parent, or child who is a U.S. citizen. Some who entered illegally can adjust their status if they qualify under former INA § 245(i), which requires an immigrant visa petition to have been filed for them prior to April 30, 2001. Undocumented immigrants can also acquire legal status through asylum, grants of discretionary relief (such as cancellation of removal) by an immigration judge, or by applying for special visas available to victims of domestic violence, trafficking or certain other types of crimes. As the Supreme Court recognized in *Plyler v. Doe*, “the illegal alien of today may well be the legal alien of tomorrow.”²⁴ At the same time, permanent residents can lose their status in a

²¹ LINA NEWTON, *ILLEGAL, ALIEN OR IMMIGRANT: THE POLITICS OF IMMIGRATION REFORM* 13 (2008).

²² *Id.* at 146.

²³ NEVINS, *supra* note 19, at 119.

²⁴ *Plyler v. Doe*, 457 U.S. 202, 207 (1982). In fact, the *Plyler* Court repeatedly noted the potential transience of undocumented status. *See id.* at 208 n.4 (noting that the plaintiff’s expert testified that “fifty to sixty per cent . . . of current legal alien workers were formerly illegal aliens,” and that a defense witness acknowledged that “undocumented children” sometimes manage to “adjust their status through marriage”); *id.* at 222 n.20 (“the courts below concluded that many [undocumented children] will remain here permanently and that some indeterminate number will eventually become citizens”); *id.* at 226 (“[T]here is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen.”); *id.* at

wide variety of ways, from a relatively minor conviction, such as petty theft, to a trip outside the U.S. that lasts longer than 180 days.

The categories of “legal” and “illegal” immigrant are also fluid because Congress and the courts continuously redefine their boundaries. Congress, for example, constantly changes the criteria for determining when permanent residents should lose their status. Most notably, immigration laws passed in 1996 dramatically increased the grounds of removal, especially by expanding the definition of an “aggravated felony.” Since the expanded grounds of removal applied retroactively, permanent residents suddenly became deportable for past crimes that were not deportable offenses at the time that they were committed. Similarly, decisions by the BIA and the federal courts of appeal interpreting the INA can instantaneously redefine who is subject to removal from the United States. For instance, the federal courts of appeal now routinely interpret whether convictions under specific state statutes constitute removable offenses under the INA, applying complex analytical methods developed by the Supreme Court.²⁵ Such case-by-case determinations shape who is “legal” on a daily basis.

In addition, undocumented immigrants in the U.S. occupy a liminal legal space because they hold certain important rights while lacking others. As Linda Bosniak explains, they carry dual identities as “juridically recognized person[s] and as illegal border violator[s].”²⁶ For example, undocumented immigrants have the same rights as citizens in criminal proceedings, the right to sue in tort and contract, the right to divorce, the right to bring employment lawsuits, the right to sue for workmen’s compensation, the right to a public elementary education, and the right to own property.²⁷ Moreover, undocumented immigrants are considered “employees” within the meaning of the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA).²⁸ On the other hand, they lack the right to engage in employ-

230 (“the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and some will become lawful residents or citizens of the United States”).

²⁵ See *Taylor v. United States*, 495 U.S. 575 (1990); see also Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313 (2011); Doug Keller, *Causing Mischief for Taylor’s Categorical Approach: Applying “Legal Imagination” to Duenas-Alvarez*, 18 GEO. MASON L. REV. 625 (2011); Jennifer Lee Koh, *The Whole Better Than The Sum? The Categorical Approach and the Immigration Consequences of Criminal Convictions*, 26 GEO. IMMIGR. L.J. (forthcoming).

²⁶ Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1006 (1988); see also Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 347 (2001) (“Undocumented workers by definition occupy a precarious position in U.S. society: their very presence at the workplace is at the same time unlawful and necessary to perform the most difficult work at the lowest wages.”).

²⁷ Bosniak, *supra* note 26, at 1006.

²⁸ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (holding that undocumented workers are “employees” under the NLRA, although their remedies might be limited).

ment,²⁹ the right to back pay or reinstatement if fired for an unlawful reason,³⁰ and the right to non-discrimination based on their legal status.³¹ They are barred from most public benefits³² and face significant challenges in everyday life, as more and more states pass laws to prevent them from renting housing,³³ qualifying for in-state tuition,³⁴ and obtaining drivers licenses.³⁵ Most obviously, undocumented immigrants face the constant risk of being deported from the United States.

By being simultaneously included and excluded within this maze of laws, undocumented immigrants inhabit an amorphous legal landscape. To the extent that “illegal alien” exists as a legal category, it is a category with porous boundaries, through which rights ebb and flow. Given the fuzzy and fluid nature of categories based on “legal” and “illegal” status, the policies that the government pursues play a critical role in shaping the boundary

²⁹ IRCA made it illegal for employers to knowingly hire an undocumented alien. Prior to the passage of IRCA in 1986, undocumented aliens did have the right to enter freely into employment contracts.

³⁰ *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that an undocumented worker fired for union organizing was not entitled to back pay); see also Garcia, *Ghost Workers*, at 750 (asserting that *Hoffman* “denies that the work performed by undocumented workers has any value”); Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and Latcrit Theory*, 55 FLA. L. REV. 511, 516 (2003) (noting that undocumented workers are technically covered by the NLRA but are unlikely to obtain reinstatement of their job as a remedy).

³¹ *Espinoza v. Farah Mfg.*, 414 U.S. 86 (1973) (holding that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on legal status). Undocumented immigrants also fall outside the antidiscrimination provisions of the Immigration Control and Reform Act of 1986. 8 U.S.C. § 1324b(a)(2)(B), (b)(2) (1986).

³² *Mathews v. Diaz*, 426 U.S. 67 (1976) (upholding the constitutionality of a federal statute limiting senior Medicare benefits to aliens who had been admitted for permanent residence and had resided in the United States for at least five years); see also Paul Meehan, *Combating Restrictions on Immigrant Access to Public Benefits: A Human Rights Perspective*, 11 GEO. IMMIGR. L.J. 389 (1997); Jeffrey T. Kullgren, *Restrictions on Undocumented Immigrants’ Access to Health Services: The Public Health Implications of Welfare Reform*, 93 AM. J. PUB. HEALTH 1630 (2003) (noting that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 declared undocumented immigrants ineligible for “any retirement, welfare, health, disability . . . or any other similar benefit for which payments or assistance are provided”).

³³ See, e.g., Clifton R. Gruhn, *Filling the Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants’ Access to Housing*, 39 U. MIAMI INTER-AMER. L. REV. 529 (2008).

³⁴ Ten states have passed laws permitting certain undocumented students who have attended and graduated from their primary and secondary schools to pay the same tuition as their in-state classmates at public institutions of higher education. The states are California, CAL. EDUC. CODE § 68130.5 (West 2007); Illinois, ILL. COMP. STAT. 305/7e-5 (2003); Kansas, KAN. STAT. ANN. § 76-731a (2004); Nebraska, NEB. ADMIN. CODE § 85-502 (2006); New Mexico, N.M. STAT. ANN. § 5-18-7.10 (2005); New York, N.Y. EDUC. LAW § 6301 (McKinney 2002); Oklahoma, OKLA. STAT. tit. 70, § 3242 (2007); Texas, TEX. EDUC. CODE ANN. § 54.057 (West 2001), amended by TEX. EDUC. CODE ANN. § 54.057 (West 2005); Utah, UTAH CODE ANN. § 53B-8-106 (West 2002); Washington, WASH. REV. CODE § 28B.14.012 (2003); see also Denise Oas, *Immigration and Higher Education: The Debate Over In-State Tuition*, 79 UMKC L. REV. 877 (2011).

³⁵ See Maria Pabon Lopez, *More Than a License to Drive: State Restrictions on the Use of Driver’s Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2004) (discussing three types of state laws that restrict noncitizens’ access to driver’s licenses).

between them. In recent decades, the U.S. has aggressively pursued immigration policies aimed at reinforcing the salience of the boundary between “legal” and “illegal” immigrants. Such policies include militarization of the U.S.-Mexico border starting in the 1990s and culminating in the construction of a massive barricade;³⁶ vast expansion of detention and removal operations, resulting in the removal of nearly 400,000 people per year;³⁷ criminalization of immigration violations such as unlawful entry, which now comprise 54% of all federal prosecutions;³⁸ and eliciting the support of state and local governments in immigration enforcement through 287(g) agreements and programs like Secure Communities, which involve the police in screening for immigration violations during routine arrests.³⁹

Policies that attempt to fortify the boundary between “legal” and “illegal” status have done little to promote social cohesion within the United States. On the contrary, such policies have gone hand-in-hand with the rise of anti-immigrant and nativist movements, which other scholars have discussed at length.⁴⁰ The following section provides a social psychological framework for understanding how categorization plays a critical role in the development of intergroup bias and conflict. By constructing social categories based on “legal” and “illegal” status and then pursuing policies that make blurry boundaries more rigid, the U.S. appears to be heading down a path that invites greater friction and factionalism. Indeed, the categorization-based strategies for reducing such bias, discussed below, focus on *reducing* the salience of boundaries, rather than making them more distinct.

³⁶ NEVINS, *supra* note 19; NEWTON, *supra* note 21, at 115-18 (noting that portrayals of the border as “a breeding ground for smugglers, drugs, violence, and generalized crime” made it even easier for Congressmen to characterize undocumented immigrants as inherently criminal during the 1996 debates on immigration reform).

³⁷ U.S. Immigration and Customs Enforcement (“ICE”), News Release, *DHS/ICE Reveal Highest Immigration Enforcement Numbers on Record in Fiscal Year 2010* (Oct. 8, 2010), available at <http://www.ice.gov/news/releases/1010/101008washingtondc.htm> (noting that 392,000 people were removed from the United States in fiscal year 2010).

³⁸ New Data on Federal Court Prosecutions Reveal Non-Violent Immigration Prosecutions Up, IMMIGR. POL’Y CENTER, <http://www.immigrationpolicy.org/just-facts/new-data-federal-court-prosecutions-reveal-non-violent-immigration-prosecutions> (last visited Sept. 4, 2011).

³⁹ See, e.g., Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 658-54 (2010) (discussing the entwinement of immigration enforcement and the criminal justice system, including 287(g) agreements and the Secure Communities program); Jennifer Chacon, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 148-50 (2010) (discussing 287(g) agreements and Secure Communities).

⁴⁰ See, e.g. DOTY, *supra* note 18; JUAN PEREA, *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* (1996); PETER SCHRAG, *NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA* (2011).

II. SOCIAL CATEGORIZATION AND INTERGROUP RELATIONS

A. *The Relationship Between Social Categorization, Intergroup Bias, and Intergroup Conflict*

Social categorization is essential to our ability to function in a complex world. As Gordon Allport declared in 1954, “[t]he human mind must think with the aid of categories.”⁴¹ In his groundbreaking book, *The Nature of Prejudice*, Allport argued that prejudice was a “natural byproduct of human cognition and, in particular, of categorization.”⁴² An influential article written by British social psychologist Henri Tajfel in 1969 further developed the idea that social categorization creates the cognitive basis for prejudice.⁴³ Tajfel’s research showed that the *mere act of categorization* had such cognitive power that even *meaningless* groups (called “minimal” groups by social psychologists) can trigger bias, eliciting preference for ingroup members (individuals included within one’s own group) over outgroup members (individuals excluded from one’s own group).⁴⁴

Tajfel’s experiments with minimal groups laid the foundation for social identity theory and self-categorization theory. The concept of social identity, which Tajfel defined as “that part of an individual’s self-concept which derives from his knowledge of his membership of a social group (or groups) together with the emotional significance attached to that membership,”⁴⁵ is key to understanding how a system of social categorizations “creates and defines an individual’s *own* place in society.”⁴⁶ Tajfel reasoned that social identity rests on favorable comparisons of ingroup members with outgroup members, which serve our underlying need for self-esteem.⁴⁷ In other words, social comparisons and discriminatory actions satisfy the need for positive self-identity by enhancing one’s sense of status.⁴⁸ Identifying with our ingroup creates a sense of belonging and security,⁴⁹ while differentiating our ingroup from the outgroup satisfies our desire for distinctiveness.⁵⁰

Tajfel developed social identity theory to explain how people’s beliefs about the relationships between groups, such as their relative status, stability,

⁴¹ GORDON ALLPORT, *THE NATURE OF PREJUDICE* 20 (1954).

⁴² Susan T. Fiske & Ann Marie Russell, *Cognitive Processes*, in *THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION*, *supra* note 17, at 116.

⁴³ Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 *J. SOC. ISSUES* 79-97 (1969).

⁴⁴ Henri Tajfel and John Turner, *An Integrative Theory of Intergroup Conflict*, in *SOC. PSY. INTERGROUP REL.* (W.G. Austin & S. Worchel, eds.) (originally published in 1979).

⁴⁵ Henri Tajfel, *Social Identity and Intergroup Behavior*, 13 *SOC. SCI. INFO.* 65, 69 (1974).

⁴⁶ Henri Tajfel, *Social Categorization*, in *INTRODUCTION TO SOC. PSY.* 293 (S. Moscovici ed., 1972) (English translation).

⁴⁷ Tajfel, *supra* note 45; J.C. Turner, *Social Comparison and Social Identity: Some Prospects for Intergroup Behavior*, 5 *EUR. J. SOC. PSYCHOL.* 5 (1975).

⁴⁸ Tajfel, *supra* note 45; Turner, *supra* note 46.

⁴⁹ Gaertner, Dovidio, & Houlette, *supra* note 17, at 528.

⁵⁰ Crisp, *supra* note 17, at 510. We seek distinctiveness because it reduces uncertainty in social situations, providing prescriptive norms to guide our behavior and helping us predict how ingroup and outgroup members will behave. *Id.*

and legitimacy, influence how they seek a positive social identity.⁵¹ Subsequently, Tajfel’s student, John Turner, and his colleagues extended social identity theory through the development of self-categorization theory, which describes how social categorization transforms group members’ representations of themselves into prototypes of their groups, such that they “perceive themselves as exemplars of the group rather than as unique individuals.”⁵²

The cognitive impact of social categorization into ingroups and outgroups is enormous. Identifying with a group leads us to minimize differences among ingroup members while exaggerating differences between ingroup and outgroup members.⁵³ We remember more information about ways that ingroup members are similar to us and outgroup members are different from us.⁵⁴ Moreover, we associate the typical characteristics of the ingroup with ourselves, a process known as “self stereotyping.”⁵⁵ At the same time, we expect our ingroup members to share our attitudes and values more than outgroup members.⁵⁶ We even attribute secondary emotions that are unique to human beings (e.g. affection, pride, and remorse) more to ingroup members than to outgroup members, suggesting that we see ingroup members as more human.⁵⁷ These cognitive processes all cultivate positive associations with our ingroup and more helpful behaviors towards them than towards the outgroup.⁵⁸ They also reflect how cognitive representations of the self and the ingroup become “inextricably linked.”⁵⁹ Research indicates that this mental fusion of self and social group occurs not only explicitly (i.e. consciously), but also implicitly (i.e. unconsciously).⁶⁰

Recent studies in implicit social categorization provide new insights about how the relative dominance or subordinance of a social group influences attitudes towards the ingroup and outgroup.⁶¹ While members of high status groups show ingroup favoritism both explicitly and implicitly, members of low status groups often show ingroup favoritism explicitly but not implicitly.⁶² For example, results from Implicit Association Tests reveal that

⁵¹ Michael A. Hogg & Deborah J. Terry, *Social Identity and Self-Categorization Processes in Organizational Contexts*, 25 *ACAD. MGMT. REV.* 121, 123 (2000).

⁵² Thierry Devos & Mahzarin R. Banaji, *Implicit Self and Identity*, 1001 *ANN. N.Y. ACAD. SCI.* 177, 180 (2003).

⁵³ John F. Dovidio, et al., *Commonality and the Complexity of “We”*: *Social Attitudes and Social Change*, 13 *PERSONALITY & SOC. PSY. REV.* 3, 5 (2009).

⁵⁴ *Id.*

⁵⁵ Devos & Banaji, *supra* note 52, at 180.

⁵⁶ *Id.*

⁵⁷ Jacques-Philippe Leyens et al., *The Emotional Side of Prejudice: The Attribution of Secondary Emotions to Ingroups and Outgroups*, 4 *PERSONALITY & SOC. PSY. REV.* 186-97 (2000).

⁵⁸ Devos & Banaji, *supra* note 52, at 180.

⁵⁹ *Id.*

⁶⁰ *Id.* at 180-82.

⁶¹ Jim Sidanius & Felicia Pratto, *Social Dominance Theory: A New Synthesis*, in *SOCIAL DOMINANCE* 31-57 (1999).

⁶² Brian Mullen et al., *Ingroup Bias As a Function of Salience, Relevance and Status: An Integration*, 22 *EURO. J. SOC. PSY.* 103-122 (1992); see also Charles M. Judd et al., *Stereotypes and Ethnocentrism: Diverging Interethnic Perceptions of African American and White*

Blacks outwardly exhibit a strong preference for Blacks over Whites as a group, but *implicitly* show no preference for their ingroup.⁶³ One explanation for this phenomenon is that disadvantaged group members make an effort to report positive attitudes towards their ingroup on explicit measures because they are striving to achieve a positive social identity, but the implicit measures reveal that they have actually internalized the lower social status of their group.⁶⁴ This explanation is consistent with “system justification theory,” which predicts a tendency to justify the status quo, even when one belongs to a socially disadvantaged group.

The hierarchical nature of social groups is also relevant to determining when ingroup favoritism will lead to outgroup derogation or hostility.⁶⁵ Studies examining the conditions where outgroup hostility occurs have found that the relative social status of the different groups and the context both play critical roles.⁶⁶ Perceiving the ingroup as powerful and enjoying strong collective support from fellow ingroup members tends to produce anger towards the outgroup, which potently predicts hostile impulses, including inclinations to confront, oppose and attack the outgroup.⁶⁷ Emotions other than anger, such as fear and distrust of the outgroup, may also lead to hostility, although the link is less clear than for anger.⁶⁸

Ingroup identification is also associated with outgroup derogation in situations where the ingroup endorses ideas of moral superiority that are incompatible with tolerance for difference and that justify domination of the outgroup.⁶⁹ “In complex national ingroups, institutions, rules and laws take on a character of moral authority, and since ethnic majorities tend to be in control of national institutions, they are also more likely to endorse claims of moral superiority.”⁷⁰ Moreover, ingroup favoritism is associated with out-

American Youth, 69 J. PERSONALITY & SOC. PSY. 460-81 (1995) (finding that African Americans often display more ethnocentric intergroup perceptions than do white Americans).

⁶³ Devos & Banaji, *supra* note 52, at 196.

⁶⁴ *Id.*

⁶⁵ For studies showing that ingroup favoritism does not inevitably entail hostility to outgroups, see C. Staerkle et al., *Ethnic Majority-Minority Asymmetry and Attitudes Towards Immigrants Across 11 Nations*, 30 PSICOLOGIA POLITICA (POL. PSY.) 7, 10-11 (2005); see also M.B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate*, 55 J. SOC. ISSUES 429 (1999); J. Duckitt & T. Mphuthing, *Group Identification and Intergroup Attitudes: A Longitudinal Analysis in South Africa*, 74 J. PERSONALITY & SOC. PSY. 80 (1998).

⁶⁶ M. Ros, C. Huici & A. Gomez, *Comparative Identity, Category Salience and Intergroup Relations*, in SOCIAL IDENTITY PROCESSES 81-95 (D. Capozza & R. Brown, eds., 2000).

⁶⁷ Diane M. Mackie, Thierry Devos & Eliot R. Smith, *Intergroup Emotions: Explaining Offensive Action Tendencies in an Intergroup Context*, 79 J. OF PERSONALITY & SOC. PSY. 602, 613 (2000). This study focused on behavioral intentions rather than actual behaviors, which are more constrained by situational factors or social sanctions. While behavioral intentions tend to predict behaviors in a general sense (as offensive or defensive), it is difficult to know what precise act will result from the impulse.

⁶⁸ M.B. Brewer, *Superordinate Goals Versus Superordinate Identity As Bases of Intergroup Cooperation*, in SOCIAL IDENTITY PROCESSES 117-32 (D. Capozza & R. Brown, eds., 2000) (finding that fear and distrust of the outgroup lead to hostility). *But see* Mackie, Devos & Smith, *supra* note 67 (finding no clear association between fear and outgroup hostility).

⁶⁹ Brewer, *supra* note 65; J. SIDANIUS AND F. PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF HIERARCHY AND OPPRESSION (1999).

⁷⁰ Staerkle et al., *supra* note 65, at 11.

group hostility in situations involving a scarcity of resources and perceived realistic threat.⁷¹ Salient group memberships and the appraisal of situations in terms of their consequences for the ingroup are particularly likely to trigger the impulse towards outgroup hostility.⁷²

All of these factors associated with the transformation of ingroup favoritism into outgroup hostility exist in the U.S. immigration context. First, U.S. citizens clearly wield more power as a group than legal immigrants and are far more powerful than undocumented immigrants. Second, the amount of anger aroused by issues of immigration reflects festering hostility that has repeatedly exploded into outright violence.⁷³ Third, the language of moral superiority pervades immigration debates, which alternatively cast the undocumented as undeserving others or outright criminals.⁷⁴ Finally, nearly half of Americans believe that immigrants are taking scarce resources, including precious jobs and health care.⁷⁵ The presence of all these factors sets the stage for Americans’ ingroup favoritism to turn into hostility against immigrants, especially those who are undocumented. The following section addresses categorization-based strategies for reducing intergroup bias, which

⁷¹ Duckitt & Mphuthing, *supra* note 65.

⁷² *Id.*

⁷³ See, e.g., Bill Schneider, *Anger Over Immigration Plan Surprises GOP Senators*, CNN, May 29, 2007, <http://edition.cnn.com/2007/POLITICS/05/29/bush.immigration/index.html>; Jacques Billeaud & Amanda Lee Myers, *Arizona Law Comes After Years of Mounting Anger*, ABC NEWS, July 25, 2010, <http://abcnews.go.com/US/arizona-immigration-law-years-mounting-anger/story?id=11247140>; SOUTHERN POVERTY LAW CENTER, *Anti-Immigrant Climate Fueling Violence Against Latinos in N.Y. County*, Sept. 2, 2009, <http://www.splcenter.org/get-informed/news/splc-report-anti-immigrant-climate-fueling-violence-against-latinos-in-ny-county>; Southern Poverty Law Center, *Immigrant Backlash: Hatecrimes Against Latinos Flourish*, Intelligence Report, Winter 2007 Issue No. 128, <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2007/winter/immigration-backlash>. Nor is anger over immigration unique to the United States. See, e.g., Christopher Hope, *Frank Field: Anger Over Immigration Could ‘Spread to the Streets’ if it is not Debated.* THE TELEGRAPH, April 13, 2010, <http://www.telegraph.co.uk/news/election-2010/7587249/Frank-Field-Anger-over-immigration-could-spread-to-the-streets-if-it-is-not-debated.html>; John Vinocur, *For Europe, Few Hints of Tolerance*, N.Y. TIMES, Aug. 1, 2011, <http://www.nytimes.com/2011/08/02/world/europe/02iht-politicus02.html>; Dan Murphy, *Norwegian Terrorist Stirs Multiculturalism Opponents*, CHRISTIAN SCI. MONITOR, July 25, 2011, <http://www.csmonitor.com/World/Backchannels/2011/0725/Norwegian-terrorist-stirs-multiculturalism-opponents>; Cristina Costantini, *Anti-Latino Hate Crimes Rise As Immigration Debate Intensifies*, HUFFINGTON POST, Oct. 18, 2011, http://www.huffingtonpost.com/2011/10/17/anti-latino-hate-crimes-rise-immigration_n_1015668.html.

⁷⁴ See, e.g., NEWTON, *supra* note 21, at 85-103 (discussing the police narratives of deserving versus undeserving immigrants), 106-112 (discussing how policy debates pit “freeloading” immigrants versus taxpayers), 115-18 (discussing the “criminal alien narrative”).

⁷⁵ According to a poll by Rasmussen Reports, 40% of the U.S. voters surveyed stated that illegal immigrants are taking jobs away from U.S. citizens, and another 11% were unsure or undecided. Among Republican voters, 60% said that illegal immigrants are taking jobs away from U.S. citizens. See http://www.upi.com/Top_News/US/2011/08/25/Poll-Half-say-immigrants-not-taking-jobs/UPI-66431314329314/; see also Public Opinion Outreach Survey (finding that 53% of liberals and progressives oppose providing health care to undocumented aliens); American Council for Immigration Reform Survey (finding that 78% of Americans believe that high immigration numbers have had a negative impact on the cost and quality of the nation’s health care system).

are then specifically applied to analyzing U.S. immigration policies in Part IV.

B. The Basics of Categorization-Based Strategies for Reducing Intergroup Bias

Since social categories are dynamic, changing the boundaries of the categories can alter the way we think about other people as well as our own spheres of membership.⁷⁶ Most categorization-based strategies for reducing intergroup bias involve reducing the salience of categories.⁷⁷ Three such strategies are decategorization, recategorization, and crossed categorization. Decategorization focuses on eroding or erasing group boundaries until they disappear, with the ultimate goal that people will interact with each other primarily as individuals rather than as group members. One way for decategorization to occur is through personal interactions with outgroup members that invalidate outgroup stereotypes.⁷⁸ Decategorization can also occur through recognition of variability in the opinions of outgroup members or by observing them respond as individuals rather than as a group.⁷⁹

A second approach called recategorization, which was pioneered by Samuel L. Gaertner and John F. Dovidio, proposes combining members of different groups into a single, more inclusive group, known as a “superordinate” group. The idea is to reduce intergroup bias “by changing the nature of categorical representation from ‘us’ and ‘them’ to a more inclusive ‘we.’”⁸⁰ For example, rendering salient a superordinate Jewish identity among Israelis helps reduce their bias towards Russian immigrants by highlighting a common ingroup identity based on religion.⁸¹ Other studies have shown the benefits of recategorization in a wide variety of situations, including in multi-ethnic high schools, merged corporations, and blended families.⁸² According to social psychologist Richard Crisp, “[t]he experimental research has shown, beyond doubt, that the introduction of a superordinate

⁷⁶ Gaertner, Dovidio & Houlette, *supra* note 17, at 530.

⁷⁷ See SAMUEL L. GAERTNER & JOHN F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL (2000). Mutual ingroup differentiation is an approach that involves the opposite tactic of increasing category salience in order to preserve feelings of distinctiveness and avoid identity threat. This approach is only effective in reducing intergroup bias in situations where the different groups have equal status and engage in cooperative activities. Gaertner, Dovidio & Houlette, *supra* note 17, at 531-32, 536-38. Since categories based on immigration status are hierarchical rather than equal and generally do not involve cooperation, the mutual ingroup differentiation model is of limited relevance to this Article and is not discussed below.

⁷⁸ Gaertner, Dovidio & Houlette, *supra* note 17, at 530.

⁷⁹ *Id.*

⁸⁰ Crisp, *supra* note 17, at 510.

⁸¹ See Aharon Bizman & Yoel Yinon, *Perceived Threat and Israeli Jews' Evaluations of Russian Immigrants: The Moderating Role of Jewish and Israeli Identity*, 26 INT'L J. INTERCULTURAL REL. 691-704 (2001).

⁸² Dovidio et al., *supra* note 53, at 5-6.

categorization can reduce bias,” although “whether, or for how long, it does so” depends on the particular context.⁸³

As Gaertner and Dovidio developed the concept of a common ingroup identity, they realized that in certain situations, especially those involving emotionally charged categories such as race, ethnicity and nationality, creating a “dual identity” may be more successful in reducing bias than a one group identity.⁸⁴ Examples of dual identities include “Mexican American” and “Korean American,” which combine an inclusive, superordinate identity (“American”) with another group identity (“Mexican” and “Korean”).⁸⁵ Since racial or ethnic ties are often central, salient aspects of identity, people may be unwilling or unable to relinquish them or to become “colorblind” and ignore them as a basis for distinguishing different groups.⁸⁶ A dual identity helps preserve a positive sense of distinctiveness and minimizes identity threat, the feeling that one’s identity is at risk of being devalued, which can undermine the success of recategorization based on a single identity. Consequently, embracing a dual identity can be *more* effective than embracing a single identity for reducing bias,⁸⁷ representing “the best all round solution for reducing intergroup bias,” especially for people with strong group identities.⁸⁸

The third strategy for reducing intergroup bias is crossed categorization, which proposes bringing out multiple, *unrelated* group identities as a way of creating more complex portraits of people that avoid simple group-based stereotypes. This approach also works by highlighting group identities other than the one giving rise to the conflict, thereby shifting attention to alternative, less provocative memberships.⁸⁹ When we perceive people as “belonging to multiple categories, rather than just one, intergroup differentiation decreases, and with it goes intergroup bias.”⁹⁰ For example, studies crossing race and gender show that sharing some aspect of identity reduces bias as well as stereotypes. Thus, White women are likely to show less bias towards Black women than towards Black men, because they have at least one subgroup in common based on their gender.⁹¹ A crossed categorization model differs from a dual identity model because the subgroups in crossed categori-

⁸³ RICHARD J. CRISP & MILES HEWSTONE, *MULTIPLE SOCIAL CATEGORIZATION: PROCESSES, MODELS AND APPLICATIONS* 7 (2006).

⁸⁴ GAERTNER & DOVIDIO, *supra* note 77. The concept of a dual identity resonates with Bill Ong Hing’s proposal for a path between (or beyond) assimilation and cultural pluralism. Hing, *supra* note 15.

⁸⁵ See Dovidio et al., *supra* note 53, at 7.

⁸⁶ John F. Dovidio et al., *Inclusion and Exclusion: Recategorization and the Perception of Intergroup Boundaries*, in *THE SOCIAL PSYCHOLOGY OF INCLUSION AND EXCLUSION* 251 (Dominic Abrams, et al., eds., 2005).

⁸⁷ Dovidio et al., *supra* note 53, at 7.

⁸⁸ Crisp, *supra* note 17, at 514.

⁸⁹ DONELSON R. FORSYTH, *GROUP DYNAMICS* 436 (2010).

⁹⁰ *Id.*

⁹¹ CRISP & HEWSTONE, *supra* note 83, at 57.

zation are unrelated (like race and gender), whereas in dual identity models, they tend to be correlated or nested within each other.⁹²

These three models should not be seen as mutually exclusive, since they can “operate in a complementary fashion, perhaps sequentially, to reduce intergroup bias in a more general and sustained way.”⁹³ The specific context determines which strategy or sequence of strategies will prove most effective.⁹⁴ In the following section, this Article explores U.S. immigration policies’ impact on intergroup bias through the lenses of decategorization, recategorization, and crossed categorization.

III. EXAMINING U.S. IMMIGRATION POLICIES THROUGH THE LENS OF CATEGORIZATION-BASED STRATEGIES FOR REDUCING INTERGROUP BIAS

While U.S. immigration policies have increased the salience of group boundaries through militarization of the border, aggressive enforcement operations, criminalization and other measures, categorization-based strategies for reducing intergroup conflict stress *weakening* the salience of such boundaries as a way of decreasing intergroup bias.⁹⁵ This section analyzes more specifically how various immigration policies impede or promote the processes of decategorization, recategorization, and crossed categorization.

A. *Decategorization*

As discussed above, a decategorization strategy predicts that eroding the boundaries between groups will lead people to perceive each other as individuals, rather than as group members, thereby reducing the influence of both ingroup favoritism and outgroup derogation.⁹⁶ The basic principle is that “me and you” replace “us and them,” leading to lower levels of group-based bias. One way decategorization occurs is by differentiating among outgroup members. A more complex perception of outgroup members permits people to evaluate them based on their personal merit, rather than just their categorical affiliations.⁹⁷ This section first examines some of the ways that U.S. immigration policies have reinforced collective anonymity among immigrants, then discusses a recent change in policy towards prosecutorial discretion that offers hope for more individualized treatment, laying the initial stepping stones for a path towards decategorization.

⁹² Crisp, *supra* note 17, at 515.

⁹³ Gaertner, Dovidio & Houlette, *supra* note 17, at 539.

⁹⁴ *Id.*

⁹⁵ GAERTNER & DOVIDIO, *supra* note 77.

⁹⁶ Gaertner, Dovidio & Houlette, *supra* note 17, at 530–31.

⁹⁷ Nurcan Ensari & Norman Miller, *Decategorization and the Reduction of Bias In the Crossed Categorization Paradigm*, 31 EUR. J. SOC. PSY. 192, 195 (2001).

1. *Immigration Policies that Reinforce Collective Anonymity*

U.S. immigration policies actively prevent decategorization by depersonalizing immigrants. In this respect, today’s immigrants resemble colonized subjects of times past who bore “the mark of the plural.”⁹⁸ As Albert Memmi explained, “[t]he colonized is never characterized in an individual manner; he is entitled only to drown in an anonymous collectivity.”⁹⁹ Congress has ensured that most immigrants receive collective rather than individual treatment in a number of ways. First, Congress has consistently expanded the broad categories of people subject to exclusion and removal from the United States. Second, Congress has sharply restricted the forms of discretionary relief available on an individualized basis during removal proceedings. Third, Congress has curtailed the scope of judicial review to prevent the federal courts of appeal from reviewing discretionary determinations that involve examining individual equities.

Before turning to each of these trends, one should note that the initial tension between decategorization and immigration policy stems from the plenary power doctrine, which permits Congress to create group-based classifications in the regulation of immigration that would be impermissible in other contexts.¹⁰⁰ Thus, classifications based on national origin, which would ordinarily receive strict scrutiny, receive only rational basis review in the context of regulating immigration.¹⁰¹ The logic of equal protection cases stressing that “the Government must treat citizens as *individuals*, not as simply components of a . . . class”¹⁰² therefore does not apply to the immigration realm. The plenary power doctrine has played a central role not only in excluding entire national groups, such as the Chinese from 1878 to 1943, but

⁹⁸ ALBERT MEMMI, *RACISM* 211 (2000).

⁹⁹ *Id.*

¹⁰⁰ *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (describing the power to expel aliens as a fundamental sovereign attribute largely immune from judicial control).

¹⁰¹ *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (rejecting the claim that undocumented aliens are a “suspect class” and applying rational basis review); *Midi v. Holder*, 566 F.3d 132, 137 (4th Cir. 2009) (“Although courts usually subject national-origin classifications to strict scrutiny, when such classifications involve unadmitted aliens in the immigration context, we subject them only to rational basis review.”); *Masnauskas v. Gonzales*, 432 F.3d 1067, 1070-71 (9th Cir. 2005) (applying rational basis review to a challenged immigration classification based on national origin).

¹⁰² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722-23 (2007) (holding that admission plans designed to achieve racial integration among students in Seattle and Jefferson County public schools were unconstitutional because they “rel[ie]d on racial classifications in a ‘nonindividualized, mechanical’ way.”). Chief Justice Roberts, writing for the majority, distinguished the Court’s decision in *Grutter*, which upheld the admissions policy of the University of Michigan Law School, by stressing, “the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group.” *Id.* at 748.

also in “further[ing] white dominance by providing a docile Mexican workforce at the bottom of the economic ladder.”¹⁰³

In recent decades, Congress has promoted categorical exclusion and removal from the United States through a series of legislative reforms that substantially expanded the criminal grounds of removal, created new grounds of inadmissibility, and introduced a system of expedited removal that does not provide for any individual hearing before an immigration judge.¹⁰⁴ In particular, Congress drastically expanded the INA’s definition of an “aggravated felony,” which eliminates eligibility for most forms of individualized relief from removal, and created sweeping definitions of “terrorist activities” and “terrorist organizations” that provided new bases for inadmissibility and removal.¹⁰⁵

At the same time, Congress has systematically constricted the forms of discretionary relief available to individuals facing removal. Congress originally created such discretionary forms of relief in deportation cases during the 1940s as a response to calls for reform by legal realists who rejected “the administration of law based on rigid categories without room for discretion or experience.”¹⁰⁶ At that time, the demands for reform focused primarily on the unjust impact of deportation on European and Canadian immigrants, leading to the creation of forms of relief with broad criteria that included a “general loophole” for “exceptionally meritorious cases.”¹⁰⁷ During the past two decades, however, Congress has whittled away the relief available to individuals facing removal, eliminating any general loophole for discretion.

In 1990, Congress eliminated the Judicial Recommendation Against Deportation (JRAD), which had existed since 1917 and served as the primary mechanism for state and federal criminal court judges to prevent deportation due to a conviction on an individualized basis.¹⁰⁸ In 1996, Congress eliminated the 212(c) waiver, which allowed immigration judges to provide discretionary relief to permanent residents facing deportation

¹⁰³ Angela Harris, *Equality Troubles: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1950 (2000).

¹⁰⁴ See The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 1751(b), 102 Stat. 4181 (1988); The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, sec. 440, §1101(a)(43), 110 Stat. 1214, 1277-78; The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, sec. 321, §1101(a)(43), 110 Stat. 3009, 3009-627 to -628.

¹⁰⁵ See “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act” (USA PATRIOT Act, H.R. 3162, Pub. L. No. 107-56, 115 Stat. 272); REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

¹⁰⁶ MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 78 (2005).

¹⁰⁷ *Id.* at 76, 82, 86.

¹⁰⁸ Immigration and Nationality Act of 1917, 39 Stat. 890 (giving judges in both state and federal criminal cases the power to recommend that an alien convicted of a crime “shall not be deported”); Immigration Act of 1990, Pub. L. 101-649, §505, 104 Stat. 5050 (repealing the JRAD formerly codified at INA § 241(b), 8 U.S.C. § 1251(b)).

based on criminal convictions.¹⁰⁹ That same year, Congress also eliminated suspension of deportation, a form of discretionary relief that allowed an alien to remain in the U.S. by showing extreme hardship to herself or to a U.S. citizen or permanent resident spouse, parent or child.¹¹⁰ Congress replaced these forms of relief with two new, more restrictive forms of relief known as cancellation of removal for permanent residents and cancellation of removal for non-permanent residents.¹¹¹ The former precludes all permanent residents convicted of an aggravated felony, while the latter imposes the incredibly high bar of showing “exceptional and extremely unusual hardship” to a U.S. citizen or permanent resident spouse, parent or child, in addition to other requirements.¹¹² Unlike suspension of deportation, cancellation of removal does not permit the judge to consider hardship to the immigrant herself;¹¹³ this, in itself, undermines her personhood.

As the Supreme Court noted with concern in *Padilla*, these reforms have made deportation “virtually inevitable for a vast number of noncitizens convicted of crimes.”¹¹⁴ Even for those without any convictions, there are very limited forms of relief available. During the past three years, only 25% of removal cases nationwide involved some type of application for relief, and immigration judges granted relief in just 12-13% of cases, issuing orders of removal about 75-80% of the time.¹¹⁵ For those who are not fleeing persecution and who are not eligible to adjust their status through a close family member, the prospect of obtaining discretionary relief remains particularly dismal. Out of over 280,000 removal cases completed by the immigration courts in 2010, fewer than 10,000 immigrants total received some form of cancellation of removal.¹¹⁶

In addition to directly curtailing available forms of discretionary relief, Congress has indirectly limited the ability to apply for relief by requiring

¹⁰⁹ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 304(b), 110 Stat. 3009-597, repealed discretionary relief under § 212(c) and replaced it with a new form of cancellation of removal that is much more restrictive, precluding anyone convicted of an aggravated felony. *See id.* at 3009-594 (creating 8 U.S.C. § 1229(b)). In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court held that the repeal of § 212(c) did not apply retroactively to aliens who had pled guilty prior to the statute’s enactment.

¹¹⁰ IIRIRA repealed suspension of removal under former 8 U.S.C. § 1254(a)(1).

¹¹¹ Cancellation of removal for permanent residents is codified at INA § 240A(a), 8 U.S.C. § 1229b(a), while cancellation of removal for non-permanent residents is codified at INA § 240A(b), 8 U.S.C. § 1229b(b).

¹¹² *See* INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (precluding those with an aggravated felony from cancellation of removal for permanent residents); INA § 240A(b)(D), 8 U.S.C. § 1229b(b)(D) (requiring “exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence).

¹¹³ *See* INA § 240A(b)(D), 8 U.S.C. § 1229b(b)(D).

¹¹⁴ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

¹¹⁵ Executive Office of Immigration Review, FY 2010 Statistical Year Book N1, D2 (January 2011). In 2010, 71,924 removal cases involved an application for relief and 215,283 cases did not. Immigration judges granted relief in 30,838 of these cases and ordered removal in 166,424 cases.

¹¹⁶ *Id.* at R3. Only 3,716 permanent residents and 4,487 non-permanent residents received cancellation of removal in 2010.

mandatory detention of certain aliens, which creates serious obstacles to obtaining both legal counsel and the evidence necessary to support an application. Consequently, the rate of applications is much lower than the national average in places where immigrants are detained. For example, the applications rates at the Stewart Detention Facility in Georgia, the Oakdale Federal Detention Center in Louisiana, and the Houston Service Processing Center in Texas range from just 1-5% of cases, compared to application rates of 57-65% at immigration courts for non-detained individuals in Los Angeles, Orlando, and New York City, where lawyers are readily available.¹¹⁷

By limiting the available forms of discretionary relief as well as the practical ability to apply for them, Congress fortified the boundaries of status-based categories. Congress went even further, however, taking steps to curtail judicial review over removal cases and thereby ensure, as much as possible, that federal judges would not have an opportunity to engage in individualized analysis.¹¹⁸ Specifically, Congress precluded judicial review of factual issues in discretionary decisions other than asylum, thereby preventing the circuit courts from considering the individual equities of a case.¹¹⁹ In addition, Congress precluded judicial review of orders of removal against criminal aliens convicted of certain crimes, except for constitutional questions and issues of law.¹²⁰ The limitations on judicial review allow only abstract, disembodied questions of law to percolate to the federal courts, once again rendering invisible the individuals involved. Through these various reforms, Congress has demonstrated its determination to deport broad categories of depersonalized people.¹²¹

Similarly, the executive branch has historically pursued programs that perpetuate the depersonalization of immigrants. When the Roosevelt administration initiated the *bracero* program, which brought in about one million Mexican agricultural workers to the U.S. between 1942 and 1964,¹²² Mexico had to insist on Individual Work Contracts between the U.S. Government and each individual Mexican worker out of concern that “Americans would not respect each *bracero* as an individual person.”¹²³ This fear was not unreasonable, given that some growers “wanted to merely contract large num-

¹¹⁷ *Id.* at N2.

¹¹⁸ Lenni Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998).

¹¹⁹ INA § 242(B)(ii), 8 U.S.C. § 1252(B)(ii).

¹²⁰ INA § 242(C)-(D), 8 U.S.C. § 1252(C)-(D).

¹²¹ See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1959 (2000) (arguing that under the immigration laws passed by Congress in 1996, “the sanction of deportation is regularly and automatically meted out on the presumption that the label of a crime is all we need to know about a person before entering an order of banishment”).

¹²² NGAI *supra* note 106, at 139. As Ngai explains, the decision to create the *bracero* program was momentous because the United States had outlawed foreign contract labor since 1885, regarding it as akin to slavery. *Id.* at 137; Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 IND. L.J. 1111, 1136 (1998); see also KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S.* (1992).

¹²³ NGAI *supra* note 106, at 140.

bers of *braceros* without taking their names.”¹²⁴ Even with individual contracts, the system remained strikingly impersonal, as the INS processed “from several hundred to several thousand incoming *braceros* a day,” an operation that “assumed the character of ‘batch processing.’”¹²⁵ *Braceros* could not bargain over wages or working conditions and did not have the right to choose their own employers, leading to widespread exploitation.¹²⁶ Organized labor compared the *bracero* program to “imported colonialism,”¹²⁷ while liberals likened *braceros* to “‘legal slave[s]’ . . . ‘kept as if in [a] concentration camp,’” metaphors that point to a profound level of dehumanization.¹²⁸

The executive branch’s enforcement policies have also treated immigrants as indistinguishable masses rather than individuals. For example, when undocumented agricultural workers continued to stream into the U.S. despite the existence of the *bracero* program (in part because Mexico refused to allow *braceros* into states like Texas that subjected Mexicans to Jim Crow segregation laws), the INS responded with a mass deportation campaign called “Operation Wetback” in 1954.¹²⁹ This campaign, like the *bracero* program itself, demonstrated how deeply depersonalized Mexican migrants had become, as the INS swept them up by the hundreds of thousands and “‘dumped’” them on the other side of the border, carting them in “‘like cows’” on trucks and shipping them off on vessels resembling “‘eighteenth century slave ship[s].’”¹³⁰

While contemporary enforcement campaigns may elicit less colorful descriptions, they still involve mass roundups. Worksite raids, for example, which became popular in 2008 under the Bush administration, allowed ICE to arrest hundreds of workers at a time without exercising any discretion, often based on nothing more than “Hispanic appearance.”¹³¹ In some cases, such as the raid of the Agriprocessors plant in Postville, Iowa, which led to the arrest of 389 mostly Latino individuals, the depersonalization of immi-

¹²⁴ *Id.*

¹²⁵ *Id.* at 141.

¹²⁶ *Id.* at 137-38, 143 (discussing how *bracero* workers filed several thousand complaints per year regarding underpayment and poor working conditions); see also Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 274 (1997) (noting that even after the dismantling of the *bracero* program, “the U.S. Border Patrol informally collaborated with growers in the Southwest to ensure ready availability of cheap undocumented labor,” then came “full circle” with Operation Wetback in 1954).

¹²⁷ NGAI, *supra* note 106, at 166.

¹²⁸ *Id.* at 161.

¹²⁹ *Id.* at 155.

¹³⁰ *Id.* at 156 (internal quotation marks omitted).

¹³¹ Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1104 (2004). For example, on August 25, 2008, ICE arrested 600 workers at a transformer plant in Laurel, Mississippi; on October 7, 2008, ICE arrested 300 workers at a chicken processing plant in Greenville, South Carolina; and on May 12, 2008, ICE arrested 389 people at the Agriprocessors plant in Postville, Iowa. See Amalia Greenberg & Shanti Martin, *How ICE Threatens the Ethical Responsibilities of Key Players in Worksite Raids: Postville Study* 16, available at <http://digitalcommons.wcl.american.edu/hrbrief/vol16/iss1/4/>.

grants during the raid bled into the criminal proceedings that followed based on charges including the use of a false work authorization document and false Social Security number. In “script[ing] the criminal proceedings through mass-prepared plea agreements” and engaging in “expedited, bulk prosecutions,” the government trampled on individual rights, including the right to due process and the Sixth Amendment right to counsel.¹³² Similarly, “[a]long the Texas border, enforcement policy has shifted and mass plea agreements with no meaningful process are becoming the norm despite the attachment of Fifth and Sixth Amendment guarantees.”¹³³ ICE also engages in “legally questionable mass arrests in neighborhoods . . . under the pretext of serving warrants on criminal aliens.”¹³⁴

Needless to say, these types of enforcement campaigns have utterly failed to stop the flow of undocumented immigrants, who work in numerous low-wage industries, often in a depersonalized manner. Legal scholars have described them variously as “invisible workers” and “ghost workers,”¹³⁵ echoing the Supreme Court’s concern in *Plyler* about a “shadow population” that “raises the specter of a permanent caste.”¹³⁶ As Mae Ngai notes, an “illegal alien,” like a specter, is “a body stripped of individual personage.”¹³⁷ In other words, undocumented immigrants occupy a disembodied presence by providing desired labor while remaining undesirable as work-

¹³² Greenberg & Martin, *supra* note 131, at 17-18.

¹³³ Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L. J. 458, n. 243 (2009).

¹³⁴ Bill Ong Hing, *Reason Over Hysteria – Keynote Essay*, 12 LOY. J. PUB. INT. L. 275, 293 (2011).

¹³⁵ See generally Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT’L & COM. REG. 483 (2002); Ruben Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J. L. REFORM 737, 738 (2003) (describing the decision in Hoffman Plastics as “a crushing blow to the millions of ‘ghost workers’ who toil in the shadows of our economy—always present and yet denied existence by law and courts”); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995); Rene Galindo, *Embodying the Gap Between National Inclusion and Exclusion: The ‘Testimonios’ of Three Undocumented Students at a 2007 Congressional Hearing*, 14 HARV. LATINO L. REV. 377, 378 (2011) (stating that self-identifying as undocumented not only “interrupts the ‘regime of enforced invisibility’ . . . [but also] challenges their metaphoric and political confinement to the ‘shadows of society’ where undocumented immigrants are expected to live anonymous and depersonalized lives as laborers without names, faces, or voices”).

¹³⁶ *Plyler v. Doe*, 457 U.S. 202, 218-19 (1982).

¹³⁷ NGAI, *supra* note 106, at 61; see also Johnson, *supra* note 126, at 267-70 (discussing how the term “alien” depersonalizes undocumented immigrants by casting them as *nonpersons* and not merely *noncitizens*).

ers;¹³⁸ their relegation to the sphere of work and exclusion from the realm of rights undermines common conceptions of personhood.¹³⁹

The intense depersonalization of immigrants, especially undocumented immigrants, cultivates and compounds bias, undermining social cohesion: “[s]ocial interaction that is grounded in depersonalized perceptions may result in prejudice, discrimination, and intergroup conflict.”¹⁴⁰ Moreover, the values of liberty, equality and democracy derive not from the concept of citizenship, but from the concept of personhood.¹⁴¹ Denying the personhood of undocumented immigrants therefore provides a foundation for severing fundamental rights.

2. *From Mass Deportation to Prosecutorial Discretion: Entering a New Era of Individualized Enforcement?*

Recent policy changes by the Obama administration instructing ICE to exercise greater prosecutorial discretion represents a positive step forward towards the individualization of undocumented immigrants and can help promote decategorization. On June 30, 2010, the Director of ICE, John Morton, issued a memorandum setting forth the priorities for the apprehension, detention and removal of aliens.¹⁴² The memo noted that ICE has resources to remove only about 400,000 people per year, less than four percent of the estimated undocumented population.¹⁴³ Accordingly, the memo instructed ICE employees that the highest priority would be the removal of aliens who pose a danger to national security or a threat to public safety.¹⁴⁴ The next highest priorities would be “recent illegal entrants”¹⁴⁵ and “[a]liens who are fugitives or otherwise obstruct immigration controls”¹⁴⁶ – priorities that aimed to maintain the “integrity” of border enforcement efforts and the

¹³⁸ Michael Kearney, *Borders and Boundaries of State at the End of Empire*, 4 J. OF HIST. SOCIOLOGY, 52, 53-70 (1991). The *Plyler* court recognized this dichotomy in stating that undocumented aliens are “encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.” *Plyler v. Doe*, 457 US 202, 218-19 (1982). The Court’s opinion suggests that education can help restore personhood by allowing undocumented children to become “self-reliant and self-sufficient participants in society” through “individual achievement.” *Id.*

¹³⁹ Kearney, *supra* note 138.

¹⁴⁰ GAERTNER & DOVIDIO, *supra* note 77.

¹⁴¹ See Markus Dubber, *Citizenship and Penal Law*, 13 NEW CRIM. L. REV. 190, 195 (2008).

¹⁴² Memorandum from John Morton, Dir. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 29, 2010), *available at* <http://www.immilaw.com/FAQ/ICE%20prosecution%20priorities%202010.pdf>.

¹⁴³ *Id.* at 1.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2. The memo explained that “recent illegal entrants” include those who “recently violated immigration controls at the border, at ports of entry, or through the knowing abuse of the visa and visa waiver programs.” *Id.*

¹⁴⁶ *Id.* at 2. The memo explained that this group includes “aliens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls.” *Id.*

immigration adjudication processes.¹⁴⁷ While the memo provided that “[r]esources should be committed *primarily* to advancing [these] priorities,”¹⁴⁸ it also stated that “[n]othing in this memorandum should be construed to prohibit or discourage the apprehension, detention or removal of other aliens unlawfully in the United States.”¹⁴⁹

In December 2010, Congress failed to pass the DREAM Act, which would have created a path to citizenship for undocumented immigrants who entered the U.S. as children, graduated from high school, and completed two years of college or served two years in the military. Perhaps in response to public anger over the DREAM Act’s failure and the ongoing deportations of non-criminals, the Obama administration took steps to support implementation of ICE’s priorities. On March 2, 2011, ICE *reissued* its June 30, 2010 memorandum, a testament to the inefficacy of the first memo in changing operations on the ground.

Shortly thereafter, on June 17, 2011, ICE’s Director issued two new memoranda on the exercise of prosecutorial discretion. One memorandum generally addressed the exercise of prosecutorial discretion consistent with civil immigration priorities,¹⁵⁰ while the other focused specifically on prosecutorial discretion in cases involving the victims of crimes, witnesses and plaintiffs.¹⁵¹ The more general memo explained that “prosecutorial discretion is the authority of an agency . . . to decide to what degree to enforce the law against a particular individual” and provided a list of factors to consider.¹⁵² These factors include, but are not limited to, the individual’s length of residence in the U.S., circumstances of arrival, pursuit of education in the U.S., criminal history, immigration history, contributions to the community, family relationships, the likelihood of being granted temporary or permanent status, and cooperation with law enforcement.¹⁵³ The memo explained that ICE should evaluate the “totality of the circumstances” on a case-by-case basis, with no single factor being determinative.¹⁵⁴ The other memo, specifically addressing victims, witnesses, and plaintiffs, used much stronger lan-

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 3 (emphasis added).

¹⁴⁹ *Id.* at 3.

¹⁵⁰ Memorandum from John Morton, Dir. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

¹⁵¹ Memorandum from John Morton, Dir., Immigration and Customs Enforcement, Memorandum on Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

¹⁵² Morton, *supra* note 150, at 2, 4.

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.* In addition, the memo identifies “certain classes of individuals that warrant particular care,” such as veterans and members of the U.S. armed forces, long-time lawful permanent residents, minors and the elderly, individuals present in the U.S. since childhood, pregnant or nursing women, victims of certain crimes, and individuals with disabilities or serious health conditions. *Id.* at 5.

guage, stating that favorable exercise of discretion in these situations is usually appropriate absent “serious adverse factors.”¹⁵⁵

These memos, like their predecessors, did not result in any immediate, visible change in ICE’s operations on the ground.¹⁵⁶ The tide began to turn, however, on August 18, 2011, when the Obama administration publicly announced that it would review 300,000 cases currently pending in immigration courts and dismiss those that do not involve criminal convictions.¹⁵⁷ In particular, the administration indicated that it would stop the removal of long-time residents with no criminal history who entered the U.S. as children, who have family members in the military, or who have U.S. citizen children or spouses.¹⁵⁸ We have yet to see how this new policy will play out after years of disconnect between the policies that ICE articulates at the highest levels and its local operations. Within a week of President Obama’s announcement, however, ICE began to dismiss removal cases against certain individuals with no criminal record.¹⁵⁹ It is still unclear whether ICE will also exercise discretion in cases of individuals with minor or very old convictions and strong equities.

The new policy of prosecutorial discretion recognizes that membership in U.S. society is a matter of degree, rather than an in/out dichotomy. It also departs from other enforcement measures by blurring rather than brightening the line between “legal” and “illegal” status insofar as it suggests that certain undocumented individuals should be allowed to remain here. While the exercise of discretion does not confer any legal status to these individuals, it helps deflate the concept of “illegal” personhood by distinguishing civil immigration violations from criminal conduct. Moreover, by requiring ICE to engage in case-by-case evaluations of people currently in removal proceedings, the new policy demands personalization of the process through consideration of individual equities. In other words, the new policy should help prevent undocumented immigrants who do not qualify for one of the limited forms of relief from drowning in the collective anonymity of summary removal.

Studies suggest that decategorization often works well as an initial approach in situations of overt hostility among groups.¹⁶⁰ Given simmering anti-immigrant sentiments, a policy urging prosecutorial discretion represents a good starting point for shifting attitudes towards undocumented immigrants. By emphasizing individual variation within that outgroup and highlighting the ways in which many members of the outgroup actually re-

¹⁵⁵ Morton, *supra* note 151, at 2.

¹⁵⁶ See Vazquez, *supra* note 39, at 661-64 (discussing how ICE primarily targets individuals with no criminal history).

¹⁵⁷ Julia Preston, *U.S. Issues New Deportation Policy’s First Reprieves*, N.Y. TIMES, Aug. 22, 2011.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ E.g., John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, in HANDBOOK OF SOCIAL PSYCHOLOGY 1102 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey, eds., 2010); T. F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. OF PSY. 65-85 (1998).

semble members of the ingroup (e.g., by drawing attention to undocumented immigrants who entered the U.S. as children and have life experiences that parallel those of people born in the U.S.), it can initiate the process of decategorization.

Of course, while the new policy blurs some boundaries, it also highlights others, such as the boundary between the categories of “criminals” and “non-criminals.” Indeed, one might argue that the new policy deploys criminality, rather than legal status, as the primary concept for marking the boundaries of social belonging. In this respect, the policy reflects a “contractarian notion of legal personhood . . . predicated on the view that only those who abide by the law can be considered citizens.”¹⁶¹ Such treatment of criminals as social outcasts not only conflicts with research on the normalcy of crime,¹⁶² but also ignores the tenuous line between criminal and non-criminal conduct.¹⁶³

In the immigration context, this line is particularly hazy, as the majority of federal prosecutions today are for immigration violations, primarily against Mexicans and Central Americans who have no prior criminal record.¹⁶⁴ The government has also creatively employed criminal laws such as the federal identity theft statute, which carries a two-year minimum sentence, to prosecute undocumented immigrants who use Social Security numbers or green cards that belong to other people.¹⁶⁵ Moreover, programs involving cooperation between ICE and local law enforcement have resulted largely in the prosecution of “those who have the misfortune of ‘driving while brown,’” leading to high rates of convictions for offenses like driving

¹⁶¹ Lucia Zedner, *Security, the State, and the Citizen: The Changing Architecture of Crime Control*, 13 *NEW CRIM. L. REV.* 379, 390 (2010). Zedner points out that this concept derives from Rousseau, who reasons: “since every wrongdoer attacks the society’s law, he becomes by his deed a rebel and a traitor to the country; by violating its law, he ceases to be a member of it.” JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 79 (M. Cranston trans., Penguin Books 1968).

¹⁶² Lawrence E. Cohen, *The Normalcy of Crime: From Durkheim to Evolutionary Ecology*, in *CRIMINAL JUSTICE: CONTEMPORARY LITERATURE IN THEORY AND PRACTICE* 113 (Marilyn McShane & Frank P. Williams, III eds., 1997) (arguing that “most crime is best understood as normal behavior” and extending Durkheim’s insights by applying an evolutionary ecological framework).

¹⁶³ See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 423 (4th ed. 2006) (describing the difficulty in “drawing a line between noncriminal preparation and criminal attempt”); Paul H., Robinson, Owen D. Jones & Robert Kurzban, *Realism, Punishment and Reform*, 77 *U. CHI. L. REV.* 1611, 1619 (2010) (discussing studies showing that “people can agree on the relative blameworthiness of different offense cases yet disagree as to where on the continuum of blameworthiness the line should be drawn marking off the minimum point for criminal liability and punishment”).

¹⁶⁴ See *New Data on Federal Court Prosecutions Reveal Non-Violent Immigration Prosecutions Up*, Immigr. Pol’y Center, <http://www.immigrationpolicy.org/just-facts/new-data-federal-court-prosecutions-reveal-non-violent-immigration-prosecutions>; see also Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law Into the Criminal Justice System*, 54 *HOW. L. J.* 639, 663 (2010).

¹⁶⁵ See *The Supreme Court 2008 Term Leading Cases, Mens Rea Requirement*, 123 *HARV. L. REV.* 312, 312-13 (2009). In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Supreme Court limited the range of conduct within the statute’s reach by requiring defendants to have known that the identity belonged to another person.

without insurance and driving without a license.¹⁶⁶ In fact, traffic offenses and immigration violations currently represent the second and third largest criminal categories for removal, after drug offenses.¹⁶⁷ Thus, the failure to apply prosecutorial discretion to people with criminal records would still result in the removal of a large number of non-violent criminals who pose no threat to public safety and whose convictions remain closely connected to their lack of legal status.¹⁶⁸

Overall, the new policy on prosecutorial discretion promises to erode boundaries based on legal status, but its focus on criminality urges caution. Depending on how ICE interprets and applies the new policy, it may indeed introduce a level of individualized analysis to immigration proceedings that will prevent lumping people into an elusive category called “illegal aliens.” On the other hand, it may also lead to grouping those with any kind of conviction into a category called “criminals,” ignoring how undocumented immigrants are uniquely vulnerable to certain kinds of criminal charges, based on both their lack of legal status and their ethnicity or race.¹⁶⁹ If the latter occurs, the policy may succeed in reducing bias towards one group while simultaneously increasing bias towards another, overlapping group.

Increased prosecutorial discretion represents one step towards decategorization. Other reforms that would help promote decategorization include: reigning in the criminal grounds for inadmissibility and removal, especially the sweeping definition of “aggravated felony”; expanding the scope of discretionary relief available to people in removal proceeding; limiting or eliminating mandatory detention, which seriously interferes with the ability to apply for relief, and restoring judicial review.

B. Recategorization

Unlike decategorization, which attempts to reduce intergroup bias by eroding existing group boundaries and thereby promoting interactions as individuals rather than as group members, recategorization involves combining members of different groups into a single, more inclusive group and thereby creating a common ingroup identity.¹⁷⁰ Once we perceive outgroup

¹⁶⁶ Vazquez, *supra* note 39, at 662. In North Carolina, for example, 56% of the 3,000 noncitizens placed in removal proceedings in 2008 as a result of 287(g) agreements were charged with violations of motor vehicle laws. *Id.*

¹⁶⁷ *Id.* at 665.

¹⁶⁸ *Id.* Vazquez notes that none of the crimes that “might truly be considered violent or dangerous, such as terrorism, murder or sexual assault . . . appear to be a leading or even considerable cause of removal.” *Id.*

¹⁶⁹ Racial profiling has been one of the most controversial aspects of cooperation between immigration and law enforcement authorities. In one Alabama study, for example, Latinos were just 2% of the population but comprised 58% of the drivers stopped by police officers pursuant to 287(g) agreements. Vazquez, *supra* note 39, at 662-63.

¹⁷⁰ Adam R. Pearson, John F. Dovidio & Samuel L. Gaertner, *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314 (2009) (showing that the salience of a common ingroup identity can inhibit activation of explicit bias); J.J. Van Bavel and W. A. Cunningham, *Self-Categorization with a Novel Mixed-*

members as ingroup members, they receive the benefits of ingroup status, including positive thoughts, feelings and behaviors.¹⁷¹ Creating a common “superordinate” group identity therefore helps redirect the cognitive processes that previously led to favoritism of ingroup members toward former outgroup members.

The recategorization strategy suggests that creating a common “American” identity should help reduce intergroup bias.¹⁷² In the case of European immigrants to the U.S., such recategorization actually occurred. While southern and eastern Europeans, as well as Catholics and Jews, faced intense discrimination at various points in U.S. history, a legal process that ultimately categorized them all as racially “White” helped them forge a common “American” identity.¹⁷³ Unfortunately, the construction of this new ingroup was based, in large part, on the exclusion of nonwhite outgroups. At different and overlapping intervals, African Americans,¹⁷⁴ Native Americans,¹⁷⁵ and Asians¹⁷⁶ all faced bars to U.S. citizenship. As Ian Haney-López and others have aptly demonstrated, during the late nineteenth century and the first part of the twentieth century, courts defined American identity largely by delineating the boundaries of Whiteness.¹⁷⁷ Even when the government uniformly granted Native Americans citizenship in 1924, the special naturalization oaths that they had to take required them to embrace new identities as *White* men and women.¹⁷⁸

Race Group Moderates Automatic Social and Racial Biases, 35 PERSONALITY AND SOC. PSYCHOL. BULLETIN 321-35 (2009) (showing that a common ingroup identity can inhibit activation of implicit bias).

¹⁷¹ Dovidio et al., *supra* note 86, at 250.

¹⁷² Jean S. Phinney & Linda L. Alipuria, *Multiple Social Categorization and Identity Among Multiracial, Multiethnic, and Multicultural Individuals: Processes and Implications*, in MULTIPLE SOCIAL CATEGORIZATION: PROCESSES, MODELS AND APPLICATIONS 232 (Richard J. Crisp & Miles Hewstone, eds., 2006) (“An American identity has the potential of being a superordinate category that can serve to reduce ethnic and racial tensions among diverse ethnic and racial categories.”).

¹⁷³ IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 74 (2006); Cheryl I. Harris, *Whiteness As Property*, 105 Harv. L. Rev. 1709, 1742-43 (1993) (explaining that an “amalgamation of various European strains into an American identity was facilitated by an oppositional definition of Black as ‘other’”).

¹⁷⁴ The Fourteenth Amendment to the U.S. Constitution granted citizenship to former African slaves in 1868.

¹⁷⁵ Congress granted full citizenship to all Native Americans in 1924. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924), current version at 8 U.S.C. § 1401(b) (2000)).

¹⁷⁶ See, e.g., Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed by Act of Dec. 17, 1943, ch. 344, 57 Stat. 600); Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952) (excluding Asian Indians and all other inhabitants of a “barred Asiatic zone” extending from Afghanistan to the Pacific, with the exception of Japan); Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974) (barring Mongolian prostitutes); *United States v. Thind*, 261 U.S. 204 (1923) (upholding exclusion of Asians from naturalization).

¹⁷⁷ See generally LÓPEZ, *supra* note 173; NGAI, *supra* note 106.

¹⁷⁸ Department of the Interior, *Ritual on Admission of Indians to Full American Citizenship* 1924 (“You have shot your last arrow. That means that you are no longer to live the life of an Indian. You are from this day forward to live the life of the white man.”) (on file with author). Thanks to Professor Gloria Valencia-Weber for providing a copy of this oath.

While Latinos never faced categorical exclusion from U.S. citizenship and were never defined as nonwhite by the courts,¹⁷⁹ they (in particular Mexicans) became “othered” through their construction as prototypical “illegal aliens” and through their historical treatment as nonwhites.¹⁸⁰ During segregation, states such as Texas and Arkansas categorized Mexicans as “colored” and barred them from “Whites only” areas, which is why Mexico refused to send *bracero* workers to those states.¹⁸¹ The disjunction between Latino and American identity also became apparent through the U.S. government’s repeated failure to distinguish between Mexican Americans (i.e. U.S. citizens of Mexican descent) and undocumented immigrants during mass deportation campaigns, such as the deportation of hundreds of thousands of Mexicans and Mexican Americans in the 1930s and during Operation Wetback in 1954, much like the government failed to distinguish between Japanese immigrants and Japanese Americans during World War II.

Overt discrimination ended with the Immigration Act of 1965, which repealed the national quota system and opened the door to U.S. citizenship to immigrants from all countries, but by that time the association between American identity and Whiteness was deeply entrenched. This association, which persists until today, presents a serious obstacle to reducing bias through a recategorization strategy that is based on bringing immigrants into the fold of American identity. Another serious challenge involves increased bias against those groups who remain excluded from a superordinate American identity even after recategorization, a problem that has plagued past legalization programs. Each of these challenges is discussed in greater detail below.

1. *The Challenge of Creating An Inclusive “American” Identity*

Recent studies in implicit social cognition “reveal a very consistent and robust” association between American identity and Whiteness, which Thierry Devos and Mahzarin R. Banaji have called the “American = White effect.”¹⁸² In a series of experiments that investigated “the degree to which the quality of ‘American’ is given to Americans of varying ethnic origin,” Devos and Banaji found that White Americans, Asian Americans and African Americans who outwardly endorse egalitarian beliefs and value a non-

¹⁷⁹ To this day, the U.S. census does not include “Latino” as a racial group, indicating instead that Latinos can be of any race.

¹⁸⁰ NEWTON, *supra* note 21, at 137-62.

¹⁸¹ NGAI, *supra* note 106, at 147.

¹⁸² Thierry Devos & Mahzarin R. Banaji, *American=White?*, 88 J. OF PERSONALITY & SOC. PSY. 447, 453 (2005) (emphasis added); *see also* Thierry Devos & Leakhena Heng, *Whites Are Granted the American Identity More Swiftly than Asians: Disentangling the Role of Automatic and Controlled Processes*, 40 SOCIAL PSYCHOLOGY 199 (2009) (confirming the American=White effect utilizing a sequential priming technique to minimize the influence of deliberate cognitive processes).

exclusory definition of American identity still associate being “American” with being “White.”¹⁸³

While participants *explicitly* purported to view African Americans as equally “American” as White Americans, measures of *implicit* bias indicated that they perceived African Americans as *less* American than Whites.¹⁸⁴ With respect to Asian Americans, the results were even more striking, as participants *both implicitly and explicitly* perceived Asian Americans known to be U.S. citizens by birth as “less American than both Whites and African Americans.”¹⁸⁵ Devos and Banaji’s results revealed that Asian Americans not only remain perpetual foreigners in the eyes of Whites, but also in the eyes of other Asian Americans and African Americans, as *all three groups* associate “White” and “American” more easily than “Asian” and “American.”¹⁸⁶

This study and others have found that the American = White effect holds up even when comparing celebrities known to be foreign and White (e.g. Gerard Depardieu or Kate Winslet) with celebrities known to be American and Asian (e.g. Connie Chung or Lucy Liu).¹⁸⁷ Although the participants consciously knew that the White celebrities were foreign, they still implicitly associated the White celebrities more strongly with the concept of American. Thus, the study demonstrated beyond doubt that “Asian Americans remain perpetual foreigners in the eyes of American society despite their American nationality.”¹⁸⁸ This same phenomenon has been demonstrated with respect to African Americans through experiments showing that participants more easily associate Hillary Clinton with being “American” than President Barack Obama.¹⁸⁹ In fact, participants even associated former

¹⁸³ Devos & Banaji, *supra* note 182.

¹⁸⁴ Even in athletics, an area where the researchers hypothesized that African Americans would represent better exemplars of the category “Americans,” this proved true only for explicit attitudes, but implicitly participants still associated White athletes more than Black athletes with the concept of “American.” *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Social dominance theory may help explain why Asian Americans would view themselves as less American than Whites, as it posits that all groups, even disadvantaged ones, tend to legitimize existing social hierarchies, even at the expense of their own group’s interests. Devos & Banaji, *supra* note 182; see also Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 759-60 (1991) (“The notion that the world is just, and that existing inequalities are deserved or desired, plays a large role in forming preferences and beliefs.”).

¹⁸⁷ Devos & Banaji, *supra* note 182, at 456; see also Thierry Devos & Debbie S. Ma, *Is Kate Winslet More American Than Lucy Liu? The Impact of Construal Processes on the Implicit Ascription of a National Identity*, 47 BRIT. J. SOCIAL PSY. 191, 206 (2008) (finding that even a celebrity who is a White foreigner, such as Kate Winslet, is perceived as more American than an Asian American celebrity, such as Lucy Liu).

¹⁸⁸ Nilanjana Dasgupta, *Color Lines in the Mind: Implicit Prejudice, Discrimination, and the Potential for Change*, in TWENTY-FIRST CENTURY COLOR LINES: MULTIRACIAL CHANGE IN CONTEMPORARY AMERICA 103 (Andrew Grant-Thomas & Gary Orfield eds., 2009); see also Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 33-38 (discussing how Asian-American citizens are treated as “foreigners”).

¹⁸⁹ Kyle Jones, Dara McIntyre, Travis Gaffud, Debbie S. Ma, & Thierry Devos, *Is Barack Obama less American than Hillary Clinton?*, Poster presented at the 88th Annual Convention of the Western Psychological Association, Irvine, CA (2008), available at http://www-rohan.sdsu.edu/~tdevos/thd/Obama_Clinton_WPA08.pdf.

*British Prime Minister Tony Blair with American identity more readily than Barack Obama.*¹⁹⁰

Another study by Thierry Devos, Kelly Gavin, and Francisco J. Quintana demonstrated the same effect with respect to Latinos, showing that both Caucasian Americans and Latino Americans implicitly and explicitly perceive Latino Americans as *less American* than Caucasian Americans, although the association between Caucasian and American identity was weaker among Latino Americans than Caucasian Americans.¹⁹¹ This study, like the others, “suggests that a very basic right to a national identity is not equally accessible to all Americans,” as “national identity is more readily granted to members of the dominant ethnic group than to members of an ethnic minority.”¹⁹²

Each of these studies points to ingroup projection as a central challenge to recategorization based on American identity. Ingroup projection describes the propensity of individuals to view their ingroup as prototypical of a superordinate category.¹⁹³ Groups that enjoy more power or higher status are the ones likely to be seen as prototypical of a superordinate category, as opposed to lower status groups.¹⁹⁴ When norms associated with the ingroup become associated with the superordinate group, ingroup members will perceive outgroup members who do not exhibit these norms as deviants from the superordinate group and will discriminate against them in order to maintain a positive ingroup stereotype.¹⁹⁵ Since the motive for discrimination in this situation is to protect positive ingroup stereotypes, rather than to preserve distinctiveness, ingroup projection appears only “when there is high identification at both the subgroup and superordinate levels of categorization.”¹⁹⁶

In explaining their results regarding perceptions of African Americans and Asian Americans, Devos and Banaji postulated that “White Americans

¹⁹⁰ Thierry Devos, Debbie Ma, & Travis Gaffud, *Is Barack Obama American Enough To Be The Next President? The Role of Ethnicity and National Identity in American Politics*, Poster Presentation at the Annual Meeting of the Society of Personality and Social Psychology, Albuquerque, New Mexico (2008); see also Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 Fla. St. U. L. Rev. 659, 659 (2010) (arguing that “the 2008 election calls for enhancing and maintaining efforts to ensure that civil rights laws address less virulent, but persistent, forms of racism that persist in America today”).

¹⁹¹ Thierry Devos, Kelly Gavin, & Francisco J. Quintana, *Say “Adios” to the American Dream? The Interplay Between Ethnic and National Identity Among Latino and Caucasian Americans*, 16 CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCHOL. 37 (2010).

¹⁹² *Id.*

¹⁹³ See Michael Wenzel et al., *Superordinate Identities and Intergroup Conflict: The Ingroup Projection Model*, 18 EUR. REV. SOCIAL PSY. 331, 342-47 (2007); Ulrike Weber, Amélie Mummendey & Sven Walzdus, *Perceived Legitimacy of Intergroup Status Differences: Its Prediction By Relative Ingroup Prototypicality*, 32 EUR. J. SOCIAL PSY. 449, 452 (2002).

¹⁹⁴ Sven Walzdus et al., *Of Bikers, Teachers and Germans: Groups’ Diverging Views About Their Prototypicality*, 43 BRITISH J. SOCIAL PSY. 385, 396-98 (2004).

¹⁹⁵ Crisp, *supra* note 17, at 516; see also Gaertner, Dovidio & Houlette, *supra* note 17, at 537 (“Members of the other subgroup may be seen not only as inferior examples but also as deviants who justly deserve unequal and possibly harsh treatment.”).

¹⁹⁶ Crisp, *supra* note 17, at 516.

are construed as prototypical exemplars of the category *American*.”¹⁹⁷ Likewise, Devos, Gavin and Quintana reasoned that “Caucasian Americans are viewed as being more prototypical of the American identity than Latino Americans,” as expected under the theory of ingroup projection, due to differences in power and status.¹⁹⁸ In short, “some individuals are relegated at the margin of the American identity because their group does not fit its prototypical definition.”¹⁹⁹

Additional studies show that minorities, including Asian Americans, Latinos and African Americans, are often aware of their perpetual foreigner status,²⁰⁰ and that such awareness corresponds to greater tension between their ethnic and national identities,²⁰¹ a lower sense of belonging,²⁰² and, to a lesser extent, psychological problems, such as depression among Latinos and lower hope or life satisfaction among Asian Americans.²⁰³ These results suggest that ethnic minorities’ “awareness of being perceived as not American may ultimately inhibit their ability to feel like they belong in America or lead to a relative dis-identification with mainstream American culture,” having “implications for [their] participation in civic life, including voting, volunteerism, military service, and other aspects of citizen involvement, all of which are bolstered by a sense of identification with the group (in this case, the American identity).”²⁰⁴ If minority groups do not identify as Americans because of their experiences of exclusion, they are even more likely to

¹⁹⁷ Devos & Banaji, *supra* note 182, at 464.

¹⁹⁸ Devos, Gavin & Quintana, *supra* note 191, at 46. They noted, however, that “Caucasian Americans claim a greater relative prototypicality than they are granted by Latino Americans.” *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Que-Lam Huynh, Thierry Devos, & Laura Smalarz, *Perpetual Foreigner in One’s Own Land: Potential Implications For Identity and Psychological Adjustment*, 30 J. SOC. AND CLINICAL PSYCHOL. 133, 154 (2011); see also S. Cheryan & B. Monin, *Where Are You Really From?: Asian Americans and Identity Denial*, 89 J. PERSONALITY & SOC. PSY. 717-30 (2005) (finding that Asian Americans were aware of being denied an American identity by others); K.M. Barlow, D.M. Taylor, W.E. Lambert, *Ethnicity in America and Feeling “American,”* 134 J. PSY. 581-600 (2000) (finding that African American and Cuban American women reported feeling excluded from the national category by European Americans).

²⁰¹ Huynh et al., *supra* note 200, at 155; see also V. Benet-Martinez & J. Haritatos, *Bicultural Identity Integration (BII): Components and Psychosocial Antecedents*, 73 J. PERSONALITY 1015, 1039-40 (2005) (finding that perceived discrimination among Chinese Americans predicted a greater sense of conflict between ethnic and national identities).

²⁰² Huynh et al., *supra* note 200, at 155; see also S. Levin, C. Van Laar, & W. Foote, *Ethnic Segregation and Perceived Discrimination in College: Mutual Influences and Effects on Social and Academic Life*, 36 J. APPLIED SOCIAL PSYCHOL. 1471-1501 (2006) (finding a relationship between perceived discrimination and a lower sense of belonging among Latino college students).

²⁰³ Huynh et al, *supra* note 200, at 156; see also P.R. Smokowski, & M.L. Bacallao, *Acculturation, Internalizing Mental Health Symptoms, and Self-Esteem: Cultural Experiences of Latino Adolescents in North Carolina*, 37 CHILD PSYCHIATRY AND HUMAN DEV. 273, 287 (2007) (finding that perceived discrimination related to higher levels of internalizing problems and lower self esteem among Latino adolescents in North Carolina).

²⁰⁴ Huynh et al, *supra* note 200, at 155-56.

be seen as perpetual foreigners, creating a vicious cycle of exclusion and alienation from American identity.²⁰⁵

These studies demonstrating the lasting influence of the association between American identity and Whiteness, as well as its negative impact on how minorities feel about themselves, indicate that recategorization as “Americans” will not be an easy path to reducing intergroup bias: “To the extent that members of minority ethnic groups feel that ‘America’ does not include them, the concept is of little use as an overarching category.”²⁰⁶ Moreover, “[w]hen members of subordinate groups are not equal participants in the society, attempts to include them in the superordinate category of the country as a whole are unlikely to contribute to better intergroup relations.”²⁰⁷

As Bill Ong Hing warned nearly two decades ago, “the continued definition of American in Euro-centric terms is fraught with danger,” because it cultivates resentment of immigrants, facilitates scapegoating people of color, reinforces racial and ethnic epithets, and leads to hate violence.²⁰⁸ Devos and Banaji, from the far field of implicit social cognition, now echo Hing’s warning, noting that the American = White effect may foster “‘exclusionary patriotism,’” whereby stronger American identity corresponds with “antagonism toward ethnic minorities” and their exclusion from the national identity.²⁰⁹

How, then, do we achieve a more expansive definition of American identity, one based on “[t]he concept . . . of addition rather than omission”?²¹⁰ One helpful fact is that ingroup projection is not an all-or-nothing phenomenon, as “the extent to which projection occurs varies, depending upon the inter-related characteristics of the multiple identities involved.”²¹¹ Accordingly, as the racial and cultural composition of the United States changes (and it is changing rapidly towards a “minority majority” country),²¹² the categories of “White” and “American” may become less and less

²⁰⁵ Miles Hewstone et al., *Multiple Soc. Categorization: Integrative Themes and Future Research Priorities*, in *MULTIPLE SOCIAL CATEGORIZATION* 293 (2006) (“If the minority group do[sic] not *identify* with the host group, they are unlikely to see, or be seen, [sic] by the host group as a partial ingroup member, or as having a superordinate common identity in addition to their individual group memberships . . . placing limits on the impact of integration for intergroup relations.” (emphasis added)).

²⁰⁶ Phinney & Alipuria, *supra* note 172, at 232.

²⁰⁷ *Id.*

²⁰⁸ Hing, *Beyond the Rhetoric of Assimilation*, *supra* note 15, at 906-07.

²⁰⁹ Devos & Banaji, *supra* note 182, at 464.

²¹⁰ Hing, *Beyond the Rhetoric of Assimilation*, *supra* note 15, at 907.

²¹¹ Crisp, *supra* note 17, at 516.

²¹² Christopher Edley Jr., Forward, in *TWENTY-FIRST CENTURY COLOR LINES*, *supra* note 188, at viii; see also Phinney and Alipuria, *supra* note 172, at 224-25 (describing how the number of interracial persons in the U.S. is rising, especially among the younger population, making it increasingly difficult to assign people to a single group), 231 (discussing how 90% of African American and Mexican American adolescents in a 1997 study considered themselves bicultural). The increasing number of multiracial and multicultural individuals in the U.S. can help “break down the distances and tensions among preexisting groups and improve intergroup relations.” *Id.* at 234. By expressing their multiple identities, these individuals

correlated, causing the ingroup projection effect to fade away. In other words, an “American” superordinate identity—or dual identities such as “Chinese American” and “Mexican American”—will be effective at reducing intergroup bias *to the extent* that being “American” becomes unrelated to Whiteness.²¹³

Another reason for optimism relates to research indicating that the American = White effect can be modified through changes in context. While the American = White effect is normally quite strong, it can be varied by manipulating the information available about the relevant subgroups.²¹⁴ Specifically, *positive* portrayals of the non White subgroup (in this experiment, African Americans) leads to their inclusion in White Americans’ conceptualizations of the category “American,” thereby reducing the American = White effect.²¹⁵ Conversely, *negative* portrayals of the non-White subgroup leads to their exclusion from White Americans’ conceptualization of “American,” thereby increasing the American = White effect.²¹⁶ Thus, the inclusion or exclusion of a group from a superordinate category will depend, at least in part, on how favorably the group is portrayed.²¹⁷ Consequently, immigration reforms that help change and improve the context in which immigrant minorities are seen—for example, by preventing their detention and deportation and by increasing their opportunities for education and employment—can play an important role in eroding the American = White effect. Moreover, once a minority group is included in the “American” superordinate group (e.g. through the spread of enough favorable information), the “American” identity will amplify the importance of the favorable information, increasing positive evaluations and behavior towards the minority group and reducing reliance on stereotypes.²¹⁸

The importance of context in moderating the ingroup projection effect is confirmed by a study examining how Italians and Germans relate to a “European” superordinate identity.²¹⁹ This study found that “changing the intergroup context had a strong impact on the features associated with the superordinate category.”²²⁰ For example, in the context of German and Italian intergroup relations, Germans spontaneously projected traits such as “organized” and “disciplined” (which are stereotypically associated with

“may eventually influence others to see that the boundaries and categories that have defined American society are more fluid than has been assumed.” *Id.*

²¹³ See Crisp, *supra* note 17, at 516 (explaining that when categories are uncorrelated, “there is no way that one can be seen as normative of the other and no way that someone could perceive one of their groups as representative of the other”).

²¹⁴ Robert J. Rydell & David L. Hamilton, Thierry Devos, *Now They Are American, Now They Are Not: Valence As A Determinant of the Inclusion of African Americans in the American Identity*, 28 SOC. COGNITION 161, 175 (2010).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 176.

²¹⁸ *Id.* at 176-77.

²¹⁹ Mauro Bianchi et al., *What Do You Mean By “European”? Evidence of Spontaneous Ingroup Projection*, 36 PERSONALITY AND SOC. PSYCHOL. BULLETIN 960, 971 (2010).

²²⁰ *Id.* at 970.

German identity and contrast with stereotypes about Italian identity) onto the superordinate European identity.²²¹ In the context of British and German relations, however, Germans did not project these same traits onto European identity. Instead, they spontaneously projected traits such as “easygoing” and “sociable” that more clearly counter stereotypes about British identity.²²² By demonstrating shifts in the traits projected onto the superordinate identity, these results provide additional evidence that the association between “White” and “American” can change, depending on the context.

2. *Past Legalization Programs as Partial Attempts at Recategorization*

Thus far, attempts at recategorization through immigration reforms – other than through simple repeals of discriminatory laws – have been extremely limited in nature. While Congress has adopted various legalization programs over the years, these usually apply only to select nationalities and provide special types of protection rather than representing a more generalized effort to expand the reach of American identity.²²³ Most are also relatively small in scale, given the total size of the undocumented population.²²⁴ During the course of U.S. history, Congress has passed only two *general* legalization programs – the Registry Act of 1929 and the Immigration Control and Reform Act of 1986 – both of which proved shortsighted in their exclusion of large numbers of people and failed to achieve recategorization.

The Registry Act of 1929 permitted legalization of those who entered before July 1, 1921, demonstrated good moral character, and paid \$20.²²⁵ In passing this law, Congress aimed to assist members of its White ingroup whose unlawful presence in the U.S. was characterized as a “mere . . . technical irregularity.”²²⁶ The law “did not formally favor Europeans over Mexicans,” but 80 percent of the 115,000 immigrants who registered under the Act between 1930 and 1940 were European or Canadian.²²⁷ Although

²²¹ *Id.* at 969-71.

²²² *Id.*

²²³ See generally Donald M. Kerwin, Migration Policy Institute, Policy Brief, “More Than IRCA: US Legalization Programs and the Current Policy Debate,” December 2010, available at <http://www.migrationpolicy.org/pubs/legalization-historical.pdf>.

²²⁴ For example, the Nicaraguan Adjustment and Central American Relief Act (NACARA) helped 67,092 people adjust their status to permanent residents between 1999 and 2009; the Haitian Refugee Immigration Fairness Act (HRIFA) helped 30,476 people adjust status during the same period; and the Chinese Student Protection Act of 1992 helped 53,088 people adjust status between 1993 and 2009. In addition, 91,575 parolees of Soviet/Indochinese origin became permanent residents between 1991 and 2009. The largest special program for a particular national group is for Cuban refugees; this program helped 405,787 Cubans adjust status between 1986 and 2000, as well as 29,812 of their non-Cuban spouses and children. *Id.* at 12 (Appendix).

²²⁵ NGAI, *supra* note 106, at 82.

²²⁶ *Id.*

²²⁷ *Id.*

“many Mexicans qualified for an adjustment of status under the Registry Act [] few knew about it, understood it, or could afford the fee.”²²⁸

Since 1929, Congress has twice advanced the date of entry to qualify for registry, first in 1939 to include those who entered before June 28, 1940 and later in 1986 as part of the Immigration Reform and Control Act (IRCA) to include those who entered before January 1, 1972. Each time the date advanced, bursts of legalization occurred followed by periods of decline. About 200,000 people legalized their status through “registry” between 1929 and 1945, with the number peaking in 1943, and another 50,000 legalized their status during the two years following IRCA.²²⁹ Approximately 72,000 people total legalized their status through “registry” between 1986 and 2009.²³⁰ Since Congress has never passed legislation to automatically advance the registry at regular intervals, this program was not designed to achieve real recategorization and certainly did not have that effect, benefiting only a small fraction of the undocumented population.²³¹

By far, the largest legalization programs occurred under IRCA, which included a general legalization program that led to adjustment of status for one and a half million people between 1989 and 2009, as well as a legalization program for Special Agricultural Workers, which led to adjustment of status for another million during the same period.²³² Given the Census Bureau’s estimate that there were 3.5-5 million undocumented immigrants in the U.S. in 1980, about one-half to two-thirds of the undocumented population was legalized under IRCA.²³³ While the Congress that passed the Registry Act was concerned with helping Europeans and Canadians “regularize” their status, the years of Congressional debates leading up to IRCA were shaped by the influential 1981 report of the Select Commission on Immigration and Refugee Policy (SCIRP), which had found that “[t]he existence of a fugitive underground class is unhealthy for society as a whole and may contribute to ethnic tensions.”²³⁴

Of course, not everyone shared this concern. Senator Alan Simpson (R-Wyoming), for example, feared that legalizing so many immigrants would undermine social cohesion. Specifically, Senator Simpson stated:

If language and cultural separatism rise above a certain level, the unity and political stability of the nation will, in time, be seriously eroded. A common language and a core public culture of certain shared values, beliefs, and customs makes us distinctly “American.”²³⁵ Senator Simpson expressed special concern about the

²²⁸ *Id.*

²²⁹ Kerwin, *supra* note 223, at 4.

²³⁰ *Id.* at 12.

²³¹ *Id.* at 4.

²³² *Id.* at 12.

²³³ SUSAN F. MARTIN, A NATION OF IMMIGRANTS 203 (2011).

²³⁴ Select Commission on Immigration and Refugee Policy (1981) (cited in Martin, *supra* note 234, at 210).

²³⁵ HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES 54-55 (2001) (emphasis added and internal citation omitted).

number of immigrants “whose cultural background may seem *more different* or *more foreign* to the bulk of our people than have past immigrants seemed to the majority population at those times.”²³⁶

Ultimately, the law passed in 1986 followed the main recommendations of the SCIRP report, rather than Senator Simpson’s approach. Rather naively, IRCA attempted a one-time recategorization through a two-pronged approach that combined a legalization program with sanctions against employers who hired unauthorized workers. The idea was that this combination of policies would incorporate the undocumented immigrants already living within the U.S. and simultaneously shut the door to future illegal entries.

One of IRCA’s main flaws was that, like the Registry Act, it left out a large group of people. Its 1982 cut-off date for entry to the U.S. excluded a large percentage of the undocumented population,²³⁷ and it failed to include any special provisions for family members who did not independently qualify for legalization.²³⁸ A host of other factors imposed additional barriers to legalization under IRCA, including: disqualifying convictions;²³⁹ difficulty obtaining the necessary documentation to establish qualification; confusion about the legal requirements;²⁴⁰ inadequate information about the legalization program, especially for non-Hispanic communities;²⁴¹ poor planning and implementation of the program;²⁴² financial hardship caused by the non-waivable application fee;²⁴³ and fear of immigration authorities.²⁴⁴ Overall,

²³⁶ E. Midgley, *Comings and Goings in U.S. Immigration Policy*, in THE UNAVOIDABLE ISSUE 66 (D.G. Papademetriou & M.J. Miller, eds., 1983) (emphasis added).

²³⁷ HAYES, *supra* note 235, at 5-6. Congress adopted almost a five-year period (from the cut-off date of January 1, 1982 until November 6, 1986, when IRCA was passed). 8 U.S.C. § 1255a(a)(2)(B) (Supp. 1986).

²³⁸ MARTIN, *supra* note 233, at 215.

²³⁹ *Id.*

²⁴⁰ *Id.* The agency’s failure to set forth clear legal standards and its narrow interpretations of some of the statutory language led to two major class-action lawsuits that did not reach a settlement until 2004. Donald Kerwin & Charles Wheeler, The Center for Migration Studies, *The Case for Legalization, Lessons From 1986, Recommendations For the Future*, in ISSUES IN IMMIGR. 18 (2004).

²⁴¹ Kerwin & Wheeler, *supra* note 240, at 15 (stating that “most of the advertising about legalization targeted the Hispanic market, leaving non-Hispanics largely in the dark”); *see also id.* at 18 (noting that “a disproportionate percentage of Hispanics applied [for legalization compared to] other ethnic groups”).

²⁴² The INS had only “six months to plan, design and implement” the legalization program. MICHAEL C. LEMAY, ANATOMY OF A PUBLIC POLICY: THE REFORM OF CONTEMPORARY AMERICAN IMMIGRATION LAW 68 (1994). Consequently, numerous problems emerged during the implementation process, including long delays in setting up Qualified Designated Entities to assist people in applying for legalization, inaccurate interpretations of the rules, and “complaints that INS staff were ‘subjective,’ ‘rude,’ ‘racist,’ and ‘insensitive’ to clients.” HAYES, *supra* note 235, at 68. Moreover, since Congress failed to establish clear standards for obtaining QED status, many “*notarios*” and other for-profit consultants obtained QED status without necessarily having the qualifications to provide proper assistance. Kerwin & Wheeler, *supra* note 240, at 14.

²⁴³ Kerwin & Wheeler, *supra* note 240, at 16-17. The application cost \$185 for an adult and \$50 for a child, and had a family cap of \$420. *Id.*

²⁴⁴ *Id.* at 13.

“far fewer people applied for general amnesty than the four million the agency had anticipated.”²⁴⁵ Meanwhile, employer sanctions completely failed to stop more undocumented immigrants from entering the U.S., so the number of undocumented immigrants kept growing.²⁴⁶

In the wake of IRCA, immigration scholars such as Linda Bosniak predicted that the law’s effects would ultimately support the exclusion of undocumented immigrants rather than promote their membership in society: “[A]lthough the undocumented immigrant will remain among us, she will live and work within a shrinking sphere of membership. At the same time, her growing marginalization will serve to further fragment and stratify the larger membership community.”²⁴⁷ In particular, Bosniak recognized that the new rules under IRCA “promise[d] both to rearrange and to curtail the limited sphere of membership the undocumented immigrant enjoyed under the previous regime.”²⁴⁸ Michael Wishnie has expressed similar concerns about a legalization program, and has warned that, “one can expect that undocumented workers will face ever more onerous conditions, in even more isolated circumstances, and that the worst sweatshop employers will have an even deeper incentive to prefer such vulnerable workers over lawful U.S. workers, regardless of the possible civil penalty they may face.”²⁴⁹

Empirical studies have confirmed this perspective by showing that those who remained undocumented after IRCA were “in a more dispossessed and desperate state than prior to the implementation of IRCA.”²⁵⁰ Moreover, comparing undocumented immigrants with those who legalized their status under IRCA reveals significant gaps in education level, employment, shared living space and monthly income.²⁵¹ Undocumented immigrants who legalized their status earned more money, had fewer experiences of homelessness, and had more benefits, such as health insurance, a private retirement plan, and life insurance.²⁵² Those who remained undocumented not only had greater economic needs, but also had greater social needs, as illustrated by statistically significant differences in depression, stress, health, and marital and family relations.²⁵³ Thus, by leaving a large percentage of

²⁴⁵ *Id.* at 18.

²⁴⁶ *Id.* at 8; Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L. J. 1723, 1760 (2010).

²⁴⁷ Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1007 (1988).

²⁴⁸ *Id.* at 1019.

²⁴⁹ Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1460-61 (2008).

²⁵⁰ HAYES, *supra* note 235, at 126.

²⁵¹ *Id.* at 76-85.

²⁵² *Id.* at 91-93; Sherrie A. Kossoudji & Deborah A. Cobb-Clark, *Coming out of the Shadow: Learning about Legal Status and Wages from the Legalized Population*, 20 J. LAB. ECON. 598, 598 (2002) (finding that “[t]he wage penalty for being unauthorized is estimated to range from 14% to 24%” and that “[t]he wage benefit of legalization under IRCA was approximately 6%”).

²⁵³ HAYES, *supra* note 235, at 88-89.

the undocumented population out of its legalization program, IRCA contributed to the creation of a new, disadvantaged subclass.

The experience of IRCA and warnings of immigration scholars such as Bosniak and Wishnie stress that legalization is not a clear path to recategorization. If improperly implemented or combined with policies that further stigmatize the remaining undocumented population, a legalization program may even have the opposite effect of increasing category salience and intergroup bias. Whenever certain subgroups are recategorized as part of a superordinate identity, other subgroups will inevitably be left out.²⁵⁴ Indeed, U.S. history is replete with examples of situations where extending membership to one group led to stigmatization of another group.²⁵⁵

Given that recategorization often creates new outgroups, the broader the reach of any proposed legalization program, the better. Due to the current political climate, however, many immigrants' rights advocates have focused on *narrower*, less controversial legalization programs such as the DREAM Act (for students) or AgJobs (for farmworkers). These programs would achieve, at best, a partial recategorization.

At a minimum, any legalization program designed to promote recategorization should not repeat the mistakes of IRCA by unnecessarily creating new outgroups. Such a program should allow for ongoing integration of the undocumented population, rather than require people to establish eligibility at a single point in time. For example, allowing undocumented immigrants to apply for legal status at any point after they meet certain criteria, such as establishing physical presence or good moral character for a certain number of years, would build flexibility into the program and avoid the harsh exclusionary rules that automatically create new outgroups. Moreover, any future legalization program should avoid replicating IRCA's errors by (1) providing legal status to derivative family members at the same time as the primary applicant; (2) setting forth clear legal standards and reasonable evidentiary requirements; (3) advertising to a wide range of ethnic groups while meeting their needs in the application process; and (4) allowing a fee waiver.

²⁵⁴ ELIZABETH THEISS-MORSE, WHO COUNTS AS AN AMERICAN? THE BOUNDARIES OF NATIONAL IDENTITY 74 (2009); see also Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 501 (2000) (critiquing nationality-based models of citizenship as “exclusionary by their nature” because “[t]he very act of normatively privileging identification with, and solidarity toward, compatriots presumes the existence of a class of nonnational others who are necessarily excluded from the domain of normative concern”).

²⁵⁵ Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” to the Heart of Darkness*, 73 IND. L. J. 1111, 1117 (1998). Johnson points out, for example, that when the U.S. formally extended legal rights to African Americans by passing the Fourteenth Amendment, it denied legal rights to Chinese immigrants, excluding them from the U.S. and preventing them from obtaining citizenship. Moreover, the same year that the Supreme Court decided *Brown v. Board of Education*, ending racial segregation in schools, the government launched “Operation Wetback,” a vicious campaign that led to the mass deportation of tens of thousands of Mexican immigrants as well as U.S. citizens of Mexican descent.

Even these measures, however, may not be sufficient to achieve recategorization, in part because of the power of ethnicity/race in shaping American identity, discussed above. A legalization program can provide legal status, but it alone cannot change perceptions based on ethnicity or race. Studies by social scientists fail to provide a clear picture of the relationship between legal status and ethnicity/race in shaping attitudes about immigrants. A 1997 study found that Anglos become more supportive of liberal immigration policies with increases in the relative size of the *legal* immigrant population where they live. These findings suggest that Anglos react differently to illegal vs. legal immigrants.²⁵⁶ A more recent study, however, found that Anglos favor policies restricting immigration even in areas with substantial levels of *native born* Latinos, leading to the conclusion that “racial or ethnic-based concerns may trump worries about legal procedures” in forming attitudes about immigration.²⁵⁷

Other studies showing that Latinos in particular (as opposed to other ethnic groups) trigger certain attitudes towards immigration seem to support the finding that ethnicity/race plays a significant role independent of immigration status. For example, Efrén O. Pérez found that Whites implicitly view Latino immigrants more negatively than both European immigrants and Asian immigrants, although his study did not distinguish between “legal” and “illegal” immigrants.²⁵⁸ Another study found that news featuring Latinos triggered anxiety and opposition to certain immigration policies because of the racial or ethnic stigma attached to that group by White Americans, rather than due to other factors, such as the sheer size of the Latino population or its economic position. Again, however, this study did not specifically address the role of legal status.²⁵⁹ These studies invite further research about the relationship between race and legal status in shaping attitudes about immigrants. Gaining a deeper understanding of this relationship will inform ideas about what role a legalization program can play as a form of recategorization.

C. *Crossed Categorization*

The third categorization-based approach to reducing intergroup bias is crossed categorization, which, as noted above, involves eliciting multiple, unrelated group identities. Rendering salient multiple group identities also “prompts individuals to develop a more *complex* conceptualization of the

²⁵⁶ M.V. Hood & I.L. Morris, *Amigo o Enemigo?: Context, Attitudes, and Anglos' Public Opinion Towards Immigration*, 78 SOC. SCI. Q. 309-23 (1997).

²⁵⁷ Rene R. Rocha et al., *Ethnic Context and Immigration Policy Preferences Among Latinos and Anglos*, 92 SOC. SCI. Q. 17 (2011).

²⁵⁸ Efrén O. Pérez, *Explicit Evidence on the Import of Implicit Attitudes: The IAT and Immigration Policy Judgments*, 32 POL. BEHAV. 517, 528-29 (2010). The White American subjects in Pérez's study showed negative implicit attitudes towards Latino immigrants not only when compared to White immigrants, but also when compared to Asian immigrants. *Id.* at 529.

²⁵⁹ *Id.*

outgroup, which leads in some cases to decategorization.”²⁶⁰ Here, complexity refers to “an individual’s subjective representation of the interrelationships among his or her multiple group identities.”²⁶¹ If a person perceives a high degree of overlap in the typical characteristics associated with her social category memberships, as well as overlap among the actual members of those groups, then her subjective representation is low in complexity. On the other hand, if “each ingroup category is distinct from the others,” then the representation is high in complexity.²⁶² Studies show that higher levels of complexity correspond to “greater outgroup tolerance, including greater support for affirmative action and multiculturalism.”²⁶³ Thus, the crossed-categorization model proposes reducing bias both by increasing the number of social groups that people need to process cognitively and by making the relationship between those categories more complex. This reduction in bias renders simple categories and stereotypes less useful in evaluating others, and leads to more individualized appraisals.²⁶⁴

Undocumented immigrants belong to multiple social groups, based on their immigration status, race, ethnicity, class, gender, sexual orientation, age, presence of disability, family structure, and employment status.²⁶⁵ U.S. immigration policies generally obscure these multiple social identities by making “illegal” status – especially when it results from illegal entry – the dominant characteristic that defines millions of undocumented immigrants. The existence of so few avenues for legalizing one’s status after illegal entry reinforces the illegal entry’s sustained legal and social salience, despite its representation of just one snapshot in time.²⁶⁶ The overriding importance that illegal entry and status assume in the immigration context closely parallels how a criminal conviction becomes the most salient aspect of an individual’s identity. Those studying the challenges of reentry after a criminal conviction note that “[t]he status of ex-offender is only one part of the person’s identity, yet it can become the most prominent defining characteristic

²⁶⁰ DONELSON R. FORSYTH, *GROUP DYNAMICS* 436 (5th ed. 2010) (emphasis added).

²⁶¹ Crisp, *supra* note 17, at 517.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 517-18.

²⁶⁵ See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 *UCLA L. REV.* 1509, 1553 (1995) (noting that “the immigrant community is heterogeneous in a number of salient ways”).

²⁶⁶ When Congress eliminated section 245(i) of the Immigration and Nationality Act, it terminated one of the main ways that individuals who had entered the U.S. illegally or who had fallen out of status after a legal entry could become permanent residents through family relationships or employment. Now, an even smaller group of undocumented immigrants – only those who had a visa petition filed on their behalf before April 30, 2001 – can benefit from 245(i). INA § 245(i), 8 U.S.C. § 1255(i). For those who entered illegally and do not qualify under 245(i), cancellation of removal for nonpermanent residents tends to be the only form of relief available, but, as noted above, this is usually unattainable due to the “exceptional and extremely unusual hardship” standard. INA § 240A(b), 8 U.S.C. § 1229b(b). Consequently, an undocumented immigrant’s own disability, years of residence in the United States, family ties, and employment history are generally insufficient to stop a deportation.

for representing self.”²⁶⁷ In much the same way, once society perceives an individual as “illegal,” a term that invokes criminality, other aspects of identity become invisible.

Indeed, many parallels exist between the social exclusions that ex-offenders encounter and those that “illegal” immigrants face. While ex-offenders who are U.S. citizens do not risk deportation, they face numerous economic, social, and political collateral consequences of their convictions at both the federal and state levels.²⁶⁸ These collateral consequences limit their abilities to vote, to maintain family integrity, and to obtain employment, education, housing, and public benefits.²⁶⁹ Such “social exclusions . . . effectively relegate ex-offenders to the margins of legitimate society, stigmatizing them and further highlighting their separation from law-abiding members of society.”²⁷⁰ Similarly, immigrants labeled as “illegal” increasingly face exclusion from social spheres as states pass stringent laws to prevent them from renting property, enrolling in school, forming contracts, and finding employment.²⁷¹ Such sustained stigmatization reinforces the perception of the original transgression – be it a conviction or the act of illegal entry – as an unredeemable offense that will forever define one’s social identity.²⁷² Thus, both ex-offenders and “illegal aliens” often remain permanent outcasts, primarily and perpetually defined by their past transgressions.²⁷³

While an illegal entry is, in general, extremely difficult to overcome, the few exceptions that exist (other than under INA § 245(i), noted above) minimize the visibility of the illegal act by recasting the immigrant as a

²⁶⁷ PATRICIA O’BRIEN, MAKING IT IN THE “FREE WORLD”: WOMEN IN TRANSITION FROM PRISON 28 (2001).

²⁶⁸ For an overview of the federal statutes imposing collateral consequences upon convictions, please see generally U.S. DEP’T OF JUSTICE, Office of the Pardon Attorney, *Federal Statutes Imposing Collateral Consequences Upon Conviction*, available at http://www.justice.gov/pardon/collateral_consequences.pdf. For an overview of the state statutes imposing collateral consequences upon convictions, please see generally U.S. DEP’T OF JUSTICE, Office of the Pardon Attorney, *Civil Disabilities of Convicted Felons: A State-by-State Survey*, Oct. 1996, available at <https://www.ncjrs.gov/pdffiles1/pr/195110.pdf>.

²⁶⁹ See Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 593-99 (2006).

²⁷⁰ Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. REV. 255, 273 (2004).

²⁷¹ See Hammon-Beason Alabama Taxpayer and Citizen Protection Act, Ala. H.B. 56 (2011); Support Our Law Enforcement and Safe Neighborhoods Act, Ariz. S.B. 1070 (2010).

²⁷² Cf. Michael Pinard, *An Integrated Perspective On the Collateral Consequences of Criminal Convictions and Reentry Issued Faced By Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 659-60 (2006) (discussing how criminality results in “sustained social stigmatization”).

²⁷³ See Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 160 (1999) (discussing how collateral consequences “label the ex-offender an ‘outcast,’ and frequently make it impossible for her ever to regain full societal membership”); George P. Fletcher, *Disenfranchisement As Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1897 (1999) (describing those who have served time as “a permanent undercaste of people”). See generally Regina Austin, *“The Shame of It All”: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 178 (2004).

victim. This represents a form of crossed categorization, whereby the law highlights an alternative social identity based on victimhood. For example, immigration reforms have created special paths to permanent residence, despite an illegal entry, for victims of domestic violence, trafficking and other crimes (through self-petitions under the Violence Against Women Act, T visas and U visas, respectively);²⁷⁴ children who are eligible for foster care due to abuse, neglect or abandonment (through Special Immigration Juvenile Status);²⁷⁵ and individuals who have experienced persecution or who have a well-founded fear of future persecution on account of certain protected grounds (through asylum).²⁷⁶ Providing these groups with the opportunity to gain legal status complicates the view of undocumented immigrants as simply “illegal” by bringing out more sympathetic aspects of their identities, most notably their vulnerability and victimhood, often related to their gender and age. As Hiroshi Motomura points out, “much current debate about the way immigration law treats victims of domestic violence, trafficking, and other criminal activity amounts to a debate about whether to protect these migrants, even if they lack lawful presence, by *imagining them in a category apart from immigration outside the law.*”²⁷⁷ Relying on a simplistic victim/criminal dichotomy to overcome illegal entry, however, raises serious concerns because this dichotomy ignores the overlap between these two categories and because the immigration statute recognizes only limited forms of victimhood, rendering invisible many forms of oppression. After discussing these concerns, this section examines how immigrants’ rights advocates are moving past the victim/criminal dichotomy and promoting more progressive forms of crossed categorization by organizing around immigrants’ alternative social identities as workers and students.

²⁷⁴ See INA § 101(a)(51), 8 U.S.C. § 1101(a)(51) (defining petitioners under the Violence Against Women Act (VAWA)); INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (defining noncitizens who qualify for T visas as trafficking survivors); INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (defining noncitizens who qualify for U visas for crime victims).

²⁷⁵ See INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (defining noncitizens who qualify for Special Immigrant Juvenile Status).

²⁷⁶ See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (defining a “refugee”); see also Hiroshi Motomura, *What Is “Comprehensive Immigration Reform”? Taking the Long View*, 63 ARK. L. REV. 225, 235-36 (2010) (noting that “America’s proud tradition as a refuge for those fleeing persecution is so deeply rooted that we often forget the way many of them arrived – without papers”). Motomura points out that other programs that create paths to legalization for certain groups are based on the principles of refugee and asylum protection, including the Nicaraguan Adjustment and Central American Relief Act (NACARA) and the Haitian Refugee immigration Fairness Act (HRIFA). *Id.* The numbers of immigrants who became permanent residents through these forms of legalization are relatively negligible. See U.S. DEP’T OF HOMELAND SECURITY, *Yearbook of Immigration Statistics 2010*, Table 7, available at <http://www.dhs.gov/files/statistics/publications/LPR10.shtm>. In 2010, 248 immigrants became permanent residents through NACARA and 386 immigrants became residents through HRIFA (these numbers include principals and their family members). *Id.*

²⁷⁷ Motomura, *Immigration Outside the Law*, *supra* note 16, at 2086 (emphasis added).

1. *Limitations of Relying on Victimhood as an Alternative Social Identity*

Relying on limited notions of victimhood to remove a small subclass of undocumented immigrants from the shadow of “illegality” is problematic for several reasons. To begin with, characterizing people as victims associates them with weakness and can further undermine their social status.²⁷⁸ As Angela Harris has noted, “[the] story of woman as victim is meant to encourage solidarity by emphasizing women’s shared oppression, thus denying or minimizing difference,” but this story also “denies the ability of women to shape their own lives” and “may thwart their abilities” to “create their own self-definitions.”²⁷⁹ Similarly, bell hooks has criticized using shared victimization as a concept that unites women because “[s]exist ideology teaches women that to be female is to be a victim.”²⁸⁰ The immigration statute provides unique paths to legal status for women who demonstrate victimhood, even if they entered the U.S. illegally, but offers no comparable paths to women who have established successful careers, stable families, or otherwise displayed strength and self-determination. By rewarding victimhood but not self-empowerment, the immigration statute reinforces the sexist ideology that the most deserving women are those who are most vulnerable.

Second, there is no true divide between victims and criminals, as “it is the rare perpetrator who has not also suffered.”²⁸¹ Abbe Smith aptly describes “the ‘cycle of violence’ that transforms victims into perpetrators,” arguing that the people who experience terrible things and those who commit terrible acts are often the same people.²⁸² She contends that “[t]hose who claim to care about victims of child abuse, sexual assault, and domestic violence and who abandon them when they repeat the behavior by acting out against others fail to make these critical connections.”²⁸³ Smith therefore critiques the “prevailing feminist approach to crime and violence” as being “too narrowly focused on victims” and “contribut[ing] to the nation’s extraordinary and exclusive turn to punishment over the past three decades.”²⁸⁴

The immigration statute, which creates special paths to U.S. citizenship for certain types of victims while simultaneously attaching extremely harsh consequences to even minor criminal offenses, including deportability and

²⁷⁸ KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 76 (1988).

²⁷⁹ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 613 (1990).

²⁸⁰ BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 45 (1984).

²⁸¹ Abbe Smith, *The “Monster” in All of US: When Victims Become Perpetrators*, 38 *SUFOLK U. L. REV.* 367, 369 (2005).

²⁸² *Id.* at 370, 393.

²⁸³ *Id.* at 393. Smith vividly describes how “feminists and others who claim to care about raped and abused women suddenly jump ship and head for the hills the minute a raped and abused woman becomes a perpetrator.” *Id.* at 386.

²⁸⁴ *Id.* at 370.

ineligibility for many forms of relief, similarly fails to recognize the connection between acts of abuse and acts of aggression. While immigration laws do permit waivers of various criminal offenses in applying for T visas, U visas, VAWA self-petitions, and VAWA cancellation of removal, the scope of the waiver is different for each type of application, reflecting an incoherent and inconsistent approach to handling cases where the victim is also a criminal.

For example, the statutory provisions pertaining to the U visa for victims of certain crimes provide a discretionary waiver of all grounds of inadmissibility except for Nazis or perpetrators of genocide, torture or extrajudicial killings.²⁸⁵ The statutory waiver for T visas is more limited, excluding all security-related grounds, as well as international child abductors, and former citizens who renounced citizenship to avoid taxation.²⁸⁶ Moreover, the statute indicates that criminal grounds of inadmissibility may only be waived for trafficking victims if the crimes were “caused by, or were incident to, the victimization,” although the regulation uses more lenient language.²⁸⁷ There is no obvious reason why the scope of waivers should be different for victims of trafficking and victims of other types of crimes, suggesting an incoherent approach to the question of what to do when a victim is also a criminal.

The statutory provisions pertaining to VAWA cancellation of removal, which is a special form of cancellation for victims of domestic abuse, further underscore this internal inconsistency. This form of relief excludes those who are subject to *any* criminal ground of deportability, as well as the grounds of deportability related to document fraud, false claims of U.S. citizenship, and security.²⁸⁸ A discretionary waiver is available only if the alien “was not the primary perpetrator of violence in the relationship” and the immigration judge determines that the alien was acting in self-defense, violated a protection order designed for the alien’s own protection, or committed a crime that did not result in serious bodily injury and that was connected to the alien’s having been battered or subjected to extreme cruelty.²⁸⁹ The waiver also appears to exclude anyone who is deportable based on an aggravated felony.²⁹⁰ This patchwork of waivers for different types of victims

²⁸⁵ INA § 212(d)(14), 8 U.S.C. § 1182 (d)(14) (providing a discretionary waiver for all grounds of inadmissibility except for those who are Nazis or perpetrators of genocide, torture, extrajudicial killings).

²⁸⁶ INA § 212(d)(13)(B)(ii), 8 U.S.C. § 1182 (d)(13)(B)(ii); *see also* 8 C.F.R. 212.16(b)(1).

²⁸⁷ INA § 212(d)(13)(B)(ii), 8 U.S.C. § 1182 (d)(13)(B)(ii). The regulation, however, provides that “[s]pecial consideration will be given to the granting of a waiver . . . where the activities rendering the alien inadmissible were caused by or incident to the victimization.” 8 C.F.R. 212.16(b)(1) (emphasis added). This language differs from the text of the statute, as it suggests that a connection is not *required* but that the existence of such a connection simply weighs in favor of granting the waiver.

²⁸⁸ INA § 240A(2)(A)(iv), 8 U.S.C. § 1229b(2)(A)(iv).

²⁸⁹ INA § 240A(5), 8 U.S.C. § 1229b(5); INA 237(a)(7)(A), 8 U.S.C. 1227(a)(7)(A).

²⁹⁰ INA § 240A(5), 8 U.S.C. § 1229b(5).

shows, at best, a deep ambivalence about how to handle aliens who fail to fit neatly into a simple, stereotypical category of “victim” or “criminal.”

Furthermore, recognizing “victimhood” only in these narrow types of cases is problematic because it renders invisible the multiple forms of oppression that other undocumented immigrants face, including extreme poverty, exploitation as workers, and disparities due to other aspects of their identities such as race, class, gender, or sexual orientation. Since qualifying for the exceptional forms of relief offered by T visas, U visas, VAWA petitions, Special Immigrant Juvenile Status, and asylum often involves showing that one is a victim of physical, sexual or psychological harm, the focus remains on individual injury rather than on a “more complex socio-political analysis” of oppression.²⁹¹

In addition, investing in “an identity of injury” limits our “political imagination and . . . ability to stake out more transformative political claims.”²⁹² Thus, instead of challenging the fundamental characterization of undocumented immigrants as criminals and the severe obstacle that illegal entry presents for obtaining legal status, immigrants’ rights advocates may simply seek special exceptions for a relatively minuscule number of cases. While there are an estimated twelve million undocumented immigrants in the United States, in 2010 U.S. Citizenship and Immigration Service approved just 6,274 VAWA self-petitions based on domestic abuse, 638 T visas for victims of trafficking and their family members, 11,779 U visas for victims of certain crimes and their family members, and 1,480 J visas for special immigrant juveniles.²⁹³ Thus, less than one percent of undocumented immigrants were able to legalize their status through one of these special avenues.

Imagining a more transformative political claim might well include bringing to light other aspects of immigrants’ identities, distinct from individual victimhood, as relevant to the determination of whether they should be allowed to remain in the United States. Immigrants’ rights advocates have actively organized around two such alternative identities – as workers and as students – that move beyond the traditional victim/criminal dichotomy.

²⁹¹ Cf. Vasuki Nesiah, *The Specter of Violence That Haunts the UDHR: The Turn to Ethics and Expertise*, 24 MD. J. INT’L L. 135, 150 (2009) (arguing that the focus on sexual violence in conflict situations “privileges bodily integrity injuries . . . rather than any more complex socio-political analysis of these conflicts”). Recent guidance indicating that the Department of Labor may certify U visa applications based on certain crimes related to labor exploitation represents one positive step forward in moving beyond physical injuries towards a more expansive definition of oppression. See U.S. DEP’T OF LABOR, U Visa Process and Protocols Question Answer, available at <http://www.dol.gov/opa/media/press/whd/whd20110619-qa.pdf>.

²⁹² Nesiah, *supra* note 291, at 150.

²⁹³ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Form I-914 Application for T Nonimmigrant Status and Form I-918 Petition for U Nonimmigrant Status Visa Service-Wide Receipts, Completions, and Pending, Fiscal Year 2002 Through Fiscal Year 2011* (April 2011), available at <http://www.uscis.gov/USCIS/Resources/Reports/Forms-Data/i-914-T-I-918-data-2011-april.pdf>; see also *Visa Statistics for VAWA, T and U*, available at <http://immigrationroad.com/visa/visa-statistics-for-VAWA-U-T.php>.

2. *Moving Past the Victim/Criminal Dichotomy*

a. *Worker-Based Identities*

Policies that recognize and protect undocumented immigrants' identities as workers move away from the victim/criminal dichotomy and can potentially boost both the social and legal status of eight million working undocumented immigrants, as well as their families.²⁹⁴ Recognizing that undocumented immigrants are already embedded in U.S. society and contributing to the economy complicates the image of the “illegal alien” as an outsider, criminal or interloper. As Jennifer Gordon and Robin Lenhardt have argued, “work functions as an important pathway to citizenship as a form of belonging.”²⁹⁵ Consequently, “new migrants may more easily be able to gain legitimacy as political actors when they are understood as workers (rather than, say, as recipients of public benefits or as consumers of education and health care).”²⁹⁶

Worker centers provide several examples of successful organizing campaigns that protect immigrants' dignity by highlighting their identities as workers. Jennifer Gordon, for example, has described how immigrant members of the Workplace Project, many of whom were undocumented, managed to obtain the support of conservative New York legislators, who had actively supported anti-immigrant measures, by sharing stories of their lives *as workers* and thus persuading the state legislature to pass a law that dramatically increased the penalty for employers who failed to pay proper wages.²⁹⁷ Another successful campaign involved the Garment Worker Center in Los Angeles, which helped mostly immigrant garment workers organize a national campaign and bring litigation that led to the creation of a standard of conduct for retailers and manufacturers.²⁹⁸ Under this new standard of conduct, retailers and manufacturers must ensure that their garment contractors comply with labor laws and health and safety standards.²⁹⁹ The

²⁹⁴ Jeffrey S. Passel & D'Vera Cohn, Pew Hispanic Ctr., *Report: A Portrait of Unauthorized Immigrants in the United States* 1 (2009) (stating that the U.S. has about 154 million workers, of whom about 8 million are undocumented immigrants), available at <http://pewhispanic.org/files/reports/107.pdf>.

²⁹⁵ Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1191 (2008).

²⁹⁶ *Id.* at 1218. As Gordon has recognized, however, focusing on a “worker” identity may result in further stigmatizing those who receive public benefits. JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 276-77 (2005).

²⁹⁷ GORDON, *supra* note 296, at 237-80.

²⁹⁸ Victor Narro, *Finding the Synergy Between Law and Organizing: Experiences From the Streets of Los Angeles*, 35 FORDHAM URB. L. J. 339, 357 (2008). Similarly, the carwash workers campaign in Los Angeles, organized by a coalition involving a novel partnership between the AFL-CIO and the National Day Laborers Organizing Network (NDLON), exposed widespread worker abuses in the carwash industry, garnered support to renew a law that protected vulnerable carwash workers, and helped bring civil and criminal charges against the owners of multiple car washes for violating state laws. *Id.* at 367. See generally Justice for Carwash Workers, <http://www.cleancarwashla.org/> (last visited Mar. 27, 2012).

²⁹⁹ Narro, *supra* note 298, at 357.

garment workers' campaign also led Los Angeles to pass a tough anti-sweatshop law that has served as a model for other cities.³⁰⁰

These examples of successful organizing by worker centers indicate that immigrants, even if undocumented, have a powerful worker identity that can serve as a catalyst not only for coalition-building but also for achieving significant legal victories that improve their statuses at their jobs and in their communities. As Victor Narro notes, worker centers have "impacted the way the media reports and the way the larger public perceives immigrant and low-wage worker issues . . . changing the climate and altering the terms of debate at the local level."³⁰¹

Worker centers promote crossed categorization in a number of ways. Not only do they highlight their constituents' roles as workers, but they also coalesce their membership around other aspects of identity. In Los Angeles, for example, all worker centers involve a high percentage of undocumented immigrants,³⁰² but define themselves based on ethnicity (e.g., the Pilipino Worker Center (PWC)), geography (e.g., the Koreatown Immigrant Workers Alliance (KIWA)), occupation (e.g., the National Day Laborers' Organizing Network (NDLON)) and industry (e.g., the Garment Worker Center (GWC)).³⁰³ Some worker centers also highlight gender by focusing entirely on women in female-dominated industries and by explicitly incorporating discussions about gender oppression in their work (e.g., the GWC in Los Angeles and Asian Immigrant Women's Advocates (AIWA) in San Francisco).

A commitment to multiethnic organizing among some worker centers further undermines simplistic, stereotypical categorizations based on race or ethnicity.³⁰⁴ KIWA, for example, never considered working only with Koreans since each workplace in Los Angeles' Koreatown employs both Koreans and Latinos.³⁰⁵ Likewise, the GWC focuses on recruiting and organizing both Chinese and Latina garment workers, even ensuring proportionate representation by both groups on its board.³⁰⁶ Bringing immigrants and African Americans together has proven more challenging, although there have been some positive developments on this front as well.³⁰⁷

³⁰⁰ *Id.*

³⁰¹ Ruth Milkman, *Introduction*, in *WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY* 16 (Ruth Milkman, Joshua Bloom, & Victor Narro, eds. 2010) (quoting Victor Narro).

³⁰² In Los Angeles, immigrants comprise over a third of the population and half of the workforce. About one million of the nation's 11-12 million undocumented immigrants live in the L.A. metropolitan area, the vast majority of whom are Latino and work in low-wage sectors with widespread violations. *Id.* at 6.

³⁰³ *Id.* at 2.

³⁰⁴ JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 61 (2006).

³⁰⁵ *Id.* at 61-665.

³⁰⁶ *Id.*

³⁰⁷ Fine notes that "[i]n its childcare work, TSWC [the Tenants' and Workers' Support Committee] has built a base of African Americans, South Asians, Haitians, and Latinos, and there are very explicit discussions about race and the need to come together as people of color." *Id.* at 67. See also Gordon & Lenhardt, *supra* note 295.

In Los Angeles, the metropolitan area with the largest concentration of undocumented immigrants in the United States, unions and workers centers have developed “a shared strategic repertoire.”³⁰⁸ This repertoire includes “producing compelling narratives that include the stories and voices of low-wage workers themselves, and framing claims in the moral language of social justice.”³⁰⁹ Thus, shifting the focus from immigrant to worker identity is a conscious part of the organizing strategy. The civil rights movement for immigrants has astutely “redrawn the parameters of the debate” by “expos[ing] a new axis: the struggle of ordinary workers and their families to be treated equally, as human beings, and as workers with full rights.”³¹⁰

Recognizing the positive benefits of highlighting a “worker” identity should not, however, lead to romanticizing or overgeneralizing the social status that it can create. Gordon and Lenhardt stress that “some low-wage worksites have more capacity to lead to a sense of belonging and to serve as a site for citizenship’s exercise than others” and that “the same work done by different people will not necessarily deliver the same citizenship value to both.”³¹¹ They note that undocumented immigrants who work in the U.S. and send remittances home often gain greater social status in their home countries than in the U.S., at least at first.³¹² Over time, however, work can also increase their social status in the U.S., especially if they are unionized or active with a worker center: “The more migrants participate politically through unions, worker centers, and marches, the deeper their sense of belonging becomes.”³¹³ Thus, despite how migrant work is sometimes used as “a rallying cry for who those who would curtail immigration,” Gordon and Lenhardt conclude that “on balance, even for undocumented immigrants, work facilitates incorporation into the polity over time and thus serves as a pathway to citizenship.”³¹⁴

Highlighting undocumented immigrants’ social identities as workers has the potential to promote social cohesion by showing that they are real people contributing to the community and fulfilling important labor needs, rather than being part of an abstract problem called “illegal immigration.”³¹⁵ To the extent that our laws and policies undermine the formation of a worker identity by denying undocumented immigrants adequate restitution for labor violations,³¹⁶ supporting worksite raids,³¹⁷ allowing employers to hide behind

³⁰⁸ Milkman, *supra* note 301, at 2.

³⁰⁹ *Id.* at 11.

³¹⁰ Justin Akers Chacón, *Out from the Shadows, Into the Street: The New Immigrant Civil Rights Movement*, 47 INT’L SOCIALIST REV. (2006), available at <http://www.isreview.org/issues/47/newmovement.shtml>.

³¹¹ Gordon & Lenhardt, *supra* note 295, at 1198-99.

³¹² *Id.* at 1215.

³¹³ *Id.* at 1218.

³¹⁴ *Id.* at 1219.

³¹⁵ See NGAI, *supra* note 106, at 63 (noting the “discontinuity between illegal immigration as an abstract general problem, a ‘scare’ discourse used at times to great political effect, and illegal immigrants who were real people known in the community, people who committed no substantive wrongs”).

³¹⁶ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

alleged fears of sanctions when retaliating against workers,³¹⁸ and permitting states to pass their own laws and programs to verify employment eligibility,³¹⁹ they counter crossed categorization and contribute to intergroup bias. Immigration reforms that eliminate these harmful policies and protect immigrants' rights as workers would therefore help promote crossed categorization and social cohesion.

b. Student-Based Identities

Just as undocumented immigrants have been organizing around their identities as workers rather than focusing on their immigration status, undocumented youth have highlighted their social identities as students in campaigns to obtain in-state tuition, access to financial aid, legalization under the DREAM Act and other types of immigration reform.³²⁰ These types of campaigns may be even more effective at promoting crossed categorization than organizing around worker-based identities because students and immigrants remain cognitively distinct categories, whereas workers in certain low-wage industries often overlap with immigrants in the public's imagination and in reality.³²¹

Energized by the massive immigrants' rights marches that swept across the nation in March 2006, immigrant youth have remained a vital force in advocacy around immigration reform.³²² They have engaged in highly visible forms of direct actions such as appearing at graduation ceremonies with bound hands and tape over their mouths to protest how immigration laws silence talented students, collectively walking out of schools, and participating in hunger strikes and vigils.³²³ They have also presented to Congress *testimonios* that promote "the destabilization of boundaries of exclusion

³¹⁷ See Wishnie, *supra* note 131.

³¹⁸ Gordon & Lenhardt, *supra* note 295, at 1233.

³¹⁹ Chamber of Commerce v. Whiting, 131 S.Ct. 1968 (2011) (holding, *inter alia*, that an Arizona law's requirement that every employer verify the employment eligibility of hired employees through a specific Internet-based system did not conflict with federal law). See also City of Hazelton v. Lozano, 131 S. Ct. 2958 (2011) (remanding to the Third Circuit pursuant to *Chamber of Commerce v. Whiting*).

³²⁰ See, e.g., Roberto G. Gonzales, *Left Out But Not Shut Down: Political Activism and the Undocumented Student Movement*, 3 NW J. L. & Soc. POL'Y 219 (2008); Leisy Abrego, *Legitimacy, Social Identity, and the Mobilization of Law: The Effects of Assembly Bill 540 on the Undocumented Students in California*, 33 LAW & SOC. INQUIRY 709 (2008).

³²¹ Gordon and Lenhardt note that "in a range of industries – food processing, janitorial, and hotel work among them – the past few decades have seen a shift from a workforce with strong African American representation to one that is predominantly immigrant." Gordon and Lenhardt, *supra* note 294, at 1173. They explain that "work in which [racially stigmatized] groups engage is often devalued simply because it is people of color rather than Whites who are doing it; the social value of a job turns not only on the citizenship status but the racial classifications of those who carry it out." *Id.* at 1199.

³²² Randal C. Archibold, *Immigrants Take to the Streets in Show of Strength*, N.Y. TIMES, May 2, 2006, at A1; Teresa Watanabe & Hector Becerra, *500,000 Pack Streets to Protest Immigration Bills*, L.A. TIMES, Mar. 26, 2006, at A1.

³²³ Roberto G. Gonzales, *Left Out But Not Shut Down: Political Activism and the Undocumented Student Movement*, 3 NW. J. L. & Soc. POL'Y 219 (2008).

based on illegality and the dismantling of pejorative identities associated with the term ‘illegal alien.’”³²⁴ Undocumented students who participate in advocacy efforts develop “a political voice and identity” that help overcome “the social stigma and silencing of undocumented status”³²⁵ and “[disrupt] the regime of enforced invisibility that positions undocumented immigrants as a subordinate group of anonymous manual laborers who lack the capacity of other types of human action, such as political activity.”³²⁶

An example of the powerful impact of creating a student-based identity is the movement of undocumented youth who organized around California Assembly Bill 540, which allowed all long-term California residents to receive in-state tuition, regardless of immigration status.³²⁷ Before the passage of AB 540, the undocumented youth that Leisy Abrego interviewed “expressed a sense of stigma and embarrassment that derived from being undocumented,” as “their status was a constant reminder that they were different, vulnerable, and considered suspect.”³²⁸ AB 540 granted these undocumented youth a “legitimate space – inside colleges and universities – where, as students, they are valued and ‘legitimate’ members of society.”³²⁹ The law gave them “a new, neutral, and more socially acceptable label that subsequently changed their social identity and their potential for collective action and further claims-making.”³³⁰ By identifying as “AB 540 students,” undocumented youth dissociated themselves from negative labels such as “illegals,” emphasized their status as students, and thereby achieved greater social acceptance in a country that celebrates individual merit and education as the path to upward mobility.³³¹

While Abrego does not challenge the way that the undocumented youth in her study embraced the “myth of meritocracy,” and focused instead on its positive impact on their lives,³³² others have explicitly criticized organizing efforts that endorse this myth. Some commentators, for example, have critiqued how “proponents of legislation such as the DREAM Act have made their case by touting examples of exceedingly high achieving undocumented students, such as high school valedictorians and start athletes,” and have argued that such stories help make the case for “wasted talent” but at the

³²⁴ Rene Galindo, *Embodying the Gap Between National Inclusion and Exclusion: The “Testimonios” of Three Undocumented Students at a 2007 Congressional Hearing*, 14 HARV. LATINO L. REV. 377, 379 (2011).

³²⁵ *Id.* at 380.

³²⁶ *Id.* at 382.

³²⁷ Abrego, *supra* note 320, at 723.

³²⁸ *Id.* at 723.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*; see also *id.* at 721 (“By submitting to the myth of meritocracy, students are able to establish a sense of legitimacy despite their status as immigration outlaws. Their legal consciousness, powerfully informed by meritocratic principles, allows them to reinterpret their lives and their social standing in U.S. society.”).

³³² *Id.* at 711.

same time exclude undocumented children who do not make it to college.³³³ Focusing on star students “move[s] the discussion away from one of rights to an argument based on ideals of meritocracy and reward,” and thus contributes to the notion of “‘deserving’ vs. ‘undeserving’” immigrants.³³⁴ Similarly, scholars contend that emphasizing a DREAM Act of limited applicability that would aid only exceptional students fails to address the more general exploitation of undocumented immigrants.³³⁵

Such arguments raise the same concern about creating new outgroups through insufficiently inclusive reforms that was discussed above regarding recategorization. Abrego’s study conveys an important message about the power of crossed categorization to transform not just external perceptions, but internal ones as well. This study shows that crossed categorization not only changed public perception of undocumented youth, but also transformed their own legal consciousness. Instead of standing “against the law” as stigmatized “illegal aliens” and feeling entrapped in a system where resistance seemed futile, undocumented youth who created a new, neutral social identity for themselves by identifying as “AB 540 students” shifted their legal consciousness to being “with the law.”³³⁶ Thus, this case study provides an excellent example of the law’s power to shape both social identity and legal consciousness.

The shift in social identity that AB 540 produced suggests that other reforms aimed to improve access to education for undocumented youth and thereby highlight their status as students would effectively promote crossed categorization. The Supreme Court has guaranteed undocumented youth access to a public elementary education but has not addressed access to higher education.³³⁷ Some states have outright precluded undocumented students from attending public colleges and universities, and required these institutions to inquire about their students’ legal statuses, while other states have been more supportive.³³⁸ By passing laws that allow undocumented youth to attend public institutions of higher education, obtain financial aid and receive in-state tuition, federal and state governments would promote a powerful form of crossed categorization.

³³³ Shannon Gleeson & Roberto Gonzales, *Wasted Talent and Hard Work: An Evaluation of Framing in the Immigrant Rights Movement*, Paper presented at the Law and Society Association Annual Meeting, Chicago, IL (May 29, 2010), available at http://citation.allacademic.com/meta/p_mla_apa_research_citation/4/0/7/0/0/p407001_index.html?phpsessid=1a1a28fda0828616a647c79e76eac946 (abstract).

³³⁴ *Id.*

³³⁵ Juan Ibarra-Flores, *Dreams Denied: Undocumented Students in the University*, Paper presented at the Law and Society Association Annual Meeting, Chicago, IL (May 29, 2010), available at https://www.zotero.org/groups/education_for_undocumented_hispanics/items/itemKey/NMAU6EHJ#/NMAU6EHJ?&_suid=133255576235505179132619366994 (abstract).

³³⁶ Abrego, *supra* note 320, at 729.

³³⁷ See *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

³³⁸ Neither PRWORA nor IIRIRA prohibit public universities from admitting undocumented immigrants, and most states permit them to enroll. See *supra* note 33.

IV. CONCLUSION

This Article has shown that research in social categorization and in categorization-based strategies for reducing intergroup bias provides a useful framework for analyzing the impact of U.S. immigration policies. Each of the strategies discussed above – decategorization, recategorization, and crossed categorization – serves as a novel lens for examining how particular immigration policies potentially impact intergroup relations. Discussions of comprehensive immigration reform have generally failed to consider immigration policies from these points of view. Such discussions have centered on how many and what kinds of immigrants to admit, instead of focusing on how to create a climate conducive to social cohesion rather than conflict. While there are numerous challenges to eroding category boundaries, redefining them more inclusively, or drawing attention to multiple categories of social identity, this Article identifies positive steps being taken in each of these directions and suggests different ways to promote each categorization-based strategy in the context of immigration reform.

The proposed reforms represent modest ways to use law as a tool to deconstruct the category of “illegal aliens” as a social identity and move towards a more cohesive society. More dramatic proposals for reform also exist to achieve these same goals. For example, a much more sweeping approach to decategorization could involve creating open borders and voiding status-based categories altogether.³³⁹ “Open admissions policies would . . . assist in promoting full community membership for all people living and working in U.S. society.”³⁴⁰ This approach involves outright erasure of category boundaries rather than the slow erosion of these boundaries in the manner discussed above.

Similarly, in considering different approaches to recategorization, we should not allow national borders to constrain our imaginations. A growing body of scholarship delinks the concepts of citizenship and nationality, and turns instead to ideas such as “global citizenship,” “transnational citizenship” and “postnational citizenship.”³⁴¹ The emergence of European citizenship, the formalization of a shared European cultural identity, provides one example of a superordinate identity that transgresses national borders and

³³⁹ Only a few fearless legal scholars have seriously examined this “taboo subject . . . [that] has been the political kiss of death for serious immigration reformers.” Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 196 (2003). Johnson’s arguments that open borders would reduce racial discrimination, prevent exploitation of workers, promote integration of immigrants into U.S. society, and reduce international tensions are all completely consistent with the concept of decategorization as a way to reduce intergroup bias. *Id.* at 244-60. Indeed, he specifically notes that “[l]egal distinctions between immigrants and citizens . . . serve to create in-groups and out-groups, promote interethnic tension, and breed discrimination against perceived outsiders.” *Id.* at 255; see also Mark Tushnet, *Open Borders*, in *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS* (Joshua Cohen & Joel Rogers eds., 1999).

³⁴⁰ Johnson, *supra* note 339, at 255.

³⁴¹ See Bosniak, *supra* note 254, at 449.

highlights the goal of social cohesion.³⁴² The proposal to create a North American Union modeled after the European Union similarly has roots in the desire for greater social cohesion, for “a more integrated North America.”³⁴³

Social psychologists have found that a superordinate European identity can, in fact, act as a buffer to bias and reduce xenophobia, if the subgroups feel committed to the shared identity and find it meaningful.³⁴⁴ Whether the creation of a North American Union could have the same impact is an issue that merits further research.³⁴⁵ This brief discussion of supranational superordinate identities simply highlights that we should not confine our thinking to small-scale reforms when considering potential categorization-based strategies for reducing bias.

Social categorization theories provide new insight into how the categories that we create through our immigration laws shape our identity as a nation. The categorization-based strategies set forth in this Article provide a coherent framework and methodology for analyzing past, present, and future immigration policies with respect to their impact on social cohesion. This Article represents an initial effort to apply this framework to a limited set of policies and to make some recommendations. Further research in this area would not only help develop ideas about how best to combine various types of immigration policies to reduce social bias, but could also generate innovative proposals for comprehensive immigration reform.

³⁴² *Id.* at 483, 486. Policy-makers actively and consciously constructed this superordinate European identity. As Stephen Zamora notes, the EU’s website contains “a cornucopia of . . . inspirational pronouncements (‘Europe is fun!’), and promotional calls for unification, peace and harmony,” and communicates in “a language sometimes referred to as ‘Eurospeak’” that includes pet terms such as “social cohesion.” Stephen Zamora, *A Proposed North American Regional Development Fund: The Next Phase of North American Integration Under NAFTA*, 40 *LOY. U. CHI. L.J.* 93, 102 (2008). For the EU, “social cohesion” signifies “the goal of assisting disadvantaged persons and poorer regions within the European Union in sharing the prosperity enjoyed by the most economically advantaged regions of the continent.” *Id.* at 95.

³⁴³ Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 *MINN. L. REV.* 1369, 1376 (2007); see also Elizabeth M. Bruch, *Open Or Closed: Balancing Border Policy With Human Rights*, 96 *KY. L.J.* 197, 224-25 (2007-2008) (urging serious consideration of open borders and discussing the European Union as a “tantalizing” model).

³⁴⁴ Catriona H. Stone & Richard J. Crisp, *Superordinate and Subgroup Identification as Predictors of Intergroup Evaluation in Common Ingroup Contexts*, 10 *GROUP PROCESS & INTERGROUP REL.* 493, 509-10 (2007). The authors of this study note that the subgroups involved in the experiments, British and French nationals, were similar in status, and that the results may differ in situations where one group has significantly higher status than the other group. *Id.* at 510.

³⁴⁵ Given that government leaders from the U.S., Canada and Mexico “sold NAFTA to their constituents with the promise that the agreement would not lead to political unification,” Zamora, *supra* note 342, at 108, one might expect resistance, rather than commitment, to the idea of a North American Union. On the other hand, U.S. citizens may grow to recognize that they live in a global age where the role of the nation-state is declining. Europeans did not immediately embrace a European identity, but rather became supportive of the idea over time. See ROBERT A. PASTOR, *TOWARD A NORTH AMERICAN COMMUNITY: LESSONS FROM THE OLD WORLD FOR THE NEW 95* (2001) (stressing that “the idea of a European identity did not spring up fully formed in 1957”).