Fordham Urban Law Journal Cooper-Walsh Colloquium

presents

You Are Not Welcome Here
Surveilling Houses, Homes, and Borders

October 15, 2021
10 a.m. - 2:45 p.m.

COURSE MATERIALS

FORDHAM UNIVERSITY
THE SCHOOL OF LAW
Table of Contents

1. Speaker Biographies (view in document)

2. CLE Materials

Panel 1: Housing and Surveillance: Ceding Control of Your Home and Body


Panel 2: A Case Study: NYC Public Housing and Surveillance: Research, Impacts and Responses

Ponder Williams, E., *Fair Housing’s Drug Problem: Combating the Racialized Impact of Drug-Based Housing Exclusions Alongside Drug Law Reform*

Panel 3: Diminished Expectations: The Lack of Privacy Protections for Immigrant Populations

Kalhan, A. Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy


COURSE MATERIALS PENDING

Motomura, H. *Immigration Outside the Law* - Chapter I. (view in document)
**Speaker Bios**

**Bennett Capers**  
Professor of Law; Director of The Center on Race, Law & Justice  
Fordham Law School


Prior to teaching, Professor Capers spent nearly ten years as an Assistant U.S. Attorney in the Southern District of New York. His work trying several federal racketeering cases earned him a nomination for the Department of Justice’s Director’s Award in 2004. He also practiced with the firms of Cleary, Gottlieb, Steen & Hamilton and Willkie Farr & Gallagher. He clerked for the Hon. John S. Martin, Jr. of the Southern District of New York. He is a graduate of Princeton University, where he graduated *cum laude* and was awarded the Class of 1983 Prize, and of Columbia University School of Law, where he was a Harlan Fiske Stone Scholar.

Prior to joining Fordham Law School, he taught at Brooklyn Law School, where he was the Stanley A. August Professor of Law, and before that at Hofstra University School of Law, where he served as Associate Dean of Faculty Development in 2010-11, and where he received the 2009 Lawrence A. Stessin Prize for Outstanding Scholarly Publication. He has thrice been voted Teacher of the Year, is an elected member of the American Law Institute, a Director of Research for the Uniform Laws Commission, a Senior Technology Fellow at the NYU Policing Project, and has served as Chair of the AALS Criminal Justice Section and Chair of the AALS Law and Humanities Section. Governor Cuomo has twice appointed him to serve on judicial screening committees, first the New York State Judicial Screening Committee for the New York Court of Claims, and then the New York Judicial Screening Committee for the Second Department. In 2013, he served as Chairperson of the AALS 2013 Conference on Criminal Justice. That same year, Judge Scheindlin appointed him to Chair the Academic Advisory Council to assist in implementing the remedial order in the stop-and-frisk class action *Floyd v. City of New York*. He has also served for several years as a Commissioner on the NYC Civilian Complaint Review Board.

**Nestor Davidson**  
Albert A. Walsh Chair in Real Estate, Land Use and Property Law, Professor of Law; Faculty Director, Urban Law Center  
Fordham Law School

Nestor Davidson joined Fordham in 2011 and was named the Albert A. Walsh Professor of Real Estate, Land Use and Property Law in
2017. Professor Davidson is an expert in property, urban law, and affordable housing law and policy, and is the co-author of the casebook Property Law: Rules, Policies and Practices (7th ed. 2017). Professor Davidson founded and serves as the faculty director of the law school’s Urban Law Center and previously served as Associate Dean for Academic Affairs.

Professor Davidson practiced with the firm of Latham and Watkins, focusing on commercial real estate and affordable housing, and served as Special Counsel and Principal Deputy General Counsel at the U.S. Department of Housing and Urban Development.

Professor Davidson earned his AB from Harvard College and his JD from Columbia Law School. After law school, he clerked for Judge David S. Tatel of the United States Court of Appeals for the District of Columbia Circuit and Justice David H. Souter of the Supreme Court of the United States.

Jennifer Gordon
Professor of Law
Fordham Law School

Jennifer Gordon founded the Workplace Project in 1992, a non-profit worker center in Hempstead, New York, which organizes immigrant workers, mostly from Central and South America. The Workplace Project lobbied for and won a strong wage enforcement law in New York state. Gordon was the executive director of the Workplace Project from 1993 to 1998. Gordon was a MacArthur Fellow from 1999 to 2004. She is the author of Suburban Sweatshops: The Fight for Immigrant Rights, as well as several articles on immigrants, politics, and labor unions. She received a Bachelor of Arts degree from Radcliffe College of Harvard University in 1987 and a Juris Doctor degree from Harvard Law School in 1992. She is currently an associate professor at Fordham University School of Law, where she teaches courses on immigration and labor law.

Anil Kalhan
Professor of Law
Drexel University Thomas R. Kline School of Law

Education
- J.D., Yale Law School
- M.P.P.M., Yale School of Management
- A.B., magna cum laude, Brown University

Accomplishments
- Anil Kalhan is a Professor of Law at the Drexel University Thomas R. Kline School of Law. During the 2021–22 academic year, he is a Visiting Professor of Law at Yale Law School and an Adjunct Professor of Law at New York University School of Law.
- Before joining the faculty at Drexel, he was a Visiting Assistant Professor at Fordham University School of Law and an Associate in Law at Columbia Law School.
- He currently serves on the New York City Bar Association’s International Human Rights Committee (which he chaired from 2015 to 2018) and its Task Force on the Rule of Law, and since 2020 he also has served as a member of Committee A on Academic Freedom and Tenure of the American Association of University Professors
- In 2018, Professor Kalhan was selected by the Conference of Asian Pacific American Law Faculty to receive its Chris Kando Iijima Teacher and Mentor Award.

Alexis Karteron
Associate Professor of Law, Director of the Constitutional Rights Clinic
Rutgers Law School

At the NYCLU, she litigated complex constitutional cases involving police reform, the school-to-prison pipeline, the First Amendment, and voting rights. While at the NYCLU, Karteron served as lead counsel in one of three cases challenging the NYPD’s stop-and-frisk practices. Prior to joining the NYCLU, Karteron served as White House Associate Staff Secretary from 2009
to 2010. From 2007 to 2009, she was an assistant counsel at the NAACP Legal Defense & Educational Fund, where she litigated voting rights cases in the federal courts, including the Supreme Court.

Karteron earned her J.D., with distinction, from Stanford Law School and her B.A., magna cum laude, from Harvard University. After clerking for Judge Marsha S. Berzon of the U.S. Court of Appeals for the Ninth Circuit, she was a litigation associate at the New York law firm of Fried, Frank, Harris, Shriver & Jacobson, LLP, as a recipient of the Fried Frank/LDF fellowship.

She is a member of the board of the Clinical Legal Education Association and recipient of the M. Shanara Gilbert award from the American Association of Law Schools.

Jennifer Koh  
**Associate Professor of Law, Co-Director, Nootbaar Institute for Law, Religion & Ethics, Pepperdine Caruso School of Law**

Professor Jennifer Koh joined the Pepperdine Caruso Law faculty in 2021 and brings an extensive background in teaching, scholarship and service to the law school. Her research focuses on the convergence of the immigration enforcement and criminal legal systems; the legal frameworks governing deportation, particularly streamlined procedures taking place outside the immigration courts; and the federal courts’ treatment of immigration claims. Her scholarship has appeared in journals such as the Yale Law Journal, Washington University Law Review, Southern California Law Review, Stanford Law Review Online, Duke Law Journal Online, North Carolina Law Review, Florida Law Review, and Wisconsin Law Review. Various federal courts—including the United States Supreme Court—have cited Professor Koh’s scholarship. She has appeared in the Los Angeles Times, Washington Post, Christian Science Monitor, Law360, Orange County Register and various other media outlets and podcasts.

Professor Koh teaches Criminal Law and Evidence at Pepperdine. She has also taught doctrinal courses in Immigration Law, Administrative Law and the Legal Profession, and directed clinical programs and supervised students in a wide range of immigration matters. Most recently, she held visiting faculty positions at UC Irvine School of Law and the University of Washington School of Law. She began her teaching career as a teaching fellow and lecturer at Stanford Law School, and served on the full-time faculty at Western State College of Law.

Professor Koh joins the law school as the Co-Director of the Nootbaar Institute on Law, Religion and Ethics. She has written about the impact of Christians conceptions of love on immigration law discourse in the U.S., and has spoken on immigration and social justice to numerous faith-based audiences across the country. For the past decade, she has been active at NewSong Church in Santa Ana, CA.

Much of Professor Koh’s career has been devoted to serving immigrant communities and advancing social justice amongst underserved populations. She helped found the nonprofit organization the Orange County Justice Fund in 2017, and continues to serve on its Board of Directors. She also sits on the Board of Directors for the Public Law Center. She is a recipient of the Orange County Hispanic Bar Association’s Attorney of the Year Award and the Ethnic Studies Award from Chapman University’s Attallah College of Educational Studies.

Professor Koh received her J.D. from Columbia Law School and her B.A. from Yale University. Earlier in her career, she clerked for the Honorable Eugene H. Nickerson of the Eastern District of New York, directed a community lawyering project aimed at serving Asian immigrant survivors of domestic abuse at Sanctuary for Families’ Center for Battered Women’s Legal Services in New York City, and a litigation associate in the New York and Palo Alto offices of the law firm WilmerHale.

Jamie Lee  
**Associate Professor of Law and Director, Development Clinic, University of Baltimore School of Law**
Education

J.D., Harvard University, 1999
B.A., cum laude, Yale University, 1994

Accomplishments
Lee joined the faculty in 2011 and teaches Business Organizations and the Community Development Clinic. CDC student attorneys provide creative transactional and regulatory legal services to local organizations that promote social and economic equity. Lee’s scholarship examines barriers faced by low-income people within contemporary legal systems, analyzes how systems meant to benefit the poor are frequently subverted or distorted, and proposes ways to combat such subversion. Lee’s scholarly writings have been put into practice through the CDC’s coalition work on water justice in the City of Baltimore, which resulted in the creation of an innovative governmental accountability structure. In 2020, the CDC’s water justice work received Honorable Mention for Excellence in a Public Interest Project by the Clinical Legal Education Association (CLEA).

Prior to joining the University of Baltimore faculty, Lee taught in the Community and Economic Development Law Clinic at American University, Washington College of Law and was a partner at a boutique law firm in Washington, D.C. specializing in federal affordable housing law, policy, finance, and public-private partnerships. Lee also clerked for Judge Marvin Katz in the Eastern District of Pennsylvania, trained and served as a mediator, and was an editor of the Harvard Negotiation Law Review.

Julie Mao
Deputy Director
Just Futures Law

Accomplishments

- Named one of Forbes 30 Under 30 in Law and Policy
- Former Equal Justice Works Fellow

Julie Mao has nearly a decade of experience in the immigrant rights, police accountability, and labor rights movement. She was a senior attorney at the National Immigration Project of the National Lawyers Guild and attorney at the New Orleans Workers’ Center for Racial Justice. She has represented immigrants in civil rights litigation against law enforcement abuse and labor exploitation, and worked with hundreds of directly impacted community members to stop their deportations.

Maru Mora-Villalpando
CEO
Latino Advocacy, LLC; Founder, Law Resistencia

Maru Mora Villalpando is founder of La Resistencia and is a community organizer and undocumented immigrant. She was born and raised in Mexico City. In December 2017, ICE put her in deportation proceedings. She is continuing her community organizing work.

Hiroshi Motomura
Susan Westerberg Prager Distinguished Professor of Law; Faculty Co-Director, Center for Immigration Law and Policy
USLA Law

Accomplishments

- Professor Hiroshi Motomura is the Susan Westerberg Prager Distinguished Professor of Law at the UCLA School of Law, where he also serves as the Faculty Co-Director of the law school’s new Center for Immigration Law and Policy.
- Before joining the UCLA law faculty, Professor Motomura taught at the

Education

- B.A. Yale, 1974
- J.D. UC Berkeley, 1978

Accomplishments

- Named one of Forbes 30 Under 30 in Law and Policy
- Former Equal Justice Works Fellow

Hiroshi Motomura is the Susan Westerberg Prager Distinguished Professor of Law at the UCLA School of Law, where he also serves as the Faculty Co-Director of the law school’s new Center for Immigration Law and Policy.
University of Colorado, Boulder, where he was Nicholas Doman Professor of International Law, and at the University of North Carolina, Chapel Hill, where he was Kenan Distinguished Professor of Law.

- He received the UCLA Distinguished Teaching Award in 2014 and the UCLA School of Law’s Rutter Award for Excellence in Teaching in 2021.
- He is one of 26 law professors in the United States profiled in What the Best Law Teachers Do (2013).
- Professor Motomura is a founding director of the Rocky Mountain Immigrant Advocacy Network (RMIAN), and he was a director of the National Immigration Law Center from 2011 through 2020.

Claudia Munoz
Co-Director Ejecutiva
Grassroots Leadership

Claudia Muñoz was born and raised in Monterrey, México and has called Texas home since 2001. As a community organizer for over 14 years, she has been on the front lines of many fights in immigrant rights and labor movements. Claudia graduated from Prairie View A&M University in 2009 and currently serves as executive Co-Director at Grassroots Leadership in Austin, TX, where she has worked since 2017. Grassroots Leadership works for a more just society where mass incarceration, criminalization, and deportation are things of the past.

Lisa Lucile Owens
Student
Graduate School of Arts and Sciences, Sociology, Columbia University

Lisa Lucile Owens received her Ph.D. in sociology from Columbia in 2020 and her J.D. from Boston College in 2012.

Accomplishments:
She is currently writing a book on housing inequality and the dismantling of the social safety net (under peer review). Her work has also been published or is forthcoming in Sociological Methodology, Critical Sociology, the Fordham Urban Law Review, the Alabama Civil Rights and Civil Liberties Law Review, and the Boston Review.

Emily Ponder-Williams
Managing Attorney
Civil Defense Practice, Neighborhood Defender Service of Harlem

Anthony Posada is a Supervising Attorney for the Community Justice Unit of the Legal Aid Society. Anthony graduated from CUNY School of Law at Queens College where he received his JD in 2012 with a specialization in Community Economic Development, Immigration and Deportation Defense.

Through his work in the Legal Aid Community Justice Unit, Anthony has provided legal services to members of “Cure Violence” Programs. Cure Violence focuses on gun violence as a national health issue. It works with likely victims to change social norms that have perpetuated the deaths of both individuals and communities. Before joining the Community Justice Unit, Anthony worked as a Public Defender in the county of Queens representing people charged with misdemeanors and felonies.

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Community Justice Unit, The Legal Aid Society

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Public Defender in the county of Queens representing people charged with misdemeanors and felonies.

**Stephanie M. Stern**  
Professor of Law  
Chicago-Kent College of Law

**Education:**  
- J.D., Yale Law School  
- B.A., Brown University

**Accomplishments**  
Prior to joining the Chicago-Kent faculty, Professor Stern practiced property and environmental law at Kirkland & Ellis, LLP and clerked for the Honorable Kermit Lipez on the U.S. Court of Appeals for the First Circuit. She also served as a Bigelow Fellow at the University of Chicago Law School and a research fellow at the Yale Center for Environmental Law and Policy. Professor Stern is a graduate of the Yale Law School and Brown University.

**Juliet Stumpf**  
Robert E. Jones Professor of Advocacy and Ethics  
Lewis & Clark Law School

**Education**  
- J.D. *cum laude*, Georgetown University Law Center  
- B.A. in English Literature, Oberlin College

**Accomplishments**  
- **Professor Juliet Stumpf** is the Robert E. Jones Professor of Advocacy and Ethics at Lewis & Clark Law School  
- Professor Stumpf is a co-founder of CINETS, the transnational, interdisciplinary network of crimmigration scholars  
- She serves as Co-Director of the academic network, Border Criminologies at Oxford University, and sits on the Board of Directors of the Innovation Law Lab  
- In 2016, she received the Leo Levenson Award for Excellence in Teaching.

**Sejal Zota**  
Legal Director  
Just Futures Law

Sejal is the legal director and a co-founder of Just Futures Law. With almost twenty years of experience in the area of immigration, Sejal has litigated and argued several high-impact decisions on behalf of individuals and amicus curiae, including *Saget v. Trump* (challenging termination of Haiti’s Temporary Protected Status), *Catalan-Ramirez v. Wong* (challenging Chicago Police Department’s gang database and ICE’s unlawful raid on Catalan-Ramirez), and *Sessions v. Dimaya*, 138 S. Ct 1204 (2018) (holding that immigration crime of violence definition is unconstitutionally vague). She has argued before the Second, Seventh, and Ninth Circuits and the North Carolina Supreme Court and Appeals Court, and is a frequent speaker on immigration issues.

Most recently, Sejal was the Legal Director of the National Immigration Project of the National Lawyers Guild, where she spearheaded creative legal strategies in the areas of immigration enforcement, crimmigration, removal defense, civil rights, and post-conviction. Prior to that, Sejal taught, researched, and advised on local and state immigration issues at the UNC School of Government, where she authored *Immigration Consequences of a Criminal Conviction in North Carolina*. Earlier in her career, she served as an instructor in the NYU Immigrant Rights Clinic, as a public defender with the Bronx Defenders, and as a Kirkland and Ellis fellow at the Immigrant Defense Project. She graduated from Duke University and the NYU School of Law.
Undocumented or Illegal?

On December 1, 1981, a crisp day in Washington, D.C., the lawyers in Plyler v. Doe went to the US Supreme Court to make their arguments to the justices, 45 minutes for each side. John Hardy was the attorney for the state of Texas. As he spoke, Justice Thurgood Marshall interrupted to ask if Texas could deny fire protection to illegal aliens. Apparently nonplussed, Hardy bought a little time: “Deny them fire protection?” Marshall persisted: “Yes, sir. F–I–R–E. Could Texas pass a law and say they cannot be protected?” When Hardy said that he did not think it could, Marshall responded pointedly: “Why not? … Somebody’s house is more important than his child?”

Justice Marshall’s question was one way of asking about what it means to be in the United States unlawfully. How does the law treat someone who is in the United States without lawful immigration status? Even if she can be arrested and deported, does this mean that local firefighters will not protect her home? Can she get married? Use public roads? Can an unauthorized migrant fight in court for child custody or sue for personal injuries? The answers to these questions have profound practical meaning for the lives of unauthorized migrants, shaping their days and nights and reflecting how much they are part of American society—or are excluded from it.

Another true story raises questions about the consequences of unlawful immigration status in the workplace. In May 1988, a man going by the name of José Castro applied for a job at Hoffman Plastic Compounds factory in Paramount, California. Then as now, it made polyvinylchloride (PVC) pellets for sale to companies that formed the PVC into pipe, insulation, fabric, and other products. Castro presented three documents with his application: a Social Security card, a California state identification card, and a birth certificate showing that he was born in El Paso, Texas. Hoffman Plastic hired him to operate machines that extruded PVC pellets before they were bagged and shipped to customers. While working there, Castro lived at his niece’s home, where he slept on the living room couch.
Around Christmas 1988, when Castro had been on the job about six months, a union—the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO—started to organize the plant workers, enlisting the help of some, including Castro. The next month, the plant management heard about the organizing and questioned Castro about his involvement. Soon afterwards, the plant laid off nine workers, including José Castro. The company’s owner, Ron Hoffman, would later insist that declining business prompted the layoffs. One of the discharged employees filed a claim with the National Labor Relations Board (NLRB), which ruled about 18 months later that the layoffs were an anti-union tactic that violated federal labor law.

In federal labor law, the normal remedy for this type of employer violation is back pay. A wrongfully fired employee gets the money that he would have earned if he had stayed on the job. But as the NLRB looked into the case, it came out that José Castro was in the United States unlawfully. He had used a borrowed birth certificate, and in all likelihood the name José Castro was an alias. The question emerged: If an unauthorized worker is laid off in violation of federal labor law, is he eligible for back pay?

No, said the US Supreme Court in its 2002 decision in *Hoffman Plastic Compounds, Inc. v. NLRB*. The Court explained that federal immigration law barred José Castro from working, so he should not get the money he would have earned. As in *Plyler*, a 5–4 vote of the justices decided *Hoffman Plastic*. The decision seemed like it might severely limit workplace protections for unauthorized workers. And yet, courts and agencies in other cases since *Hoffman Plastic* have distinguished back pay from other workers’ remedies. Unauthorized workers can receive unpaid wages for work performed, damages for employment discrimination, and remedies for other employer violations of workers’ rights. These workplace cases, like Justice Marshall’s question about fire protection, probed when and why the law protects unauthorized migrants.

**Asking about the practical consequences of unlawful status is just one of four ways to ask what it means to be in the United States in violation of immigration law. The *Plyler* Court was considering the consequences of unlawful status when it observed that “there is no assurance that a child subject to deportation will ever be deported.” In *Plyler*, it seemed beyond doubt that the children who challenged the Texas statute were in the United States unlawfully, and the Court referred to the children as illegal aliens, but it is not always clear if someone’s presence is unlawful. A third way to think about unlawful presence is to ask if someone, even if clearly violating immigration law, can acquire lawful status in the future. On this issue, the *Plyler* Court**
observed that Congress might adopt a legalization or amnesty program, but this routinely happens (without a broad-scale program) through many narrow avenues in current immigration law, making unlawful presence changeable.¹

A fourth aspect of unlawful presence is its meaning in moral or social terms. Does it carry the sort of deep stigma that might follow a conviction for a violent crime, or is being in the United States illegally more like littering in a public park or driving faster than the speed limit? *Plyler* addressed this question indirectly by seeming to absolve both the children and their parents from guilt. The Court observed that “[s]heer incapability or lax enforcement of the laws barring entry into this country” had led to a sizable unauthorized population, and that unauthorized migrants were “encouraged by some to remain here as a source of cheap labor.” This moral or social meaning of unlawful presence may be the aspect that most directly affects whether migrants who lack lawful status have a claim to take part in American society.⁴

These four aspects of unlawful presence overlap, and it can be natural to consider them together. The *Plyler* Court addressed both the practical consequences of unlawful presence and its social meaning in this passage: “the confluence of Government policies has resulted in ‘the existence of a large number of employed illegal aliens…whose presence is tolerated, whose employment is perhaps even welcomed.’”⁵ The Court’s opinion as a whole seemed to adopt the view that unlawful presence is inconclusive in several key respects, and that immigration status is just the start of deciding how unauthorized migrants should be treated.

One central goal of this chapter is to examine each of these four aspects of unlawful presence, especially by explaining the complexities of federal immigration law related to each. The history of immigration to the United States combines with the present contours of immigration law to show that immigration status often is hard to ascertain or is changeable. And even when a violation is clear, its consequences are not. Moreover, the history of immigration law suggests strong reasons not to treat unlawful presence as deeply immoral or to assign serious stigma to unauthorized migrants, and not to treat being undocumented—literally, without papers, *sin papeles*—as diminishing claims to participate in American society.⁶

This chapter’s other central goal is to explain how these four aspects of unlawful presence are related to each other. Unlawful presence is inconclusive in four ways, but more significantly, it is inconclusive by design. My argument goes beyond saying that unlawful presence is too indeterminate to allow comfort in neat divisions between *legal* and *illegal* and between *us* and *them*, and that immigration status can only be the start of a conversation and never its end. I go further to explain that the vagueness of the legal/illegal line is part
of an immigration system in which both lawful admission and enforcement are highly selective. Immigration law on the books creates a large number of violators; immigration law in action has historically tolerated them. Whether they are ultimately deported depends on countless decisions by government officials who exercise discretion, always aware of political and economic pressures, and often in ways that can be inconsistent, unpredictable, and sometimes discriminatory. Unauthorized migrants are often accused of breaking the law, but the real threat to the rule of law comes from the system as a whole.

**Of Paths to Lawful Status and Gray Areas**

Even when a noncitizen’s presence in the United States clearly violates immigration law, that status may change. Many unauthorized migrants can be very close to having lawful immigration status. Some meet all requirements to qualify for lawful status but must file applications and await processing. Others have successfully qualified in an admission category, for example as the spouse of a citizen, but must wait in one of the several lines for admission to the United States because of an annual limit on immigrant visas. Others are in one of the lines but they are disqualified for some reason, such as unlawful presence in the United States, and need to restore eligibility through a waiver.

In fact, many noncitizens who become lawful permanent residents have been in the United States unlawfully at some earlier time. According to a study led by sociologist Guillermina Jasso, about 19 percent of new permanent residents originally crossed the border without inspection at a port of entry. Another 12 percent were lawfully admitted but then overstayed. This does not mean that 31 percent of unauthorized migrants have a path to permanent resident status. Many noncitizens who cross the border without inspection or overstay after admission as a nonimmigrant have no way to acquire lawful permanent residents. But it is striking that so many of those who become lawful permanent residents were unauthorized migrants at one time.

Explaining further how someone who is in the United States unlawfully can qualify for lawful immigration status requires a quick tour of the main federal statute, the Immigration and Nationality Act (INA). Among the complexities of this intricate body of law are the many narrow paths from unlawful to lawful status under current law.

**Imagine the case** of Mariano, who came from Mexico to the United States four years ago. He had temporary worker status as a computer programmer at
a software company in Boulder, Colorado. He traveled from his hometown, a place not far from Guanajuato, to Denver International Airport, where he was admitted as a “nonimmigrant.” This term refers to noncitizens who are admitted for a specific purpose and a limited time. United States immigration law has many nonimmigrant categories, including business visitors, tourists, and students. Mariano was admitted as an H-1B temporary worker for a period of three years.

Mariano decided that the job was not for him and quit one year after his arrival. An accomplished musician, he now makes a living as a guitarist in several bands and as a guitar teacher at a local music store, H. B. Woodsong’s. Mariano also works the early morning shift as a barista at Vic’s Espresso. Having quit his job and overstayed his three-year admission, Mariano is in the United States unlawfully. He could be deported—or “removed,” in the language of the statute. But Mariano recently married Rachel, a US citizen, who can file a petition for Mariano as her “immediate relative.” Though unlawfully present in the United States, Mariano now qualifies to become a lawful permanent resident without a waiting period. Through a procedure called “adjustment of status,” Mariano can become a permanent resident without leaving the country.

Lawful permanent residents are noncitizens who have been admitted for an indefinite period. They get what are often called “green cards” due to the card’s traditional hue. After five years—or just three years for spouses of citizens—permanent residents can become citizens through a process called “naturalization.” A total of almost 7 million permanent residents naturalized in the decade from 2002 through 2011. Permanent residents may lose their status if they leave the country for a long period—generally one year or longer. But unless they become deportable, for example because of certain types of criminal convictions, they may live in the United States indefinitely as permanent residents. No law requires them to naturalize as a condition of staying.

Now for some complications: Suppose that Mariano had not come through Denver International Airport as a nonimmigrant, but instead had crossed the border by avoiding an official port of entry. His marriage to Rachel still qualifies him as an immediate relative who is eligible to become a lawful permanent resident, but his clandestine entry disqualifies him from getting a green card through the adjustment of status procedure inside the United States. Mariano can still go back to Mexico for his immigrant visa, but then he would face another problem.
Federal immigration law restricts the admission of noncitizens who leave the country after at least 180 days of unlawful presence. For unlawful presence between 180 days and one year, they generally must leave for three years before they may return. Noncitizens like Mariano who have over one year of unlawful presence face a longer penalty period of 10 years. This rule applies only to noncitizens who leave the country, so Mariano could avoid it through adjustment of status. But noncitizens who enter without inspection generally are ineligible to adjust their status inside the United States. Mariano would have to leave the United States to get his green card. The only way to avoid a 10-year wait is to ask the government for a waiver, which requires showing that barring Mariano from admission as a permanent resident would cause extreme hardship to Rachel, a US citizen. This waiver is discretionary and a decision can take time, but approval rates are high. In this scenario, too, Mariano would be in the United States unlawfully, but it is also true that he qualifies for permanent residence.

Even if unauthorized migrants fit no admission category, they may become permanent residents on a case-by-case basis. Ever since 1917, federal law has allowed immigration officials to grant permanent resident status to noncitizens. The current version of this scheme, called “cancellation of removal,” was set up in 1996. Each year it allows up to 4,000 noncitizens who are in the United States unlawfully to become permanent residents. The applicant must have been physically present in the United States for 10 years and must show that his removal would result in exceptional and extremely unusual hardship for a US citizen or permanent resident spouse, minor child, or parent. Criminal convictions can be disqualifying. If the applicant meets these threshold eligibility requirements, immigration judges have the discretion to grant cancellation. The current eligibility rules for cancellation of removal are much stricter than they were before 1996, when Congress substituted the exceptional and extremely unusual hardship standard for the “extreme” hardship required by earlier law. But even under the new, more demanding standard, it remains true, as the Plyler Court noted, that an “illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen.”

Overall, then, unlawful presence is more nuanced than it seems, first in that current law allows immigration status to change. An estimated 4.4 million noncitizens are waiting in line with approved immigrant visa petitions. Of this group, it is safe to assume that many are currently in the United States without lawful immigration status, though the exact number is unknown. For these noncitizens who meet the basic green card requirements but must
wait, or who can get green cards through cancellation of removal, “illegal” does not mean “absolutely illegal.” It seems especially cavalier to dismiss a non-citizen’s presence as illegal if she only needs to file paperwork or wait in a line for which she has qualified, or if she lacks the money to pay filing fees and for the help of a lawyer to navigate the complexities of federal immigration law.

What about the millions of unauthorized migrants who do not have approved immigrant visa petitions or strong claims for cancellation of removal? For many in this group, unlawful presence is inconclusive in a different way. They are in a gray area between lawful and unlawful status. Well over one million have some form of federal government permission to stay in the country in a twilight status, as legal scholar David Martin put it.16

For example, “temporary protected status” (TPS) shields noncitizens who are in the United States from removal to countries that are beset by disturbed conditions, such as political strife in Liberia, Somalia, Sudan, and South Sudan. The government also granted TPS after volcanic activity in 1995 on the Caribbean island of Montserrat, after Hurricane Mitch in Honduras and Nicaragua in 1998, and after earthquakes in 2001 in El Salvador and in 2010 in Haiti. The federal executive branch designates countries for TPS and can extend such designations. TPS designation typically ends when home country conditions improve, but the duration of TPS can be long, even lasting for years. To keep TPS from attracting new arrivals, applicants usually must be in the United States when the country is designated. TPS holders are not permanent residents, but they are allowed to work.17

Another twilight status is “parole,” which is a form of limited government approval for noncitizens to be in the United States, even if they do not qualify immediately for lawful admission. Parole has served as a form of refugee protection when the circumstances were compelling but existing laws provided no options for formal admission. In 1956, when the Soviet Union sent tanks to put down unrest in Hungary, the annual cap on immigration from Hungary had been reached. No refugee category was available, but the Eisenhower administration paroled about 30,000 Hungarians into the United States. In more recent decades, the federal government has granted parole to hundreds of thousands of persons from a variety of countries including Cuba, as well as countries in Asia and elsewhere in the world. Parole is also used on a case-by-case humanitarian basis to let noncitizens into the United States for medical care for themselves or family members, sometimes for long stays, even if they have no basis for admission.18
Though these examples show how the federal government uses parole as a substitute for formal admission, it has also granted parole as a bridge toward permanent residence for noncitizens who are in the United States unlawfully. In 2010, for example, the Obama administration started to grant parole to Haitian orphans who were in the process of being adopted by US citizens and to unlawfully present spouses, parents, and children of citizens serving in the US military. Parole allowed these unauthorized migrants to become permanent residents through adjustment of status without leaving the United States, thus avoiding the three-year or ten-year bars to admission for noncitizens who have been unlawfully present.19

Discretion and Legalization

The number of unauthorized migrants who may acquire lawful permanent residence or who may be in a twilight status still falls well short of the total US unauthorized population of over 11 million. For the majority of unauthorized migrants, unlawful presence is also inconclusive in a third, more fundamental way that affects the entire unauthorized population and gets closer to the essence of the immigration law system as a whole.

The practical reality of immigration law enforcement is that the federal government tries to remove only a small fraction of the unauthorized migrants in the United States. The statement by the Plyler Court in 1982 that “there is no assurance that a child subject to deportation will ever be deported” is just as true today. The arrest and deportation of any particular unauthorized adult or child has been predictably improbable for at least a century. The reason has been that the administrative capacity and political will to apprehend and remove immigration law violators have been limited. The letter of the law creates a large removable population, but whether an individual is actually targeted for removal has long depended on government discretion and bad luck.20

To be sure, there are signs that this situation is changing, especially with the infusion of ever more resources into enforcement. I will look closely at these developments, but my focus for now is the long-standing system that has led to the current state of affairs. Even if some consensus were to emerge that future immigration enforcement must be more effective, wise responses to the current unauthorized population of over 11 million must be grounded in a sound understanding of historical patterns, starting with the outsized role of discretion in immigration law.

It is useful to distinguish between two types of discretion in immigration law. Both are exercised outside any statutory provision, so they are unlike
the immigration judge discretion specifically authorized as part of the cancellation of removal statute. Instead, both types of discretion come from the inherent authority of any federal agency to make a broad range of choices about how it administers and enforces any body of law.

One type might be called macro discretion, which agencies and officials exercise when they set enforcement priorities, such as border enforcement or anti-terrorism efforts, and support them with funds and other resources. The available statistics are rough, but they make clear that an unauthorized migrant’s chances of arrest have historically been very low, even quite recently. In 2009, the Border Patrol and the Bureau of Immigration and Customs Enforcement (ICE) arrested only about 600,000, or under 6 percent of the estimated unauthorized population of 11.2 million.\(^{21}\) I cite arrest figures for 2009 because that was the last full federal fiscal year before a new federal enforcement initiative called Secure Communities allowed routine state and local arrests to bring unauthorized migrants to the attention of federal enforcement agencies. This shift represents the start of a major increase in enforcement activity, but my immediate concern is historical enforcement patterns and practices.

Other federal agencies such as US Citizenship and Immigration Services (USCIS) can initiate removal proceedings against unauthorized migrants. In this respect, the 600,000 arrests in 2009 by the Border Patrol and ICE are an undercount that omits some enforcement activity against unauthorized migrants. On the other hand, the Border Patrol makes most of its arrests at or near the border, so the 600,000 number exaggerates the chances of a federal arrest inside the United States. Overall, vast macro discretion that results in incomplete enforcement has been an important aspect of immigration law in the United States, at least until late in the first decade of the 2000s.

Another type of discretion might be called micro discretion—whether or not to pursue the removal of someone after she has been individually identified as unlawfully present or otherwise removable. If the federal government opts for removal, it typically starts a civil removal proceeding. It might also press criminal charges based on the immigration violation.\(^{22}\) Or federal officials might exercise discretion to not seek removal. The term “prosecutorial discretion” usually refers to this type of micro discretion.

Prosecutorial discretion of this individualized sort has long been commonplace in immigration enforcement, but it first became highly visible in a case involving the Beatle, John Lennon. In 1971, Lennon was admitted to
the United States as a visitor while he and his wife, Yoko Ono, tried to assume custody of Ono’s daughter from a prior marriage. But the father had taken the daughter into hiding, and they could not be found. While Lennon and Ono searched for the child, Lennon overstayed his admission and thus became deportable. The Immigration and Naturalization Service (INS) placed him in deportation proceedings and denied his request for nonpriority status, a form of prosecutorial discretion. Lennon’s lawyer, Leon Wildes, succeeded through a Freedom of Information Act request in discovering the reason for denial, which apparently was his British conviction for marijuana possession. Lennon was later granted permanent resident status in the United States as a noncitizen involved in a profession or the arts, but his efforts to see his INS files opened up public access to the nonpriority status guidelines.

Two decades later, during the Clinton administration in the 1990s, the INS started to issue public memos outlining the factors that would govern prosecutorial discretion. A milestone was 1996, when amendments to the Immigration and Nationality Act narrowed the availability of cancellation of removal and similar forms of relief in the federal immigration statute. Previously, a much larger group of unauthorized migrants and lawfully present noncitizens who had become deportable could ask an immigration judge for discretionary relief, for example under the precursor to cancellation of removal. But under new, much tighter eligibility rules, many could no longer apply to immigration judges for such relief and instead had to ask the INS for a more informal exercise of prosecutorial discretion.

Congress dissolved the INS in 2003 and reorganized the federal agencies responsible for immigration, absorbing INS functions into various parts of the new Department of Homeland Security (DHS). Since then, the Bureau of Immigration and Customs Enforcement (ICE) has been the DHS agency charged with immigration enforcement inside the United States, including removals. In June 2010, John Morton, the director of ICE, issued a public memo estimating the practical capacity of the federal government at 400,000 removals per year—under 4 percent of the unauthorized population. Citing this number, Morton explained the need to exercise prosecutorial discretion in light of enforcement priorities and listed factors to guide federal officials in deciding to seek or not to seek a particular noncitizen’s removal. Criminal convictions, for example, would make noncitizens a priority for removal. In contrast, low priorities for removal included US military veterans, pregnant and nursing women, and victims of domestic violence, trafficking, or other serious crimes.

DHS later issued several more memos to guide prosecutorial discretion. It sometimes designates a noncitizen’s case as a low priority for removal or closes
the noncitizen’s immigration case file, but nevertheless leaves her in practical limbo in the United States without permission to work. In other cases, DHS acts more formally by granting “deferred action” status. This means that although a noncitizen is unlawfully present, the government will not seek her removal and thus will allow her to stay as a practical matter, with eligibility for work permission based on economic necessity. However, deferred action is usually granted only for limited periods of time and does not provide a path to lawful permanent resident status or citizenship.26

Several Obama administration programs granted deferred action on an individualized basis to persons who meet certain criteria. Starting in June 2009, DHS granted deferred action to noncitizen widows and widowers of US citizens living in the United States, as well as to the widows’ and widowers’ unmarried children under 21 years of age. At that time, the federal statute required two years of marriage before it would make them eligible to become permanent residents. This deferred action policy was intended to let these noncitizens live and work in the United States while Congress considered legislation, ultimately enacted, that conferred permanent resident status without a minimum period of marriage.27

In June 2012, President Obama announced DHS guidelines for two-year grants of deferred action for individuals without lawful status who had been brought to the United States as children. Under this program—Deferred Action for Childhood Arrivals (DACA)—applicants had to be under the age of 31 in June 2012 and in the United States for the previous five years. They must have arrived before turning 16 and have no disqualifying criminal convictions. DACA shows yet again that limited federal enforcement capacity and the need for prosecutorial discretion can allow unauthorized migrants to acquire formal permission to stay and work in the United States. Permanent residence and citizenship may follow only if the noncitizen qualifies on some other basis.28

*Plyler* acknowledged that unlawful presence was inconclusive in another way when it observed that Congress might adopt a legalization or amnesty program. This aspect of unlawful presence can be considered an example of changing immigration law status, or of discretion exercised on a very broad scale. Either way, legalization is exactly what Congress approved as part of the Immigration Reform and Control Act (IRCA) of 1986. Four years after the Supreme Court’s decision in *Plyler*, IRCA offered permanent residence to noncitizens who had been in the United States unlawfully since January 1, 1982. They also had to show knowledge of English and civics, and
have a clean criminal record. IRCA also included a legalization program with less demanding requirements for unauthorized agricultural workers. If they had worked at least 90 days in seasonal agriculture between May 1985 and May 1986, they could become permanent residents by working three more years in the fields.29

About 1.6 million unauthorized migrants became permanent residents through IRCA’s general legalization program, plus another 1.1 million through the agricultural program. When IRCA became law, the estimated unauthorized population of the United States was about 3.2 million. Many were ineligible because they had arrived in the United States after January 1, 1982, but if they had close relatives who did qualify, they were allowed to stay and work in a type of twilight status. Many later became permanent residents by qualifying in the standard family admission categories.30

The Plyler Court’s recognition that Congress might enact legalization was borne out not only by IRCA, but also by the life stories of the children who were the plaintiffs in Plyler. In the 1990s, a Los Angeles Times reporter traced 13 of them. All had become lawful permanent residents of the United States. Ten finished high school in Tyler, Texas, and many went to college, though none graduated from a four-year institution. In 2007, another journalist interviewed three of the plaintiff children and found that two had become US citizens.31 Though these are individual stories, they are typical of the opportunities that IRCA and other features of immigration law made possible.

Congress has not enacted broad-scale legalization since IRCA, but as Chapter 6 will explore, other pieces of federal legislation have conferred lawful immigration status on smaller groups of unauthorized migrants.32 Since the year 2000, several broad-scale legalization proposals on the congressional agenda seemed to come close to congressional approval, though all fell short of enactment.

**IN SUM, UNLAWFUL** presence under current US immigration law is inconclusive in related but distinct ways. Immigration status can change, even if it is clear. Or status may be in a gray area between lawful and unlawful. And a great many noncitizens whose presence clearly violates immigration law have historically not been apprehended and deported. Moreover, Congress adopted a broad-scale legalization or amnesty program in 1986 and has seriously considered similar proposals.

A skeptical reader might view these possibilities as loopholes and unauthorized migrants as lawbreakers, even if deportation is improbable, and even
if some of them may acquire lawful status some day. From this perspective, nothing about the changeability, ambiguity, or uncertain consequences of unlawful presence should keep the government from insisting on broader compliance with the law to correct past enforcement failures. To test whether this view is justified, it is essential to ask more closely what it means in a moral or social sense to violate immigration law. The answer depends on a further question: Do the changeability, ambiguity, and uncertain consequences of unlawful presence reflect a failure to implement and enforce immigration policy, or are they a consequence of immigration policy that makes unlawful presence inconclusive by design? The answers to this question emerge from the history of unauthorized migration to the United States.

**We Asked for Workers**

History shows that the US economy has long had a nearly insatiable desire for a flexible, pliable, and inexpensive labor force supplied by immigration, including unauthorized migrants. As I will explain, early immigration patterns and the growth of the American nation created a persistent demand for workers that was satisfied with immigrants from Asia in the late 1800s, and then from Mexico starting in the early 1900s.

From these beginnings, the immigration system that became entrenched in the 1960s was marked by selective admissions combined with selective underenforcement. This history is a tale of labor, race, and discretion, and of policies that led to a large unauthorized population. And since the late 1960s, what has mattered has not been the line between the legal and the illegal, but rather the exercise of enforcement discretion. It can often turn harsh, but it can also be lenient. This history shows that the changeability, ambiguity, and uncertain consequences of unlawful presence are essential features of US immigration law. The corollaries to these aspects of unlawful presence are unpredictability and inconsistency in immigration enforcement that undermine the rule of law.

The origins of this immigration system go back to the early 1800s. In an ebb and flow that continued through the entire nineteenth century, the dominant attitudes in the making of US policy favored a sustained flow of migrants from northern and western Europe. The reasons were largely economic. The expansion of railroads made it possible to reach and settle previously inaccessible lands, where immigrant labor was badly needed: first to farm the new land, then to mine it, and later to work the factories and mills as industrialization spread.
By the mid-nineteenth century, American public opinion began to harden as new and different groups of immigrants came to the United States. Until about 1830, most newcomers had been Protestants from Great Britain or elsewhere in western Europe, but over the next two decades, immigrants started to come from a broader array of lands. Most prominent among the new source countries were Ireland and Germany. For the first time, sizeable groups of Catholic immigrants came to America.34

The sheer number of immigrants also grew dramatically, reflecting rapid population growth in Europe as well as major upheavals that included the revolutions of 1848 and the Great Irish Famine of 1845–1849. The tendency of immigrants to cluster in a few American cities made them more conspicuous. From the 1860 census through the 1920 census, around 13 percent of the total US population was foreign-born. In contrast, more than 40 percent of the population in New York, Chicago, San Francisco, and six other cities was foreign-born in 1870.35

Popular reaction against the new immigrants soon fueled organized nativism, centered around the American Party, also called the Know-Nothings because its members were sworn to secrecy. But business interests generally favored unrestricted immigration to maintain a continuous source of cheap labor, and the nativism of the 1850s receded with the Civil War. The practical urgencies of war drew a diverse array of newcomers into common cause, especially on the Union side of the conflict, leading to greater immigrant integration and acceptance. Almost a quarter of Union soldiers were foreign-born, including large numbers of Irish and German immigrants who had encountered a skeptical or hostile reception just a few years earlier.36

The evolving reception of European immigrants was just one part of the story of immigration to the United States in the nineteenth century. During the same period, and more directly relevant to unauthorized migration today, the nation expanded westward across the continent. As settlers pushed the national frontier west to the Pacific, one prevailing vision was immigration as settlement, with enlightened Europeans fulfilling their destiny by civilizing the land enough to make it worthy of statehood. Even after nativism declined as an organized political force that resisted waves of unfamiliar Europeans, it lived on as an ideology of conquest and settlement of new territory in the American West.37

In 1821, Mexico granted land to Texas pioneer Stephen Austin in what was then the Mexican state of Coahuila y Tejas, and American settlers followed. Even earlier, tensions had emerged between the newcomers from the north.
and the Spanish-speaking and native populations that were already there. In 1829, the Mexican government abolished slavery, a move directed against US citizens in this territory, now called Texas. Mexico also announced the end of legal immigration into the territory, repealed the property tax exemption for immigrants, and increased duties on US goods. But the American influx continued, and by 1834 an estimated 30,000 US citizens lived in Texas, compared to 7,800 citizens of Mexico.18

General Antonio López de Santa Anna then suspended the Mexican Constitution in 1835, limiting the rights that Texans enjoyed inside Mexico. In March 1836, Texas declared its independence from Mexico, continuing what historian Amy Greenberg called a state of intermittent warfare between Texas and Mexico. The annexation of Texas by the United States, once considered a remote possibility, occurred in February 1845, and the Mexican-American War followed. On February 2, 1848, the Treaty of Guadalupe-Hidalgo between Mexico and the United States officially ended the conflict. For a sum of $15 million paid by the United States, Mexico ceded over half of its pre-war territory. This land became the states of California, Nevada, Texas, Utah, and parts of Arizona, Colorado, Kansas, New Mexico, and Oklahoma. The treaty turned the estimated 100,000 Mexican Americans who lived in the vast ceded area into strangers in their own land. Almost all of them later automatically acquired federal citizenship in the United States, though not the state citizenship that was the main source of political rights at the time. Only about 5,000 left the region or exercised their right to stay while retaining Mexican citizenship.19

The aftermath of the Treaty of Guadalupe-Hidalgo saw the gradual loss of the economic, social, and political position that Mexicans had enjoyed in these lands before 1848. In California, the Spanish-speaking settler families—known as the Californios—who traced their ancestry back to Spain or Mexico had dominated political and economic life up to the mid-1800s, but they lost their influence in just one generation’s time. More generally, the treaty brought into the United States large populations whose race and ethnicity left them outside prevailing concepts of what it meant to be American. In these southwestern borderlands, vanquished Mexicans and Indians were cast as inferiors, even though the expansion of the frontier gave the formal status of US citizenship to many of the Mexicans who lived there.40

The legacy of conquest would be even more profound for noncitizens who found themselves on the Mexican side of the new border, because as noncitizens of the United States they were even more susceptible in the decades that followed to the discretionary management of immigrant labor by employers and the US government. Even if the territorial expansion of the United States
and the treatment of Mexican workers were distinct phenomena, they were related. Vanquishing Mexico made it easier for the United States later to treat Mexican migrants from south of the new border with less respect than would have emerged from a stable Mexico-US relationship as independent neighboring countries of equal stature.

THE ORIGINS OF the current unauthorized population of the United States also lie in the fact that questions of belonging and exclusion well into the twentieth century did not necessarily depend on the tight control of a physical border. Though it served as the symbol of national aspirations in an era of expansion and conquest, the boundary often defied precise demarcation, let alone enforcement in the modern sense of immigration control. More important was defining who was a citizen settler and who was not. In turn, citizenship depended heavily on race, as it had from the earliest years of American history.41

The first naturalization statute, enacted in 1790, allowed only “free white persons” to become US citizens. Though prevailing understandings of race into the early twentieth century cast many new and unfamiliar European immigrants—especially the Irish—as racially different from the dominant Anglo-Saxon stock of the US population, they were considered white for this purpose. And linking race and citizenship even more fundamentally, the American Civil War was fought over the power of the states to decide if African Americans could be citizens or property.42

The example of slavery makes painfully clear that labor and race were closely intertwined. And as the country continued to push west, an essential part of settler society was a hierarchy of work and workers. Many European immigrants found their place in the expanding nation as independent yeoman farmers and entrepreneurs, or as workers in factories. Their treatment under a variety of US laws reflected the assumption that they would become Americans. Even before becoming citizens, European immigrants were allowed to homestead, and in many states and territories to vote. They only had to file a declaration of intent to naturalize—an opportunity limited to white immigrants as the only ones eligible to naturalize. Though newcomers, they were Americans in waiting.43

Many states and territories enticed European immigrants with advertisements both overseas and at ports of entry. But much of what had to be done in fields and factories was dirty or degrading manual labor. Who would do the dangerous and backbreaking work to build the transcontinental railroad? The western states’ enormous needs for cheap and ample labor led the
federal government to negotiate the Burlingame Treaty with China in 1868. It declared the “inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of [American and Chinese] citizens... for purposes of curiosity, of trade or as permanent residents.” Chinese immigrants came in great numbers, making up 90 percent of the crews that laid the Central Pacific tracks east from California to Promontory Point, Utah Territory. Leland Stanford, as president of the Central Pacific Railroad, hefted the silver maul that drove home the golden spike on May 10, 1869, but eight Chinese workers laid the last rail.44

When the completion of the transcontinental railroad put some 10,000 Chinese laborers out of work, they spread out into new occupations. They drew blame for taking jobs from Americans and depressing wages throughout the West. A deep recession from 1873 to 1878 further fueled anti-Chinese hostility in California and neighboring regions. Calls to limit Chinese immigration grew louder, first in California, and soon pushed Congress toward a national policy of Chinese exclusion.45

In 1875, Congress passed the Page Act, sponsored chiefly by California congressman Horace F. Page, from Placerville in the heart of the gold country. It was phrased to keep convicted criminals and prostitutes out of the United States, but Congress intended the law to bar Chinese women, reflecting the widely held view that the majority of Chinese women coming to America were prostitutes or second wives in polygamous marriages. In intent and effect, the Page Act was the first of many Chinese exclusion laws. In 1877, a special joint congressional committee urged that Chinese immigration be curtailed by modifying the Burlingame Treaty. Two years later, Congress approved a law that drastically cut the number of Chinese passengers allowed to arrive by ship, but President Rutherford B. Hayes vetoed it. Some states decided to act on their own, rather than wait for federal action. One provision, in the 1879 California Constitution, allowed incorporated towns and cities to expel Chinese.46

In the 1880 presidential election, both Democratic and Republican party platforms called for restrictions on Chinese immigration. That year, a new treaty with China allowed the United States to “regulate, limit or suspend” the immigration of Chinese laborers. In 1882, Congress adopted a 10-year ban, based on a congressional declaration that “the coming of Chinese laborers to this country endangers the good order of certain localities.” With President Chester A. Arthur’s signature, this became the 1882 Chinese Exclusion Act. Congress renewed it several times over the next two decades and then extended it indefinitely in 1904. Chinese exclusion was the law of the land until 1943.47
Like many anti-immigrant movements in US history, Chinese exclusion was born of hostility driven by an economic recession and by the fear that strange and unassimilable newcomers would not only flood the labor market but also undermine American society more generally. But as the national economy rebounded near the end of the nineteenth century, it needed workers. Chinese exclusion forced employers to find cheap labor elsewhere, but where? The next answer—and the next milestone on the road to over 11 million unauthorized migrants today—was Japan.

Until the 1880s, the Japanese government severely limited emigration, but starting in 1884 it allowed laborers to go to the Hawaiian Islands to work on sugar plantations. The next year, Japan let emigrants go directly to the continental United States. In the 1890s, total Japanese immigration to the United States was ten times what it had been in the previous decade. And when the United States annexed the Territory of Hawaii in 1898, the many Japanese there gained lawful access to the US mainland.48

As the number of Japanese immigrants grew, so did hostility toward them. In 1905, the San Francisco School Board required Japanese immigrant children to attend a segregated school that it operated in Chinatown for Chinese children. The Japanese government protested with the argument, among others, that the local requirement violated a treaty between the United States and Japan. Recognizing Japan’s growing stature on the world stage, President Theodore Roosevelt’s administration sued to block the school board’s order, but then it pressured the Japanese government to curtail emigration. In 1907, a presidential order barred Japanese and Korean immigration from Hawaii to the US mainland. Later that year, the two governments adopted the so-called Gentlemen’s Agreement, which called for the Japanese government to limit emigration by no longer issuing passports that would allow Japanese laborers to travel to the US mainland. In return, the US government allowed new Japanese immigrants to join their parents, spouses, or children already in the United States. Many of these immigrants were picture brides—so called because their husbands relied on photographs to choose them from across the ocean.49

These restrictions on Chinese and Japanese immigration might have opened the door for labor migration from elsewhere in Asia, but new federal legislation in 1917 imposed further limits on Asian immigration. Except for the Philippines and other US possessions, immigration was forbidden from a so-called Asiatic barred zone that swept eastward from Saudi Arabia to Southeast Asia, and north from Sri Lanka, India, and Indonesia up through Afghanistan and what would soon become the Soviet Union. The
1917 law also barred immigrants who traced their ancestry to these countries. The barred zone did not include Japan, but only because the Gentlemen’s Agreement made outright exclusion seem unnecessary.

Then, in 1921, Congress passed the first of several laws that limited immigration in ways that were expressly intended to preserve the ethnic composition of the United States. The 1921 law capped immigration from regions other than Asia and the Western Hemisphere at 3 percent of “the number of foreign-born persons of such nationality” residing in the United States as of 1910. Because most immigrants from southern and eastern Europe had arrived after 1910, this scheme drastically reduced the numbers of migrants from those regions. The 1921 law was intended as a temporary measure, but Congress soon replaced it in 1924 with like-minded legislation, the National Origins Act.50

These laws, adopting what became known as the national origins system, were the first comprehensive federal statutes regulating the number of immigrants admitted to the United States. Prior federal laws had excluded various undesirable groups without imposing numerical limits. The formula for capping immigration from each country changed in 1924 and again in 1929, but the system kept immigration to the United States almost entirely white and largely western and northern European for over 40 years, from 1921 to 1965.

The national origins system made Asian exclusion nearly complete. The 1917 Act had already cut off immigration from independent nations in Asia except Japan. The 1924 National Origins Act ended what little Japanese immigration survived the 1907 Gentlemen’s Agreement. The National Origins Act also barred the Asian spouses and children of US citizens and admitted only the white inhabitants of countries in Asia. After 1924, only the Philippines, a US possession since the Spanish-American War of 1898, sent large numbers to the United States. Filipino workers could travel freely to the United States as noncitizen US nationals—a status between citizen and alien—making them the most significant Asian labor source. Immigration from the Philippines increased rapidly, from about 27,000 in 1920 to 108,000 in 1930, but Congress intervened with the Tydings-McDuffie Act in 1934. This law provided for Philippine independence in 1946, but it applied the national origins system immediately to the Philippines as if it were already a foreign country, subject to a limit of 50 immigrant visas per year.51

Six Hundred Miles to That Mexico Border

So far, the saga that leads to over 11 million unauthorized migrants in the United States has been a story of the shrinking supply of Asian immigrant workers. It is also a story of the persistent tension between the economy’s
thirst for workers and some Americans’ fears that too many of the wrong kind of newcomers would arrive. With a growing US economy in the early twentieth century, the question was unavoidable: Where would factories and fields find cheap labor? The answer was plain: with each new restriction on Asian immigration, the demand for Mexican workers intensified.15

Mexican labor migration to the United States began in earnest with the emergence of large-scale agriculture in the American Southwest in the early 1900s. In a period when the Gentlemen’s Agreement of 1907 and federal legislation in 1917 and 1924 radically restricted Asian immigration, irrigation opened up vast croplands, and the invention of the refrigerated boxcar made distant markets reachable. These factories in the fields needed armies of workers to plant, tend, harvest, and load the crops.16

The first decade of the twentieth century was a period of great dislocation in Mexico. A depressed economy and the Mexican Revolution of 1910 spurred northward emigration. Meanwhile, the US government did little to control its land borders. Immigration enforcement focused on coastal ports of entry like New York, with inspection stations at Castle Garden and later on Ellis Island, and on Angel Island in San Francisco Bay. In 1906, only 75 immigration inspectors on horseback patrolled the 1,900-mile border with Mexico. Their core mission was not to stop Mexicans, but to keep Chinese from evading the Chinese exclusion laws by traveling through Mexico to reach the United States.17

The southern boundary remained porous, even after the Border Patrol was established in 1924.18 Lack of enforcement was consistent with the substance of immigration law at that time. In contrast to strict limits on Asian immigrants, US law did not limit the number of Mexicans entering the United States. In the debates that led to the 1924 National Origins Act, some legislators pressed for a numerical cap on Western Hemisphere immigration, but their efforts failed. Instead, federal immigration statutes restricted entry from Mexico primarily by requiring proof of financial means. But at the behest of Southwestern growers, ranchers, mining companies, and railroads, some of these requirements were not applied to Mexicans, were applied to them selectively, or were phased in only gradually.19

Immigration law framed Mexican labor migration to the United States during this period, but the story has two other essential parts—race and discretion. Racial perceptions cast Mexicans as a subordinate labor force. This was the role imposed earlier on Chinese and other Asian workers, but geography led to different attitudes toward Mexican workers. They were expected to work when they were needed, but when they were not, they could be sent
home more easily than Asian workers. In contrast to formal exclusion of Asian immigrants by law, Mexican workers could be managed with flexible or informal forms of immigration control. In 1911, the 42-volume final report of the Dillingham Commission, established by Congress in 1907 to “make full inquiry, examination, and investigation… into the subject of immigration,” observed:

Because of their strong attachment to their native land… and the possibility of their residence here being discontinued, few become citizens of the United States. The Mexican migrants are providing a fairly adequate supply of labor. … While they are not easily assimilated, this is of no very great importance as long as most of them return to their native land. In the case of the Mexican, he is less desirable as a citizen than as a laborer.⁵⁷

Recruitment of Mexican workers both within and outside the law became commonplace. Southwestern farmers began to rely heavily on Mexican laborers, but as more came, they spread throughout the United States, helping to meet the needs of employers far from the border and in a variety of industries.⁵⁸

To understand this formative period in the history of unauthorized migration, it is crucial to appreciate that the lines between various categories of lawful admissions and between legal and illegal immigration had not acquired the meaning that they sometimes carry in today’s immigration debates. When “permanent resident” entered the legal vocabulary in the 1920s as a synonym for immigrant, the immigration statutes reflected a pervasive, entrenched view that European immigrants were Americans in waiting, and other newcomers were not. And regardless of whether immigrants from Asia or Latin America had formal permanent resident status, what mattered more was what they were expected to do in the United States. No matter if they came as permanent residents or as temporary workers, or came outside the law, the more basic fact was that they were needed as workers.

An emerging pattern brought Mexicans as migrant workers or commuters, though many eventually stayed indefinitely. Many employers preferred temporary workers over Mexican Americans who had become lawful permanent residents or US citizens. A temporary worker’s permission to be in the United States depended on his job, and this dependence on an employer kept them more subservient while working for low wages in harsh conditions. The most prominent lawful path for workers was the Bracero program, which
operated from 1942 until it formally ended in 1964 and finally was phased out in 1967. The program institutionalized the expectation that the vast majority of Mexicans who came to the United States did so temporarily to work.\textsuperscript{59}

Equally essential to understanding this formative period’s legacy is that crossing the border to work largely disregarded the line between the lawful and unlawful. Many employers of that era—like many today—also understood that unauthorized workers were easier to control and exploit than lawful temporary workers or permanent residents.\textsuperscript{50} Many Mexicans came without papers and readily found work in the United States. A vast border and minimal available resources limited what the US government could do to control crossings, but it could choose to tolerate unauthorized migration or sometimes move vigorously to control it, depending on what economic conditions and politics dictated. Enforcement was highly discretionary, and its intensity ebbed and flowed. Many of today’s debates over unauthorized migration have their roots in the perceptions formed in this era among employers, and among migrant workers and their families.

In January 1948, an airplane—a Douglas DC-3 known as a Skytrain—caught fire over Los Gatos Canyon, in western Fresno County, California. It was headed for the Imperial County Airport and then to the INS Deportation Center in El Centro, California. But it crashed, killing all 32 people on board. Iconic folksinger Woody Guthrie was outraged that news accounts named the pilot, copilot, stewardess (who was the pilot’s wife), and federal government guard, but referred to the other passengers as “twenty-eight Mexican deportees.” In protest, Guthrie penned a poem about the tragedy, giving the deportees symbolic names. The chorus begins, “Good-bye to my Juan, good-bye Rosalita, adios mis amigos, Jesus y Maria…. ” A schoolteacher, Martin Hoffman, later set the poem to music, and Pete Seeger popularized it as the song \textit{Deportee (Plane Wreck at Los Gatos)}.\textsuperscript{61}

As Guthrie’s lyrics tell their story, some of the deportees on that plane were in the United States illegally, while others had worked legally until their work contracts ran out.\textsuperscript{62} The distinction may not have mattered much for work in the fields. In practical terms, Braceros were as firmly in the grip of employers and the government’s deportation power as workers who came outside the law. But that power was a matter of discretion.

Historian Kelly Hernández has shown how decisions to arrest and deport suspected unauthorized migrants on the US-Mexico border from the 1920s until modern times depended primarily on decisions by local Border Patrol
officials and individual officers on the line. Officers operated with considerable independence, able to decide day-to-day when to enforce immigration laws—or when not to. In periods of vigorous enforcement, the targets were not only Mexicans, but also US citizens of Mexican ancestry, most infamously during the Great Depression of the 1930s. Federal immigration officials and local police went door to door in predominantly Mexican and Mexican-American neighborhoods in Southern California, asking residents for proof of lawful immigration status, arresting those who failed to show any, with deportation often the ultimate outcome. When the State of California offered a formal apology in 2005, the legislative history estimated that about two million people, including over one million US citizens of Mexican ancestry, had been forced to leave the United States as a result of these raids.63

Part of the explanation for today’s unauthorized population of over 11 million is that US immigration policy has treated some groups—Asian immigrants in the late nineteenth century, then Mexicans in the twentieth—as workers, not as Americans in waiting. Of course, these groups differed, as did their treatment under immigration law. Asian immigrants were potential settlers who had to be excluded when they were not wanted. Mexican immigrants were expected to come to work and to go home of their own accord when the work was done. A related major difference was that as Mexican workers took over for Asian workers, the law came to matter less. Some Mexicans workers came legally, and others did not. Though formal legal barriers to immigration and citizenship defined Asian exclusion, the hallmark of US policy toward unauthorized migration from Mexico became discretion that fluctuated from acquiescence to raids, arrests, and other visible and harsh enforcement.

Today, about 70 percent of unauthorized migrants in the United States are Mexican. Even if significant numbers of unauthorized migrants come from other regions of the world, the dominant image is one of unauthorized migrants from Mexico or elsewhere in Latin America. This image strongly influences public perceptions and de facto US policies toward unauthorized migration by signaling what unauthorized migration means in numbers, types of immigrants, and possible countermeasures. In this way, the story of the US-Mexico borderlands broadened into a national story of an immigration system marked more by discretion than by uniformity, consistency, or predictability.64

**Selective Admissions**

Selective enforcement of immigration law against a large unauthorized population is now a core feature of current US immigration policy. Discretion
exercised by government agencies, especially in the federal executive branch, matters far more than the letter of the law. But this would not be true with a more open system of admissions. It is the highly selective nature of the modern immigration system that helps to create a large unauthorized population, which in turn has made discretion in enforcement inevitable.

Unauthorized migration often prompts this skeptical question: Why not just get in line and come legally, like my grandparents did? The answer is that many would-be immigrants are not allowed to come legally. There is no line for them. This contrasts sharply with previous eras, when immigration was less restricted. Or, to be more precise, it was less restricted for European immigrants who came to America before 1965, when US immigration law favored them explicitly and flatly barred other immigrants by race and nationality. As one study of unauthorized migration quipped: “Saying, ‘Let them get in line’ is like saying, ‘Let them eat cake.’”

For immigration from Mexico to the United States, the current mix of lawful and unauthorized migration began to evolve in the 1960s, with drastic changes to the legal framework that had shaped Mexican migration up to that time. The Bracero program had operated for a generation as the major legal path for Mexican temporary workers, with about 500,000 coming and going each year. The program ended in 1964, largely because of conspicuous employer exploitation and abuse of the migrant workers that seemed intolerable in a political climate that would soon produce significant domestic civil rights legislation. Since the end of the Bracero program, the US government has gradually revived and expanded various admission schemes for temporary workers, but without the same scale or reach, and without a focus on workers from Mexico or any other specific countries.

As for immigrant admissions, the McCarran-Walter Act of 1952 reorganized federal immigration laws into the Immigration and Nationality Act, which retained the national origins system from the 1920s. Though President Harry Truman vetoed the bill, Congress voted to override, and the discriminatory limits remained in effect. But as legal historian Mary Dudziak later documented, the Cold War intensified the pressure to shed the nation’s history of racial discrimination, and the 1960s brought renewed calls to abandon criteria that explicitly discriminated by nationality.

In 1960, John F. Kennedy was elected the first Catholic president of the United States. Some congressional power brokers—among them Peter Rodino and Dan Rostenkowski—belonged to nationality groups that had suffered under the national origins system. After President Kennedy was assassinated, his brother, Senator Ted Kennedy, took up the cause of
Undocumented or Illegal?

immigration reform. Major amendments adopted by Congress in 1965 replaced the national origins system with a new scheme that abandoned the effort to preserve the nation’s ethnic mix. When President Lyndon Johnson signed the 1965 amendments into law at the base of the Statue of Liberty, he declared that the legislation would “repair a very deep and painful flaw in the fabric of American justice…. The days of unlimited immigration are past. But those who do come will come because of what they are, not because of the land from which they sprung.”

The coalitions that won repeal of the national origins system also secured other important civil rights legislation, most prominently the Civil Rights Act of 1964 and the Voting Rights Act of 1965. For Latin America, however, the repeal of the national origins system came at significant cost, by introducing numerical limits. Previously, the national origins system had set a numerical limit for overall immigration from the Eastern Hemisphere. The number of immigrants from the Western Hemisphere was not capped, even if individuals could be barred if they fell within certain exclusion grounds, such as those for immigrants without sufficient financial means.

The 1965 amendments changed this. Some legislators pressed for a cap on immigration from Latin America, expressing concerns that it would otherwise increase dramatically. Reform-minded legislators could not fend off the argument that ending the national origins system, with its discriminatory caps, meant that all countries and regions should be treated equally. Congress decided to limit Western Hemisphere immigration to 120,000 per year starting in 1968. Similar pressures led in 1976 to a new annual limit of 20,000 per year on immigration from any single country. These per-country limits exempted spouses and unmarried minor children of all US citizens and the parents of adult US citizens, but they applied to all other categories, including other relatives and all immigrants in employment categories. Further amendments folded the Western Hemisphere cap into an annual worldwide cap of 270,000 immigrants. Long lines soon formed for populous countries where the desire to go to the United States was strong due to geographical, historical, or economic ties.

The post-1965 per-country and overall caps on the number of immigrants only partly explain the growth of the unauthorized population to over 11 million today. Another crucial contributing factor has been that the qualifying categories for admission as a lawful immigrant have been defined narrowly and limited in number. The admissions system forces many qualifying immigrants to wait years or even decades. The system completely shuts out
many other immigrants who have neither qualifying family ties nor a high level of formal education. Explaining why this is true requires an overview of the admission system.

The most favored immigrants are the immediate relatives of US citizens. This group consists of spouses and unmarried minor children, as well as parents of citizens who are at least 21 years of age. An unlimited number of immediate relatives can become permanent residents. But the other family-based categories—children and spouses of permanent residents and adult children and siblings of US citizens—face annual limits and long waiting periods. As of February 2014, unmarried adult children of US citizens could immigrate only if they applied before January 2007. Siblings of US citizens could immigrate only if they applied before late October 2001.

The annual per-country cap makes the lines longer for many immigrants born in Mexico, the Philippines, India, and China. The longest waits are for Philippine-born brothers and sisters of US citizens, who reached the front of their line in February 2014 only if they applied over 23 years earlier, before August 1990. Federal immigration law makes some close relatives of US citizens and lawful permanent residents eligible for admission, but it then forces many of them to wait for years.

A snapshot shows that over one million new permanent residents were admitted annually in the period from 2005 through 2012. The family categories account for about 700,000, around 65 percent. Roughly 15 percent are refugees who applied for admission from outside the country or for asylum at a port of entry or inside the United States. About 4 percent won an annual lottery open to noncitizens from countries that have sent low numbers of immigrants in recent years. About 1 percent of permanent residents are unauthorized migrants who were granted cancellation of removal or another type of discretionary relief.

As compared to other admission categories, employment-based immigration is more limited. There are only 140,000 slots annually—16 percent of the total—for all employment categories workers and their families combined. At least as striking is the almost complete exclusion of workers without four-year college degrees—even if the workers are skilled or soon acquire skills, and are sought by US employers. All but 10,000 of these employment-based immigrant visas require at least the equivalent of a four-year US college degree, and these applicants face very long lines. The employment categories with shorter lines require more education or experience. As in the family categories, the per-country limits force immigrants from Mexico, China, India, and
Undocumented or Illegal?

the Philippines to wait longer than equally qualified individuals from other countries.76

The current scheme admits temporary workers, most of whom would not qualify for the employment categories for immigrants. A rough average of about 165,000 workers were admitted annually from 2008 to 2012 in the H-2A category for agricultural work. Annual admissions in the H-2B category for nonagricultural temporary workers averaged around 78,000 in the same period. But the use of these programs remains limited, largely because various procedures, requirements, and a cap on H-2B admissions curb their appeal for employers. These programs are also unattractive for workers, tying them like indentured servants to one employer and exposing them to exploitation in wages and working conditions. All in all, current programs do little to satisfy the economy’s apparent need for workers. The number of lawful temporary workers is tiny compared to an unauthorized US workforce estimated at 8 million as of March 2010.77

The end of the Bracero program in 1964 blocked the broadest lawful official employer access to cheap, flexible, temporary labor from Latin America. Soon afterward, three new features of the admission scheme—the new Western Hemisphere cap, per-country limits, and restrictive employment-based immigration categories—combined to make it very hard for workers from Mexico to come as permanent residents.78

But it would have been naïve to expect the number of Mexican migrants to drop. Migration continued, even after US immigration law made it harder. As sociologists Douglas Massey, Luin Goldring, and Jorge Durand have shown, migration networks and patterns are self-perpetuating and durable once they are established. Migration transforms sending and receiving communities in ways that sustain more migration, largely oblivious to what the law may or may not allow. Over generations, migration patterns, both lawful and unlawful, came to be normalized as the expectations of sending communities, US employers, and the migrants themselves.79

Even after the Bracero program ended and new restrictions were in place, migrants were able to come illegally with relative ease. A migration industry emerged to help them cross the border and reach locations in the US interior for work and housing. Employers continued to depend on a steady supply of inexpensive labor. Stagnation in the Mexican economy made northward emigration attractive to many Mexicans, no matter what US immigration law said. The Mexican government’s policy of developing its northern
border cities as part of its Border Industrialization Program drew workers up from other regions of Mexico, and many kept going to the United States.50

Around the same time, Central America was destabilized by coups, civil wars, and other political upheavals in El Salvador, Honduras, Guatemala, and Nicaragua, accompanied by economic instability—all powerful forces that pushed people to emigrate. With admissions highly restricted but economic conditions at home deteriorating and US employers willing to hire, it is no wonder that many migrants came from Mexico and Central America to the United States outside the law.

Selective Enforcement

A combination of historical migration patterns, strong transnational networks, and robust demand for foreign workers has sustained patterns of immigration to the United States, much of it unauthorized, and all in spite of restrictions on lawful immigration. With the unauthorized population far exceeding federal enforcement capacity, enforcement must also be selective, both in the interior and at the border.

To be sure, enforcement is better funded than it was in the early 1990s. Congress has directed more resources to the US-Mexico border. Removals of unauthorized migrants consistently increased during the Obama administration, largely by enlisting state and local law enforcement to assist in identifying and detaining unauthorized migrants. This emphasis on enforcement is open to a range of reasonable interpretations.81

One might say that, in spite of everything that increased enforcement has appeared to accomplish, it has not fundamentally changed the reality of unauthorized migration to the United States or the overall tolerance of a sizable unauthorized population within a highly discretionary enforcement regime. Or one might say that repeated infusions of money and other resources into immigration enforcement, combined with changes in immigration law that started with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)82 of 1996, represent a fundamental shift. In June 2013, the US Senate approved comprehensive immigration legislation that would have directed massive resources toward enforcement, especially on the US-Mexico border. Such moves suggest a continuing shift away from the traditional tolerance or acquiescence that prevailed over much of the twentieth century.

Accurately assessing the significance of enforcement requires first identifying the aspects of enforcement that suggest a policy of acquiescence or tolerance. This is essential because these features of the traditional immigration
system have led to a large population of unauthorized migrants and are the source of their claims and expectations. Whether or not the upsurge in enforcement reflects a fundamental shift away from a discretionary system of highly selective admissions and highly selective enforcement, these claims and expectations need to be assessed by understanding the context in which they arose. Government policies can change, and sometimes they should change, but justice requires dealing fairly with the consequences of prior policies.

A key area of traditional acquiescence in significant unauthorized migration has been the treatment of employers who hire unauthorized workers. Before the Immigration Reform and Control Act (IRCA) of 1986, 12 states had some sort of ban on the hiring of unauthorized workers, but there was no such federal law. In 1952, Congress made it a felony to harbor an alien unlawfully in the United States. But at the insistence of Southwestern growers and other agricultural interests, Congress added the so-called Texas Proviso, which defined harboring not to include employing an unauthorized worker.

IRCA's federal employer sanctions scheme did not broaden the definition of harboring, but it was a major shift, at least on the surface. The federal scheme relies on employers, who face penalties if they fail to meet either of two basic obligations. They must fill out and keep paperwork designed to deter and expose unauthorized employment. And they may not knowingly hire or continue to hire unauthorized workers. Congress debated but rejected criminal penalties for the unauthorized workers themselves, though they may face criminal charges for using a false Social Security number or similar offenses.

Employers comply with differing degrees of diligence and punctiliousness. Even when they do what the employer sanctions statute demands, they need only complete the required forms and check an employee’s identity or work authorization document to see if it “reasonably appears to be genuine.” Congress declined to require a closer look out of concern that a stricter system will lead employers to discriminate against some workers. In fact, Congress authorized discrimination claims against employers who probe a document's authenticity. Congress also required a US government study of discriminatory effects, which later showed that employer sanctions led employers to discriminate against workers with a “foreign” appearance or accent.

Because employers may not look closely at employees' documents, fake green cards and other documents that are good enough to get work are readily available and are frequently used. This is true in many occupations and industries, but employer sanctions are especially ineffective in informal economies...
like house cleaning, child care, and landscaping, where wages are often in cash, with little paperwork of any sort. Congress’s reluctance to burden employers with paperwork and other requirements also limits the effectiveness of employer sanctions. If employers minimally check documents and fill out forms, the risk of penalty is minimal, but so is the scheme’s value in immigration enforcement. Because employer sanctions need to strike a balance between enforcement and other concerns such as cost and discrimination, their effectiveness in stopping unauthorized work is predictably limited.87

Instead, immigration law enforcement against unauthorized work depends heavily on direct action by federal agencies. Worksite enforcement by Immigration and Customs Enforcement (ICE) agents who appear without warning to check documents and arrest unauthorized workers has waxed and waned as an aspect of enforcement strategy. Under President George W. Bush, ICE conducted relatively little worksite enforcement until the winter of 2006–2007, when it started to emphasize raids for the remainder of his administration. Arrests typically led to removal proceedings for immigration violators, but the federal government sometimes also brought criminal charges.88

The combined use of immigration and criminal law reached its apex in May 2008, when federal agents raided the Agriprocessors meat-packing plant in Postville, Iowa. The raid was harsh, dramatic, and controversial, with about 300 arrestees confined in livestock rings at the National Cattle Congress fairgrounds. The government put unauthorized workers in removal proceedings in immigration court, but it also brought criminal charges against them in federal district court for using false identity documents and Social Security numbers. Instead of relying principally on immigration removal proceedings, the government pressured the unauthorized workers to plead guilty to immigration-related criminal charges and to accept removal as part of criminal sentencing. There were other workplace raids during the final year of the Bush administration, but not with the same large-scale, coordinated criminal and immigration prosecution as in Postville.89

After President Obama took office in January 2009, federal workplace enforcement patterns shifted. Rather than emphasizing high-profile worksite raids and sending agents to make arrests, ICE devoted more resources to checking electronic databases for employees’ work authorization and sending the results to employers, who predictably responded by firing the workers. The federal government also relied more heavily on E-Verify, the federal employment verification database. E-Verify became mandatory in 2009 for federal contractors and subcontractors, and the federal government has encouraged its expansion in the private sector. But E-Verify is still plagued
Undocumented or Illegal?

by significant error rates that pose major practical and political obstacles to replacing the paperwork now required. E-Verify also does nothing to prevent unauthorized employment by someone who assumes the identity of someone who has permission to work. And there is deep resistance to a more regulated labor market with more intrusive monitoring—such as a national identity card—that would burden citizens and noncitizens alike. In fact, much of the opposition to making E-Verify mandatory has come from conservative, libertarian groups.90

The real significance of these flaws and fluctuations in enforcement against unauthorized work becomes clearer from the big picture. Despite recent upswings in workplace enforcement, the current unauthorized workforce of over 8 million is a significant part of the overall workforce, accounting for about 5 percent of all workers in the United States, and far more in some occupations and industries. Current immigration law makes it very difficult or impossible for employers to sponsor and hire temporary workers or for immigrants with little formal education to come to the United States lawfully. Responding to this mismatch between the immigration law system and their workforce needs, employers have the political and economic clout to inhibit raids, to resist stronger employer sanctions, and to eliminate jobs if they fail to secure a suitable workforce. Congress can enact no more than a system that looks good on paper but is designed to acquiesce in significant levels of noncompliance.

Naturally, enforcement inside the United States intensifies from time to time in response to political pressure, just as is true on the border. The upsurge in interior enforcement—at worksites and in other settings—may target unauthorized migrants viewed as especially undesirable, such as national security threats or noncitizens with criminal convictions, or it might sweep more broadly. But when any priority emerges to focus limited resources, it reduces the intensity of enforcement against the unauthorized population as a whole. Another complication is that immigration enforcement competes with the other missions of federal agencies. The Department of Labor and the Department of Health and Human Services, for example, often deal with unauthorized migrants in ways that put low priority on immigration enforcement or block it altogether.91

More generally, enforcement has typically been more vigorous in hard economic times, or whenever the balance of political imperatives favors getting tough on migrant-intruders. The Obama administration has deported more noncitizens than any other administration. Much of this effort has been
exerted in the belief that establishing government control over unauthorized migration—especially enforcement credibility through high removal numbers—will win political support for legalization and related measures. If history is any guide, enforcement inside the United States will rise and fall with its value as political currency.

Border enforcement has displayed patterns that resemble interior enforcement, but with some significant differences. In the 1990s, the Clinton administration reshaped enforcement on the US-Mexico border, especially near population centers like San Diego and El Paso. Rather than try to catch border crossers as they walked, ran, or swam from Mexico, the Border Patrol shifted strategy to deter entry with more imposing fences, high-tech surveillance, and many more Border Patrol agents on the line. The number of agents on the southern border more than doubled from about 3,400 in 1993 to about 8,200 in 1999. Congress almost tripled the INS budget from $1.5 billion in 1993 to $4.2 billion in 1999. The trend continued through the decade of the 2000s, with the combined budgets of the INS’s successor agencies exceeding $20 billion by the fiscal year 2010. That was also the year that President Obama reached beyond the Department of Homeland Security for federal enforcement resources, ordering National Guard units to the border.

The federal government has also adopted stricter policies toward border crossers who are apprehended. It is a federal misdemeanor crime to enter or attempt to enter the United States other than at an official port of entry. But the federal government has not always systematically filed criminal charges for simple illegal crossings—as opposed to repeated crossings, illegal reentry after deportation, or smuggling others. For simple crossings, the Border Patrol typically sent the offenders back across the border, often without a formal order of removal. Under this policy, sometimes called “catch and release,” the migrants could, as Woody Guthrie’s lyrics tell, “pay all their money and wade back again.”

Starting around 2005, criminal prosecutions to penalize and deter illegal crossings became much more common. In Arizona, New Mexico, and Texas, a federal initiative known as Operation Streamline calls for the criminal prosecution of anyone caught crossing the border illegally. The number of criminal prosecutions for border crossings rose dramatically to account for about half of all federal criminal prosecutions as of mid-2013.

A higher, smarter border fence backed by the weight of criminal law seems like a natural response to unauthorized migration. The next logical question is
whether intensified border enforcement has reduced the number of clandestine crossings. Some effect seems reasonable to assume, but any actual decrease depends on how much harder the crossing becomes in a given location and what new strategies border crossers adopt. Many now avoid the fortifications between Tijuana and San Ysidro, California, once the scene of nightly crossings by large groups of migrants.86

Their journey takes migrants further east to try their luck, where the fences are lower and fewer Border Patrol agents are on watch. This typically means crossing the harshest terrain on the US-Mexico border, trudging for days across the intense Sonoran mountains and desert into Arizona, New Mexico, and Texas. A growing number cross in another way—aboard panga boats that speed to landing spots up the California coastline. The migrants increasingly rely on smugglers—called coyotes—whose services have become more indispensable and more costly, not only to cross the border but also to evade checkpoints on the northbound route to destination cities. Over 4,000 travelers have died of heat and thirst, and yet they persist in their journey to jobs, willing to brave burning deserts and suffocating truck trailers.87

A related but different question is whether intensified border enforcement reduces the unauthorized population—as opposed to reducing the number of illegal crossings. Border enforcement does nothing about the 25 to 40 percent of unauthorized migrants who were admitted lawfully and then violated the terms of their admission. The unauthorized population also fluctuates depending on how many leave, either permanently or in seasonal or circular patterns. As for unauthorized migrants who cross the border, stricter border enforcement has seemed to increase their number, paradoxically yet predictably. In earlier decades, they might have traveled back and forth, but the increased risk and cost of each crossing means that they stay longer once inside the United States, and that their close family members are more likely to join them.88

A more fundamental puzzle is how demographic and economic factors influence the effectiveness of devoting more resources to border enforcement. The unauthorized population of the United States decreased from a little over 12 million in 2009 to over 11 million in 2012. Economic stagnation in the Mexican economy might have been expected to increase the number of Mexicans who sought work in the United States, but the United States also had a substantial unemployment rate. In the same time period, the growth rate of the Mexican population slowed significantly, and new employment and educational opportunities may have kept people in Mexico who might have gone to the United States in earlier periods. In these ways, which tend
to elude measurement, the consequences of border enforcement depend not only on its intensity, but on the larger economic and demographic context in which enforcement operates.99

Regardless of the actual effectiveness of enforcement resources, voting for fences—like voting for employer sanctions—can be smart pragmatic politics. The idea has become entrenched that robust border enforcement is an essential part of any rational immigration system. But as with employer sanctions, intensified border enforcement runs up against heavy counterweights that diminish real effects. These include the economic imperative to ease border crossings for trade and tourism, the reluctance to impose restrictive monitoring on US citizens, and the sheer cost of border infrastructure and Border Patrol salaries. Fiscal estimates for border fencing vary from $3 million to $21 million per mile. Although border-related spending can be more politically attractive than interior enforcement and makes a powerful symbolic statement that the government takes immigration enforcement seriously, high-tech border fortifications are in place only for a fraction of the 1900 miles from Imperial Beach near San Ysidro, California, to the mouth of the Rio Grande near Brownsville, Texas.100

The Meaning of Unlawful Presence

This chapter has explained why saying that a noncitizen is in the United States unlawfully can be a logical start to analysis but should never be its end. Unlawful presence can be inconclusive in several ways. It can change, it can occupy a gray area between lawful and unlawful, and its consequences are highly uncertain. These insights were essential to the US Supreme Court’s understanding of unlawful presence in Plyler v. Doe. But a more basic truth—crucial to understanding the social and moral significance of unlawful presence—is that unlawful presence is inconclusive by design. A highly restrictive admissions system predictably produces a large unauthorized population, to which the response is selective enforcement, which various government actors administer with broad discretion that can be unpredictable, inconsistent, and sometimes discriminatory. If unauthorized migrants are violating immigration law by their very presence in the United States, they are here within a system that also disregards the rule of law in its own ways.

A crucial question is whether selective, discretionary enforcement in immigration law is unique or instead resembles enforcement in other areas of law. An answer might start with the likelihood that an individual violator will be detected and penalized. The unauthorized population of the United States is
over 11 million, and the current enforcement system can remove only 400,000 noncitizens per year, including permanent residents and other lawfully present noncitizens who have become deportable. So an unauthorized migrant’s risk of removal is low. And yet, rates of detection and enforcement may be similarly low with regulatory offenses such as traffic and alcohol violations.

Two key features distinguish selective discretion in immigration enforcement from enforcement in other areas of law. First, detection and enforcement lead to a very severe penalty—removal from the United States, often preceded by a period of detention that can be prolonged. This contrasts sharply with the typical penalty for violations with similarly low detection and enforcement rates. Second, the uncertainty that selective discretion creates for unauthorized migrants is an essential part of the system itself.

The best way to analyze why immigration law operates as it does is to consider what it would take to transform it. There are signs that the commitment to immigration enforcement is changing. Since around the year 2009, the deputization of state and local police to identify noncitizens who may be removable from the United States has significantly increased the chances that any given unauthorized migrant will be apprehended, detained, and deported. A bill approved in 2013 by the US Senate (but not the House of Representatives) would have combined a broad-scale legalization program and an expansion of lawful admissions with both a massive infusion of funds into US-Mexico border enforcement and a requirement that all US employers use E-Verify. Yet it remains to be seen whether these developments will move away fundamentally from the discretionary system that prevailed for much of the twentieth century.

Any fundamental change of this sort cannot be durable unless two things both happen, and if that is improbable, then it is fair to consider the current state of affairs to be a system that operates by design. First, the system for admitting new immigrants and temporary workers lawfully needs to expand dramatically. Or, enforcement could intensify to a level that would seriously reduce unauthorized migration. Several factors suggest strongly that the second option is not politically sustainable.

The wages, working conditions, and even the jobs of citizens and lawful permanent residents throughout the US economy can depend on the availability of unauthorized coworkers to fill out an employer’s workforce. Domestic economic growth in many sectors depends on the availability of workers to fill informal, temporary, low-wage jobs. This is not just a matter of employer preferences. The demands originate throughout the population of the United States. Consumers want lower prices, which depend on
minimizing labor costs, even if they seldom stop to consider what keeps prices low. The result is broad, if controversial, acquiescence in unauthorized migration. Though they are in the United States without lawful permission, they are tolerated as workers at first, though over time they make lives, families, and communities. As the Swiss writer Max Frisch wrote about the northern European experience: “we asked for workers, but people came.”

Acquiescence in a flexible unauthorized workforce also reflects deeper rationales. The pragmatic reality is that good workers are essential to the economy but are hard to identify in advance. The US immigration system seems to reflect the temptation—messy and cruel—to let them come and work unlawfully, and then later to grant lawful status to some who can show strong histories of work, integration, and other contributions to US society. In the meantime, they serve what amounts to a probationary period when they are paid less, are laid off more easily, work with fewer protections than US citizens or permanent residents, and suffer other indignities. Compared to pre-selecting the best workers, this sort of screening after some time in the United States may more accurately find the best contributors. It may also be more sensitive to the economy’s needs than legislation or other categorical approaches to choosing immigrants in advance.

Unauthorized migration also gives the US government a flexible option for addressing international economic development issues. Unauthorized workers send substantial amounts of money to their home countries. These remittances are an essential part of those economies, especially in developing countries with substantial numbers of expatriates in the United States. Preserving these streams is an essential part of US international economic policy. If immigration enforcement constricts remittances, the US government may need to foster development more directly in migrants’ home countries, or to safeguard political stability there by other means. Such initiatives might be inflexible, unfeasible, or less politically attractive than allowing remittances from unauthorized workers to continue.

Similarly, unauthorized migration functions as a safety valve for political and economic pressures in sending countries, including the consequences of US government actions that generate migration to the United States. For example, the North American Free Trade Agreement (NAFTA) transformed the Mexican economy in ways that have disrupted the livelihoods of many small-scale farmers. Prices for some crops have tumbled to levels that make farming unsustainable. Feeling that they have no choice, many of these farmers become migrants. Some go elsewhere in Mexico, while others come to the United States, many of them unlawfully. If immigration enforcement were to
become much stricter and cut off the option to leave Mexico for the United States, NAFTA’s political consequences for the Mexican government, and in turn for the US government, would be much more serious and hard to contain.  

Later chapters will return to the design of a workable immigration system in which enforcement is not only feasible and effective, but which also respects the rule of law by being predictable, consistent, and non-discriminatory. My goal in this chapter has been more limited—to explain how it is a predictable consequence of US immigration policy that 11 million live in the United States without lawful permission, and how these aspects of the past and present immigration system complicate the seemingly simple question of whether someone is present in violation of law. Even if future policies and practices are different from what prevails today, this history is essential in deciding how to treat unauthorized migrants already living and working in this country.

In Plyler v. Doe, the US Supreme Court refused to let unlawful presence extinguish the rights of children or undermine their future. But the meaning of unlawful presence was just one of the three essential themes in Plyler. In assessing the Texas statute, the Court had to decide whether responses to unauthorized migration should come from the federal government, or in some measure from states and localities. This second Plyler theme—the role of state and local governments—has assumed great urgency in recent years and is the focus of the next chapter.