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**Defining American: The DREAM Act,
Immigration Reform and Citizenship**

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DEFINING AMERICAN: THE DREAM ACT, IMMIGRATION REFORM AND
CITIZENSHIP

Elizabeth Keyes*

TABLE OF CONTENTS

Introduction 2

I. The DREAM: Legislation and Narrative 8

 A. The DREAM Act and Immigration Reform Proposals for DREAMers **Error!**

Bookmark not defined.

 B. The Narrative Being Told 12

 1. Harnessing the American Dream 12

 2. A Story of Worthiness and Blamelessness 16

II. DREAMers Exposing and Expanding the Limits of Citizenship 21

 A. The Claiming of Citizenship During a Time of Illegality-Discourse..... 21

 1. A Clash Between Citizenship as Identity and Citizenship as Status. 21

 2. The Discourse of Illegality 24

 B. The Limits of Immigration as Transition..... 31

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C. Challenging the Limits of Citizenship as Legal Status..... **Error!**

Bookmark not defined.

III. DREAMers Changing the Story of Race and Citizenship..... 40

A. Race and Citizenship-Acquisition..... **Error!**

Bookmark not defined.

B. Race and Citizenship Today: The Immigration Pipeline **Error!**

Bookmark not defined.

1. Entry 46

2. Remaining 49

3. Naturalizing 52

C. The DREAMers' New Face of Race and Citizenship 58

IV. Dangers of Worthiness-Based Citizenship 60

A. The Cost of Worthiness to Immigration Reform 61

1. Comprehensive, but not Expansive, Immigration Reform 61

2. The Limits of the DREAMer Coattails 67

B. Effects on Calls to Restrict the 14th Amendment 71

C. Outside of Immigration: Unworthy Americans 76

V. CONCLUSION..... 80

INTRODUCTION

Undocumented immigrant youth are helping define the contours of American citizenship.

The “DREAM Act,”¹ would put them on a path to citizenship, but the impact of the movement seeking passage of the law has consequences for how society views immigration reform and citizenship more broadly, narrowing the standards for who is deemed worthy of citizenship. This article examines how the DREAM movement is both a product of America’s changing views on citizenship, and a potential indication of where those views are headed, for better and for worse.

There is much to be celebrated about the ways in which the DREAM movement breaks radically from the history of immigrants and citizenship, which is a history dominated by overt racial exclusion. By contrast with that history, the DREAMers— represented by youth from virtually every corner of the globe —are claiming their American identity as well as the right to a path to formal citizenship status. There is cause for concern, however, in how the movement has put forward a strategy of citizenship based on worthiness--elevating the best, the brightest, and the blameless--with costs both within the world of immigration and outside it. The standards for who is deemed worthy of citizenship are narrowing, reflecting an increasing intolerance for imperfection. This narrowing shows up well beyond the traditional scope of immigration and citizenship discourse, and connects with efforts to disenfranchise voters through felon disenfranchisement and voter identification laws.

DREAMers take their name from the Development, Relief, and Education for Alien Minors Act or “DREAM Act” legislation which has been introduced in Congress every year

¹ Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, S. 952. IS, 112th Cong. (2011) [hereinafter “DREAM Act of 2011”]; Development, Relief, and Education for Alien Minors (DREAM) Act of 2009 & DREAM Act of 2010, H.R. 1751, H.R. 6327, H.R. 6497, S. 729, S. 3827, S. 3963, S. 3992, 111th Cong. (2009-10). See generally Mariela Olivares, *The Impact of Recessionary Politics on Latino-American and Immigrant Families: SCHIP Success and DREAM Act Failure*, 55 HOW. L.J. 359, 377-8282 (2012); Michael A. Olivas, *Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009).

4DEFINING AMERICAN--DRAFT (NOT FOR CITATION WITHOUT AUTHOR'S PERMISSION)

since 2001, without ever passing both chambers.² Specifically, the bill creates a path to citizenship³ for youth who came to the United States before the age of 16, who are still below the age of 35, who have resided in the United States for at least five years, who completed high school (or equivalent schooling, like a GED), and who enroll in either an institute of higher learning or the military⁴. The individuals must also possess “good moral character,” a term of art in immigration law that bars eligibility for almost anyone with a criminal conviction, even minor ones.⁵ These eligibility criteria for immigration relief under the DREAM Act reveal how its proponents view who is most worthy of legal immigration status and, ultimately, citizenship. This vision sets a very high standard, one with little tolerance for any but the most minor criminal or immigration-related violations.

The DREAM movement--with its “coming out” tours, dramatic cross-country walks to raise support for the bill, and countless rallies across the country⁶--lives at and vividly illustrates the disjuncture between American citizenship as a formal legal status (something DREAMers clearly lack) and citizenship as American identity (something DREAMers have in abundance).

² The bill passed the House in 2010. Chris Richardson, *DREAM Act Passed by House but Senate May Be Tougher*, CHRISTIAN SCIENCE MONITOR (Dec. 9, 2010), available at <http://www.csmonitor.com/USA/Politics/2010/1209/DREAM-Act-passed-by-House-but-Senate-may-be-tougher>.

³ The Act provides “conditional” permanent residence that has the possibility of becoming permanent residence if the individuals do complete a certain level of higher education or serve in the military. DREAM Act of 2011, § 5(2011). Permanent residence, as discussed in section X, *infra*, is a *sine qua non* of eligibility for citizenship. 8 U.S.C. § 1427(a) (2012).

⁴ See, e.g., DREAM Act of 2011, *supra* note __.

⁵ *Id.* Good moral character is defined at 8 U.S.C. § 1101(f). For a full exploration of the ways in which criminal convictions affect eligibility for citizenship, see Kevin Lapp, *Reforming the Good Moral Character Requirement for Citizenship*, 87 IND. L.J. 1571 (2012). Lapp’s thoughtful article examines in depth a specific, powerful aspect of the more general concern underlying this present article, namely the steady restriction of who is deemed eligible, or worthy, of citizenship, and the failure to apply principles of redemption to citizenship.

⁶ Julia Preston, *Young Immigrants Say It’s Obama’s Time to Act*, N.Y. TIMES, Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/us/dream-act-gives-young-immigrants-a-political-voice.html?pagewanted=all>. See also Mariela Olivares, *The Impact of Recessionary Politics on Latino-American and Immigrant Families: SCHIP Success and DREAM Act Failure*, 55 HOW. L.J. 359, 377-8282 (2012).

This disjuncture helps give the DREAMers their eloquence and power, for their audiences can readily perceive that citizenship is under-inclusive for DREAMers, and many feel it is wrong to deny the full membership conveyed by citizenship to people who are so fully integrated in America.⁷ DREAMers make a compelling case for re-evaluating who is and is not a full member of American society precisely both because they lack culpability for their present immigration situations (brought by parents, or to join family members at young age) and because they are today's standard-bearers for the perennial American dream. That they are able to recast the American dream with the stories and faces of people of color provides an overdue contrast to the stunningly race-exclusive history of citizenship.

This expansive recasting of history comes with a restrictive corollary, however. The DREAM movement has shifted the history of citizenship away from its troubled racial past, but in doing so inadvertently raises the bar for how America perceives citizenship itself, by casting citizenship discourse in terms of worthiness and blamelessness. When citizenship is assessed with an ever-narrowing view of worthiness, many are left outside its frame. Immigrants who might historically have been viewed as prospective citizens, or "Americans in waiting" to use Hiroshi Motomura's powerful conception,⁸ may be excluded as America narrows prospective citizenship using a framework of worthiness. This narrowing leaves out the laborer with strong community ties but who never graduated high school, or the high school valedictorian who got

⁷ President Obama's remarks announcing his immigration reform proposal captured this sense of wrongness, as he discussed the story of DREAMer Alan Aleman, who hopes to join the Air Force after college. President Obama remarked, "Remember Alan and all those who share the same hopes and the same dreams. Remember that this is not just a debate about policy. It's about people. It's about men and women and young people who want nothing more than the chance to earn their way into the American story." President Barack Obama, Remarks by the President on Comprehensive Immigration Reform (Jan. 29, 2013) (transcript *available at* <http://www.whitehouse.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform>).

⁸ HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (Oxford Univ. Press, 2007) (hereinafter *AMERICANS IN WAITING*).

two drunk and disorderly convictions and one conviction for possessing marijuana. The distinctions between the worthy DREAMers and the less worthy, or unworthy, others, have manifested in the dramatically different approaches taken toward the two groups in every proposal for comprehensive immigration reform in 2013.

The discourse of worthiness and blamelessness inherent in the DREAM movement exposes a discourse of undesirability and unworthiness that is already vividly alive not just within immigration reform debates and citizenship law, but also in such civil rights issues as felon disenfranchisement and voter identification laws, both of which affect those who already *have* citizenship. The debates around these aspects of voting rights, which are core to the exercise of citizenship, have included the same discourse of worthiness and blamelessness. Situating the DREAM movement among these other concurrent issues affecting the understanding and enjoyment of citizenship in America, this article names the danger of a hopeful, inspiring movement becoming bound up in a move to make full membership in American society—exemplified by our understanding of citizenship—more exclusive. As ideas about citizenship regress to a very restrictive mean, and citizenship becomes a good to be parceled out among the “worthy,” we trade a problem of under-inclusion for a problematic flexibility in defining citizens *out* of our polity as well.⁹

This article examines this dilemma by first, in Part I, analyzing both the legislative approaches to the DREAMers and the narrative and strategy required to advance the DREAMers’ goals. Part I introduces the idea of worthiness and blamelessness advanced by

⁹ The article in this way responds, at least in part, to the challenge laid out by Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *FORDHAM L. REV.* 2493 (2007) (discussing the lack of connection between immigration and critical race scholarship).

DREAMers in their efforts to make their cause more politically feasible. Part II looks at the positive ways in which the DREAMers have vitally exposed the problem of *under*-inclusion in our current citizenship laws, whereby America fails to extend full formal membership to people who subjectively feel like citizens already. The DREAMers' answer to the problem calls for a definition of citizenship that puts forward a more hopeful, positive vision of membership in American society, and demonstrates a radical expansion of the idea, if not the formalities, of U.S. citizenship. Part III turns to the broader questions of race and worthiness that are found both in immigration history and current immigration laws and processes, examining how the three forms of citizenship-acquisition—citizenship by place of birth, by parentage, and by naturalization—incorporate ideas of worthiness and raise issues of race.

A discourse of worthiness, however, can imply and justify a discourse of unworthiness; a discourse of blamelessness provides the opportunity to question people's culpability for not being full members. Part IV turns to this risk of the narrowing of "citizenship-worthiness," examining how the discourse of worthiness connects with strands of political conversations around perceived problems of *over*-inclusion of citizenship. This happens in two distinct arenas. First, this article turns to the immigration context where worthiness-based discourse limits who is likely to benefit from immigration reform and supports attacks on birthright citizenship. Second, this article considers problems *beyond* the immigration context, including the disenfranchisement of felons, and attempts to make voter registration more difficult. Each of these problems also intersect with questions of race, bringing race-based exclusion back into citizenship discourse. This article concludes by urging awareness of the complicated ways that race and citizenship have always intersected, and how worthiness-discourse can be subverted both to shift that history

and to continue it.

I. THE DREAM: LEGISLATION AND NARRATIVE

A. CREATING A PATH FOR DREAMERS BY LEGISLATION

The proposed DREAM Act emphasized the characteristic strengths of the immigrant youth who are the face of the movement, seeking passage of the law by structuring its requirements around education, service, length of time in the United States, age of entry, and relative absence of criminal convictions. Since it was first proposed in 2000, the DREAM Act laid out the same basic structure, providing both protection from deportation and a path to citizenship for certain immigrant youth.¹⁰ As will be described more fully below, the criteria included: entering before the age of 16, having a high school diploma or GED, being admitted to higher education institutions or non-profit trade schools, residing continuously in the United States for five years continuously, and possessing “good moral character,” largely defined in immigration law by the absence of many kinds of criminal convictions.¹¹

After the Act last failed to pass in 2011, the Obama Administration announced the temporary provision of work authorization for most of the youth who would have been eligible for status under the Act.¹² Because the Executive Branch lacks the power to create new visa categories, the Administration acted through the prism of enforcement and created “Deferred

¹⁰ Michael A. Olivas, whose dedication to and scholarship on immigrants and education is well known, has written a comprehensive overview of the legislation. Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 461-62 (2004).

¹¹ See, e.g., DREAM Act of 2011, *supra* note __. “Good moral character” is defined by 8 U.S.C. § 1101(f), and is discussed more fully in Part III.B., *infra*.

¹² President Barack Obama, Remarks by the President on Immigration (June 15, 2012) (transcript *available at* <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>).).

Action for Childhood Arrivals,” or DACA.¹³ Deferred action generally is an administrative acknowledgment that the individual in question will not be the subject of any immigration enforcement activities for a certain period of time. Deferred action, which is essentially a form of prosecutorial discretion, has long been available through the Department of Homeland Security for a wide variety of matters, although data on its implementation are difficult to secure.¹⁴

DACA extended deferred action status for two years to youth who had arrived in the United States before their 16th birthdays; had lived in the United States for five years; were in school, had graduated from high school (or received a general equivalency diploma, or GED), or been honorably discharged from the armed services or Coast Guard; had been present in the United States on June 15, 2012 (the date the policy was announced); and had amassed no more than three misdemeanor convictions.¹⁵ The program attracted immediate support from the DREAMers who celebrated its announcement.¹⁶ By March 2013, 469,530 individuals had submitted applications under the program, approximately half of which have been approved as of this writing.¹⁷

¹³ DHS, Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities, June 15, 2012, <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

¹⁴ Deferred action is defined through the regulation governing issuance of employment authorization documents. 8 C.F.R. § 274a.12(c)(14) (“An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment.”) See generally Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1 (2012); Michael A. Olivas, *DREAMS Deferred: Deferred Action, Prosecutorial Discretion and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463 (2012).

¹⁵ USCIS, *Consideration of Deferred Action for Childhood Arrivals Process* (updated Jan. 18, 2013), <http://1.usa.gov/LhQrYl>.

¹⁶ See, e.g. Paul West, *Latino Voters Show New Enthusiasm for Obama*, BALT. SUN, June 19, 2012; Julia Preston, *Obama to Permit Young Migrants to Stay in U.S.*, N.Y. TIMES, June 15, 2012 (quoting United We Dream Network leader Lorella Praeli, who said “People are just breaking down and crying for joy when they find out what the president did.”).

¹⁷ USCIS, *Deferred Action for Childhood Arrivals Process* (Data from Aug. 15, 2012 through March 14, 2013),

The outlines of both the DREAM Act and DACA reemerged in the 2013 Senate blueprint for Comprehensive Immigration Reform (“Senate Blueprint”) and the Obama Administration’s proposed Comprehensive Immigration Reform Act of 2013 (“Obama Proposal”).¹⁸ The Senate Blueprint creates separate systems for legalization: a slower, more restrictive one for non-DREAMer immigrants, and a much faster one for the DREAMers and certain agricultural workers.¹⁹ Notably, the non-DREAMers would be given a temporary “probationary status” until commissions from border states determined whether the border had been adequately secured, at which point those with probationary status could apply for lawful permanent residence.²⁰ To achieve probationary status in the first place, the plan calls for those immigrants to “pay their debt to society” and a severe provision sending the immigrants to the proverbial back of the immigration line.²¹ “Individuals who are present without lawful status -- not including people within the two categories identified below - will only receive a green card after every individual who is already waiting in line for a green card, at the time this legislation is enacted, has received

<http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-3-15.pdf>. After a slow start, USCIS began approving approximately 50,000 of the applications each month. *Id.*

¹⁸ Julia Preston, *Senators Offer a Bipartisan Blueprint for Immigration*, N.Y. TIMES, Jan. 28, 2013.

¹⁹ The exceptional treatment of agricultural workers itself harkens back to an earlier age of immigration politics, when the Immigration Act of 1924 imposed no quotas on migration from Mexico, due to the needs of farmers for agricultural labor. MAE M. NGAI, IMPOSSIBLE SUBJECTS; ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (Princeton Univ. Press, 2004) (hereinafter IMPOSSIBLE SUBJECTS), 50.

²⁰ Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet and Flake, *Press Release: Bipartisan Framework for Comprehensive Immigration Reform* (Jan. 29, 2013) [hereinafter Senate Blueprint], http://www.mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=87afa1c7-c0ac-6131-5e8e-9bf8904159e6.

²¹ The State Department Visa Bulletin publishes the wait times for visas in different categories. The June 2013 bulletin showed that the shortest wait (two years) was for spouses and children of lawful permanent residents. Unmarried adult children of citizens were next, with a wait of approximately seven years (but *twenty* years if those children were from Mexico). Married sons and daughters of U.S. citizens had a roughly 11 year wait (or twenty from Mexico and twenty-one from the Philippines). Longest were siblings of U.S. citizens, who faced a twelve year wait generally, or seventeen years from Mexico, and twenty-four years from the Philippines. Dep’t of State, Visa Bulletin, June 2013, http://travel.state.gov/visa/bulletin/bulletin_5953.html.

their green card.”²² Notably, immigrants with criminal convictions are ineligible for the status.²³

By contrast, DREAMers are exempted from this general process, although the Blueprint does not detail the process that would be made available for them.

The plan put forward by President Obama, although lacking detail, contains a similar bifurcation of approaches, although it softens some of the approaches taken by the Senate. The Obama Proposal, leaked to the press in the midst of Congressional deliberations, would provide “Lawful Prospective Immigrant” status to those currently without status, and would prohibit those with such provisional status from obtaining *permanent* residence until either everyone currently “in line” for immigration status has received their lawful permanent residence, or eight years has passed, whichever is sooner.²⁴ Those seeking this relief would need to pay a penalty, pay back taxes (if any), learn English, and understand U.S. history prior to obtaining permanent residence at the later date.²⁵ Immigrants with certain criminal convictions would not be able to apply (although, prospectively, the bill significantly softens existing immigration consequences of criminal convictions).²⁶ The lengthy wait, notably, would not apply to DREAMers—those deemed eligible for DACA. These individuals could adjust to permanent residence on an expedited track, if they went to college or serve in the Armed Forces.²⁷

The momentum toward passage of the DREAM Act, the administrative embrace of the

²² Senate Blueprint, *supra* note ____.

²³ *Id.*

²⁴ Alan Gomez, *White House Immigration Plan Offers Path to Residency*, USA TODAY, Feb. 17, 2013, <http://www.usatoday.com/story/news/nation/2013/02/16/obama-immigration-bill/1925017/> (analysis of White House plan obtained by USA Today but not otherwise published in full)

²⁵ *Id.*

²⁶ For an assessment of the changes softening the impact of certain criminal convictions, see César Cuauhtémoc García Hernández, *Obama Immigration Plan Is a Mixed Bag*, CRIMMIGRATION BLOG (Feb. 20, 2012, 4:00 AM) <http://crimmigration.com/>.

²⁷ Comprehensive Immigration Reform Act, § 202(e) (2013), available at <http://media.miamiherald.com/smedia/2013/02/18/19/57/2CfDr.So.56.pdf>.

principles of the Act through the implementation of DACA, and the bipartisan support for a special track for DREAMers in comprehensive immigration reform efforts all show how powerfully the DREAMers have occupied much of the rhetorical space for the advance of immigration reform.

B. THE NARRATIVE BEING TOLD

1. HARNESSING THE AMERICAN DREAM

The DREAM movement references the classic narrative of the American dream. The classic American dream, a powerful piece of national mythology, suggests that anyone can come to or be born in America and achieve greatness through hope and tenacity. DREAMers call upon the vision of America as the “land of opportunity,” where anyone with the commitment to work hard can prosper. They remind us of the promise of the Statue of Liberty, and with it, our visions of the boats filled with people seeking safety and prosperity in the United States. And, of course, the name of the movement itself invokes the American “dream...of a land in which life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement...a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.”²⁸

The typical DREAMer narrative is one of success against great odds.²⁹ In this narrative,

²⁸ JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 214-15 (1931).

²⁹ This composite identifies the shared characteristics of the kinds of stories told at *Dream Activist: Undocumented Students Action and Resource Network*, <http://www.dreamactivist.org/about/our-stories/>. Each story is unique, but it is possible to identify and name the common strands. In this way, the DREAM movement shares something interesting with the anti-slavery movement, which was also richly story-driven, and from which narrative types could be identified. Scholars have discussed both the usefulness of stories to advancing the cause of abolitionism,

the DREAMer, despite having no legal status, has graduated from an American high school and done something of great note: he or she has finished school despite enormous health or family struggles, risen to leadership positions, cared for ailing relatives, engaged in significant community activism and community service, and so forth. The DREAMer is often also hoping to channel all of his or her hopes and energy into becoming a lawyer, a doctor, a journalist, a scientist, or any of a number of other professions requiring further education and commitment. In the examples below, where DREAMers put forward stories of struggle and obstacles overcome by dedication to hopes and dreams, the DREAMers summon and share much with the classic, perennial invocations of the American Dream.

Gaby Pacheco, a DREAM leader from Florida, has lived in the United States since she was seven.³⁰ As the above narrative suggests, she excelled in school from an early age, and took part in the ROTC program at her high school, while also playing on numerous school sports teams. She made her way to college and became student government president for the entire Florida state college system, and founded the organization Students Working for Equal Rights, among others. She walked with other DREAMers all the way from Florida to Washington, D.C. to publicize the need for passage of the DREAM Act.³¹

Likewise, Yves Gomes came to the U.S. with his parents when he was only 14 months old, excelled at school, became an altar boy at his Catholic church, and cared for (and still cares

and the creation of a prototypical slave narrative, despite the undeniable individuality of each particular story. *See, e.g.,* JAMES OLNEY, *'I was born': Slave Narratives, Their Status as Autobiography and as Literature*, in *THE SLAVE'S NARRATIVE* (Charles T. Davis & Henry Louis Gates, Jr. eds.) (1985).

³⁰ Daniel Altschuler, *DREAMing of Citizenship: An Interview with Gaby Pacheco*, *AMERICA'S QUARTERLY* (Dec. 15, 2010), <http://www.americasquarterly.org/node/2040/>.

³¹ *A Long Walk for a Cause*, *N.Y. TIMES*, Apr. 28, 2010, available at <http://www.nytimes.com/2010/04/29/us/politics/29students.html>.

for) his uncle suffering from multiple sclerosis.³² He has been active in promoting both federal DREAM legislation and a state DREAM Act in Maryland to provide undocumented Maryland high school graduates with access to in-state tuition.³³

Soporuchi Victor Chukwueke—a Nigerian orphan, abandoned because of a serious medical condition—came to the United States at age 15 for a series of surgeries to address that medical condition.³⁴ He entered on a visitor visa, but once it expired he lacked lawful immigration status. Despite the strains and difficulties of the multiple medical procedures he underwent in Michigan, he completed a GED and graduated from Wayne State University, dreaming of further education in medical school. Victor's situation and his medical dreams caught the attention of Senator Carl Levin, who sponsored a private bill to provide Victor with lawful permanent residence. An extraordinarily rare immigration remedy,³⁵ the private bill for Victor passed the Senate on December 18, 2012³⁶ and was signed into law by President Obama on December 29, 2012.³⁷

Perhaps most famously, Jose Antonio Vargas, a Pulitzer-prize winning journalist from the Philippines, came out as undocumented in a *New York Times* magazine cover story in June

³² A video depicting Mr. Gomes' situation can be seen at <http://www.keepingfamilies-together.net/yves-gomes-maryland-17-year-old-to-be-deported/>.

³³ "A Step in the Right Direction": Maryland Student Reflects on DREAM Act, PBS NEWSHOUR (June 15, 2012), http://www.pbs.org/newshour/extra/speakout/us/jan-june12/yves_06-15.html.

³⁴ Faith Karimi, *Obama Signs Bill to Grant Nigerian Student U.S. Permanent Residency*, CNN, <http://www.cnn.com/2012/12/29/world/africa/us-nigerian-obama-law/index.html>.

³⁵ Shankar Vedantam, *Condo Residents Fight for Immigrant Chief Engineer They Love—And Need*, WASH. POST, Nov. 16, 2010 ("Even as anti-immigrant sentiment has swelled in large swaths of the country, many communities are willing to do battle for individual immigrants who have become part of their lives. Each year their lobbying efforts produce scores of private bills in Congress seeking to grant individual immigrants legal residency. Few succeed.").

³⁶ Benach Ragland LLP, *One-Man DREAM Act Passes Congress* (Dec. 18, 2012), <http://liftedlamp.wordpress.com/2012/12/18/one-man-dream-act-passes-congress/>.

³⁷ Karimi, *supra* note __.

2011.³⁸ Vargas had entered the United States on what he learned later was a fraudulently obtained visa and passport. His *New York Times* essay details the ways in which he had to hide his undocumented status, all the while amassing ever greater career laureates, culminating in the Pulitzer Prize he won in 2008.³⁹ Vargas describes the profound disconnect between his struggle to keep his lack of status a secret and his feelings of being an American, writing:

At the risk of deportation — the Obama administration has deported almost 800,000 people in the last two years — they are speaking out. Their courage has inspired me. There are believed to be 11 million undocumented immigrants in the United States. We're not always who you think we are. Some pick your strawberries or care for your children. Some are in high school or college. And some, it turns out, write news articles you might read. I grew up here. This is my home. *Yet even though I think of myself as an American and consider America my country, my country doesn't think of me as one of its own.*⁴⁰

The organization Vargas has founded to advance the DREAMer cause is therefore appropriately named “Defining American.” The photo gracing the cover of Time Magazine reflects how much diversity is a part of that redefinition: Vargas at the center of a large cluster of youth from all corners of the world.⁴¹ And where early accounts of the American dream prominently featured a dreamer who was white, and usually male, this photo showed that the quintessential DREAMer today, male or female, is an immigrant of color.

Vargas proved the strength of the movement's narrative on June 19, 2012, when he did a television interview with Bill O'Reilly,⁴² whose views on immigration had been strongly

³⁸ Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES, June 22, 2011, http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?pagewanted=all&_r=0.

³⁹ *Id.*

⁴⁰ *Id.* (emphasis added).

⁴¹ Jose Antonio Vargas, *We Are American (Just Not Legally)*, TIME (June 19, 2012). A copy of the cover image is available at <http://www.time.com/time/covers/0,16641,20120625,00.html>.

⁴² Interview by Bill O'Reilly with Jose Antonio Vargas on the Bill O'Reilly Show, *Debating Immigration Solutions* (June 19, 2012), available at <http://video.foxnews.com/v/1697317877001/jose-antonio-vargas-talks-to-bill-oreilly/>.

restrictionist.⁴³ Indeed, O'Reilly uses the word illegal twice in the first twenty seconds of the interview alone. Nonetheless, O'Reilly characterizes the DREAMers as "helping the nation," and after listening to Vargas' story calls Vargas's story "compelling" and agrees that "there should be a process for [Vargas]" and others "dragged across the border."⁴⁴ O'Reilly sharply distinguishes Vargas, however, from the older immigrant who crosses the border illegally, for whom there should be no process. The interview thus captured one implicit piece of the DREAMer narrative: blamelessness.

2. *A STORY OF WORTHINESS AND BLAMELESSNESS*

The moral clarity and strength of the DREAMers' call comes from the summoning of the American dream, which has emphasized the worthiness of the DREAMers to be the inheritors and advancers of the dream today. Blamelessness, as highlighted in the Vargas/O'Reilly interview above, is deeply connected with the idea of worthiness. Worthiness itself, as applied to DREAMers, manifests as a commitment to education, patriotism, virtue,⁴⁵ industriousness, and community ties. The article will discuss these components before moving on to a discussion of blamelessness.

Consider first the commitment to education that is prominent in the DREAMer narrative.

⁴³ Frances Martel, *Bill O'Reilly: 'There Is an Invasion from Mexico Into the United States*, Mediaite, April 7, 2010 <http://www.mediaite.com/tv/bill-oreilly-there-is-an-invasion-from-mexico-into-the-united-states/>.

⁴⁴ *Id.*

⁴⁵ Virtuousness encompasses both avoidance of criminal trouble, and affirmative compliance with tax obligations. *See, e.g.*, Van Le, *Dreamers from Across the Nation Protest Kansas Secretary of States Kris Kobach, Architect of the Failed GOP Anti-Immigrant Strategy* (Nov. 20, 2012), <http://americasvoiceonline.org/blog/dreamers-from-across-the-nation-protest-kansas-secretary-of-state-kris-kobach-architect-of-the-failed-gop-anti-immigrant-strategy/>. This emphasis on tax-paying resonates with an incident from 1740 whereby the black population of South Carolina sought repeal of the Negro Act with an argument that, as taxpayers, they should not be subjected to the law's indignities. (Remarks of Andre L. Smith at the 2013 Mid-Atlantic People of Color Conference, held at the University of Pennsylvania, Jan. 25-26, 2013).

To qualify for conditional permanent residence (a temporary “green card”) under the DREAM Act, the individual must have enrolled in an “institute of higher education in the United States” or completed high school or its equivalent.⁴⁶ One route to having conditions lifted and transitioning to full “permanent residence” is to either obtain a higher-education degree or complete at least two years in a bachelor’s or other higher education program.⁴⁷ This commitment to education—encompassing struggles to remain in school and to find ways to access higher education, unites the stories of Yves, Gaby, Victor and Gabe above. Likewise, at rallies for the DREAM act, the DREAMers often appear wearing high school caps and gowns, making their commitment to education the central visual metaphor for their cause.⁴⁸

The second criterion is patriotism: another route to full permanent residence is serving in the military for at least two years, without being dishonorably discharged.⁴⁹ Gaby’s ROTC service speaks to this quality of patriotism, as does the fact that many DREAMers who wanted to join the military appear at rallies wearing combat fatigues.⁵⁰ Indeed, the DREAM movement relies on explicit statements that this is the country that these DREAMers already love. As one

⁴⁶ 2011 Cong U.S. H.R. 1842, 112th CONGRESS, 1st Session § 3(a)(1)(D).

⁴⁷ *Id.*, § 5(a)(1)(D).

⁴⁸ See e.g., Elise Foley, *DREAM Act, Don’t Ask Don’t Tell Repeal Derail Defense Bill Amid Republican Filibuster*, FL. INDEP. (Sept. 21, 2010) (photo accompanying story), <http://floridaindependent.com/8491/dream-act-don%E2%80%99t-ask-don%E2%80%99t-tell-repeal-derail-defense-bill-amid-republican-filibuster>; Rachel Rubein, *An Educational Battle: Both Sides of DREAM Act Use Grassroots Activism*, CARROLL COUNTY TIMES, Sept. 16, 2012, (photo accompanying story), available at http://www.carrollcountytimes.com/news/local/an-educational-battle-both-sides-of-dream-act-usegrassrootsusegrassroots/article_d02323bd-cf89-5efc-ad05-6904256ccb48.html?mode=story.

⁴⁹ DREAM Act of 2011, *supra* note __, § 5(a)(1)(D).

⁵⁰ Daniel Altschuler, *The Dreamers’ Movement Comes of Age*, DISSENT MAGAZINE, available at <http://dissentmagazine.org/online.php?id=490>. (“At the same time, immigrant youth activism got the country’s attention. Dreamers developed a compelling iconography to highlight their stories. Graduation caps and gowns became ubiquitous at DREAM events, where students not only protested but also donated blood, prayed alongside religious leaders, and in one case held a ‘study-in’ in a Senate cafeteria. Those Dreamers who wish to serve in the armed forces also played their part, dressing in fatigues and donning flags while they marched and saluted their way through the Capitol. These actions reinforced a persuasive narrative of young people who simply want to study and serve.”)

DREAMer testified before the Senate Judiciary Committee's Subcommittee on Immigration, "I grew up here. I am American in my heart. There are thousands of Dreamers just like me. All we are asking for is a chance to contribute."⁵¹ Senator Durbin, perennial sponsor of the bill, added "They are willing to serve the country they love. All they're asking for is a chance."⁵² President Obama likewise highlighted the patriotic aspects of the DREAMer story in his plan for immigration reform, commenting on how one DREAMer had "pledged allegiance to the flag" and wanted to serve in the Air Force.⁵³

The third criterion is virtue, broadly defined: The individual must possess good moral character,⁵⁴ a term of art in immigration law⁵⁵ that means the individual has no "aggravated felonies."⁵⁶ "Aggravated felony" is yet another term of art encompassing a range of crimes from the inarguably grave--such as murder and rape--to other less 'aggravated' crimes--like receipt of stolen property (with a possible sentence of one year or more) or selling marijuana.⁵⁷ The most prominent DREAM narratives are silent about criminal offenses, and even without passage of DREAM legislation, criminal offenses are considered negative factors in accessing any lesser

⁵¹James Parks, *DREAM Act Students Want a Chance to Serve the Country They Love*, (June 28, 2011), <http://www.aflcio.org/Blog/Political-Action-Legislation/DREAM-Act-Students-Want-A-Chance-to-Serve-the-Country-They-Love>.

⁵² *Id.*

⁵³ President Barack Obama, Remarks by the President on Immigration, *supra* note __.

⁵⁴ DREAM Act of 2011, *supra* note __ § 3(a)(1)(B).

⁵⁵ 8 U.S.C.A. § 1101(f) (defining good moral character).

⁵⁶ 8 U.S.C.A. § 1101(a)(43) (defining aggravated felony).

⁵⁷ Kevin Lapp has thoughtfully examined how the "good moral character" requirement that is woven through various junctures in the immigration process creates a high bar for those seeking fuller membership in U.S. society. Lapp, *supra* note __. "Using criminal records as a proxy for virtue and a character test as a precondition for access to the franchise does not promote or protect democracy. This is especially so when the blunt instrument of immigration law's 'aggravated felony' provision does the decisive work." *Id.*, at 1623-24. See also Jennifer Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1831 (2007) (assessing the steady encroachment of criminal law into the field of immigration, and how both have been "subsumed" into the issue of national security).

immigration relief like deferred action and prosecutorial discretion.⁵⁸

Finally, community ties matter to eligibility for the DREAM in two ways. First, the DREAM Act uses the proxy of length of residence in the United States as a way of ensuring a level of ties to the country. The bill explicitly requires that the individual have lived in the United States for not less than five years before the enactment of the law,⁵⁹ and have arrived before the age of 16. Second, and less explicitly, the central focus on education aligns with the idea that the American educational system serves a principal role in integrating our nation's youth and promulgating the American identity, something recognized by the Supreme Court itself in *Plyler v. Doe*.⁶⁰

Moreover, the discretionary nature of the applications for permanent residence for DREAMers offers an opportunity to include other evidence of community ties, patriotism and character, and conversely raises the possibility that even those who meet the eligibility criteria could be denied if something about their situations felt unworthy to the adjudicator.⁶¹ Here, a DREAMer will show not just that he or she graduated high school, but that he or she received an award for contributions to year book, or took several advanced placement classes. The DREAMer might speak about patriotism in their desire to give back to America through service,

⁵⁸ Memorandum from John Morton, Dir. U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge & All Chief Counsel, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) [hereinafter June 2011 Morton Memo], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

⁵⁹ Section 3(a)(1)(A).

⁶⁰ Hiroshi Motomura, *Who Belongs? Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 373 (2012) (hereinafter Motomura, *Who Belongs?*) (discussing how *Plyler* advanced the integration of immigrants by “emphasizing the importance of education for the children who lacked lawful immigration status”).

⁶¹ I more fully discuss the consequences of such exercises of discretion in Elizabeth Keyes, *Beyond Saints and Sinners*, __ GEO.IMM. L. J __ (forthcoming, 2013).

or a dream to go into law enforcement. The DREAMer will show not simply that he or she has lived in the United States for five years, but that the time had meaning as measured by the ways in which family, friends, and community leaders speak about their volunteer work, leadership and activism, and family ties.

The DREAMers' powerful narrative is not based solely on their worthiness; indeed, what makes them especially worthy of citizenship status is the fact that they are blameless for their situation.⁶² At first, the narrative itself emphasized that the DREAMers, brought here as youth, did not choose to break the immigration laws, so they should not be punished.⁶³ Although the DREAMers have more recently been de-emphasizing this distinction between those brought here without a choice and those who brought them, the distinction was embraced in the early moves toward immigration reform in January 2013. The idea of blamelessness is reflected dramatically in the Senate immigration reform blueprint, which states: "individuals who entered the United States as minor children *did not knowingly choose to violate any immigration laws*."

Consequently, under our proposal these individuals will not face the same requirements as other individuals in order to earn a path to citizenship."⁶⁴ Likewise, the President's call for comprehensive immigration reform, one day after eight Senators introduced the Senate Blueprint, emphasized that those being legalized needed to pay a fine and then go "to the back of

⁶² The costs of this are discussed in Part IV, *infra*.

⁶³ See, e.g. Opinion, *Leave the Policy Stand As Is*, Leavenworth Times, Feb. 15, 2013 ("Immigrant children brought here by their parents are not guilty of the sins of their mothers and fathers."); Kevin Cirilli, *Eric Cantor Markets the GOP to Busy Families*, POLITICO, Jan. 29, 2013, <http://www.politico.com/story/2013/02/cantor-pitches-gop-to-busy-families-87209.html> (quoting Eric Cantor, "One of the great founding principles of our country was that children would not be punished for the mistakes of their parents."); James Q. Lynch, *DOT to Begin Issuing Driver's Licenses to Undocumented Residents*, Gazette (Iowa), Jan. 24, 2013 (quoting Rep. Steve King, "'Some were brought here by their parents without having any say about it or any knowledge. That's true and we have sympathy for them.'").

⁶⁴ Senate Blueprint (emphasis added), http://www.mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=87afa1c7-c0ac-6131-5e8e-9bf8904159e6.

the line, behind all the folks who are trying to come here legally. That's only fair, right?"⁶⁵

Although the DREAMer strategy changed consciously and explicitly in December 2013, the narrative's compelling tale of blamelessness still resonates in these initial proposals for comprehensive immigration reform.

II. *DREAMERS EXPOSING AND EXPANDING THE LIMITS OF CITIZENSHIP*

A. *THE CLAIMING OF CITIZENSHIP DURING A TIME OF ILLEGALITY-DISOURSE*

DREAMer self-identification as “Americans already” reveals a gap between the identity of citizenship, and the formal status of citizenship. This gap is particularly pronounced at a time when the political discourse centers so heavily on status and the concept of “illegality.” Moreover, and troubling for the DREAMers’ goals, emphasis on legal status has increased as paths to *securing* legal status have steadily narrowed. In this section, the article examines how the narrative embraced by the DREAM movement moves in tension with these concerns about legal status, and explores how the DREAMers have in some ways adapted to the prevalent discourse of illegality, but also highlighted a different framework for thinking about citizenship beyond “status.”

⁶⁵ President’s Remarks on Comprehensive Immigration Reform. For a critique of the “line” referenced in these remarks, see Mae M. Ngai, *Reforming Immigration for Good*, N.Y. TIMES, Jan.29, 2013, available <http://www.nytimes.com/2013/01/30/opinion/reforming-immigration-for-good.html>. (“In practice, [the per country quote system] means it is easy to immigrate here from, say, Belgium or New Zealand, but there are long waits — sometimes decades — for applicants from China, India, Mexico and the Philippines. These four max out on the limit every year. When critics admonish prospective immigrants — as well as the 11 million plus undocumented migrants currently in America — to ‘go to the back of the line,’ they should realize that for many people the line is a cruel joke.”)

I. A CLASH BETWEEN CITIZENSHIP AS IDENTITY AND CITIZENSHIP AS STATUS

DREAMers frequently and unequivocally self-identify as American. “We Are Americans” was the title of the influential *Time Magazine* cover story essay in 2012 by Vargas.⁶⁶ Yves Gomes reiterated this idea when he told the *Washington Post*, “I consider myself an American.”⁶⁷ Others talk unselfconsciously about being “good citizens,” without implying that they have that formal status.⁶⁸ President Obama invoked this “already American” theme as he announced the deferred action policy for DREAMers: “They are Americans in their heart, in their minds, in every single way but one: on paper.”⁶⁹ This citizenship of the heart and mind taps into the notion of being a “good citizen” that exists outside the immigration context, which is seldom invoked with reference to formal legal status,⁷⁰ but rather to being involved in one’s community, actively volunteering, caring for elderly neighbors, participating in school activities, and so forth. In this way, citizenship is a metaphor for a set of desirable characteristics, characteristics that the DREAMers collectively embody.⁷¹

This self-identification as “American already” fits squarely within the theory of citizenship as identity. Linda Bosniak has described this as “citizenship's psychological

⁶⁶ See Vargas, *supra* note __.

⁶⁷ David Montgomery, *Illegal Indian Immigrant is Granted Rare Reprieve, Allowed to Stay in U.S.*, WASH POST, Aug 12, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/11/AR2010081106293.html>.

⁶⁸ The “good citizen” phrase is suggestive of another form of citizenship discourse. LUIS F.B. PLASENCIA, *DISENCHANTING CITIZENSHIP: MEXICAN MIGRATION AND THE BOUNDARIES OF BELONGING* (2012).

⁶⁹ Julia Preston, *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?pagewanted=all>. As Mae Ngai described of an earlier period, these people fully present here with no concomitant legal status are “a class of persons within the national body--illegal aliens—whose inclusion in the nation was at once a social reality and a legal impossibility.” Mae M. Ngai, *The Strange Career of the Illegal Alien*, 21 LAW & HIST. REV. 71 (2003) (hereinafter “Ngai, *Strange Career*”).

⁷⁰ If it *were* so invoked, it would have serious immigration consequences. INA § 212(a)(6)(C)(ii) (permanently barring the admission of someone who falsely claimed U.S. citizenship).

dimension, that part of citizenship that describes the affective ties of identification and solidarity that we maintain with groups of other people in the world.”⁷² Bosniak captures the essence of the DREAMers’ claims to belonging in America: “The term citizenship here is deployed to evoke the quality of belonging—the felt aspects of community membership.”⁷³ As DREAMer after DREAMer states, being American is about opportunity and contribution to the community, and their stories emphasize those contributions and indicia of community membership, demonstrating that their attributes mirror those of the “good citizen” in its popular, metaphorical sense.⁷⁴ For DREAMers like Vargas and others, full citizenship would be an “outward manifestation of inward truth.”⁷⁵

This existing “inward truth” clashes, however, with another theory of citizenship: citizenship as formal legal status. Citing political philosopher Joseph Carens, Bosniak describes this conception of citizenship as “a matter of legal recognition.”⁷⁶ This approach to defining citizenship is simplest because it is demarcated by clear lines: one is either born an American citizen by parentage⁷⁷ or location of birth, or becomes one after naturalizing according to the parameters set by the Immigration and Nationality Act. This simply requires application of the

⁷² Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 479 (2000) (emphasis added).

⁷³ *Id.*

⁷⁴ See also Seyla Benhabib, *The Morality of Migration*, N.Y. TIMES (Jul. 29, 2012), available at <http://opinionator.blogs.nytimes.com/2012/07/29/stone-immigration/>.

⁷⁵ Naima Ramos-Chapman, ‘American,’ But Just Undocumented, (June 15, 2012) at http://campusprogress.org/articles/american_but_just_undocumented/.

⁷⁶ Bosniak, *supra* note __, at 456, citing Joseph H. Carens, *Dimensions of Citizenship and National Identity In Canada*, 28 PHIL. F. 111-12 (1996-97)).

⁷⁷ Professor Isabel Medina is exploring the borderline cases where citizenship through parentage is actually highly contested and difficult to prove, raising interesting issues of race, gender, sexual orientation and class. Isabel Medina, *Derivative Citizenship - What's Marriage, Sex, Sexual Orientation, Race and Class Got to Do WithIt?* (unpublished manuscript).

statute (or historical statutes, if trying to derive citizenship through parents and grandparents)⁷⁸ to the facts at hand, and the answer to the inquiry is either yes or no—there are no shades of meaning or degrees of citizenship under this conception. One either is or is not a citizen, and therefore the DREAMers' lack of formal status is the only thing that matters, not their ties or “American-ness” or self-definition.

2. THE DISCOURSE OF ILLEGALITY

This clash between immigration as identity and immigration as status matters profoundly at a time when the question of status dominates America's immigration debates. The preoccupation with “illegal immigrants” and “lawbreakers” makes primary the immigration status of immigrants, over and above questions of economic need or contribution, poverty, family unification, and so forth. Although the term is not a legally accurate one,⁷⁹ and it fails to capture the fluidity with which people can sometimes move back and forth between legal, illegal, and legal again,⁸⁰ it is nonetheless politically powerful—and this political salience contrasts starkly with the DREAMers self-identification as Americans. The focus on illegality in

⁷⁸ A vivid illustration of this process is the exercise in Legomsky and Rodriguez's *Immigration and Refugee Law and Policy* casebook, which contrasts with almost every other exercise in the case book that has levels of ambiguity to it. Students, reaching this problem at the end of a semester of immigration law, are often relieved to know that they can input the information into a chart and achieve a result. STEVEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* (Fifth Ed., 2009). At 1294-95 (referencing a table by Robert A. Mautino, *Acquisition of Citizenship*, IMM. BRIEFINGS (1990)).

⁷⁹ Charles Garcia, *Why 'Illegal Immigrant' is a Slur*, CNN.com (July 6, 2012, 12:14 PM) <http://www.cnn.com/2012/07/05/opinion/garcia-illegal-immigrants/index.html>.

⁸⁰ Michael A. Olivas and Kristi L. Bowman, *Plyler's Legacy: Immigration and Higher Education in the 21st Century*, 2011 MICH. ST. L. REV. 261, 265 (2011) (“But there had historically been such [legalization] provisions, through various means, and immigration status was, at the least, not immutable.”). Mae M. Ngai also describes this fluidity, suggesting that “shifts in the boundary between legal and illegal status might tell us a lot about how the nation has imagined and constructed itself over time.” IMPOSSIBLE SUBJECTS, *supra* note __, at 6. *See also* Prerna Lal, *It's More Complicated Than Legal vs. Illegal*, New American Media (July 10, 2012), <http://newamericamedia.org/2012/07/its-more-complicated-than-legal-vs-illegal.php>.

contemporary political discourse differs from many other points in America's immigration history. Although this shifting history has been well presented elsewhere, the article briefly traces how and when concern with illegality became important, from the largely open borders of the 19th century when it was all but impossible to immigrate illegally, to the relentless focus on illegality that has characterized the debates on immigration in the 21st century. By understanding how the discourse of illegality has grown, this section lays a foundation to understand in the next section why and how the DREAMers needed a different way to justify their self-definition as American.

Much of America's identity as a nation of immigrants derives, rightly or wrongly, from the visual image of the Statue of Liberty paired with the words of 19th century poet Emma Lazarus, engraved at the Statue's base, inviting the "tired" and "poor" to come.⁸¹ At that time it would have been almost impossible for the immigrants Lazarus would have known in New York City to be "illegal immigrants" as we conceive of the term today. Indeed, in that "land of opportunity" that awaited most non-Asian immigrants in the late 19th and early 20th century,⁸² there were simply immigrants who came alone or with families; for economic opportunity, political refuge, or simple adventure; and settled across the country. Visa categories did not exist and so, although people could be turned away for a few limited reasons (being a "convict," having a severe mental illness, or being likely to become a public charge),⁸³ there was no concept of "illegal immigrant" analogous to what exists today. Notably, the iconic photos of Russian and

⁸¹ Emma Lazarus, *The New Colossus* (1883). Lazarus wrote the poem to help raise funds for the Statue of Liberty, and the poem was engraved on a plaque installed at the base of the Statue of Liberty in 1903.

⁸²
⁸³ The Immigration Act of 1882 prohibited the immigration of "convict[s], lunatic[s], idiot[s], or any person unable to take care of himself or herself without becoming a public charge." An Act to Regulate Immigration, 22 Stat. 214 (1882).

Italian immigrants on boats in the shadow of the Statue of Liberty come from that largely pre-regulated time, as do the immigration histories of many of the people who point out that their forebears came legally. Legal immigration meant something entirely different at a time where it was all but impossible to immigrate illegally.

As elements of public opinion began to perceive immigrants as threats to both national security and public safety, Congress began passing laws that barred categories of people from entering, thus creating a distinction between legal immigration—those still permitted under those laws—and illegal immigration—those who came in defiance of those laws. The creation of “illegal immigration” occurred as nationalities were either barred outright or sharply limited in their immigration by quotas in the 1920s with the imposition of quotas.⁸⁴ Would-be immigrants from China were barred from entry beginning in 1882,⁸⁵ and those from the rest of Asia were barred by 1917 with the creation of the Asiatic Barred Zone.⁸⁶ While not barring immigration from other non-white areas entirely, the Immigration Act of 1924⁸⁷ imposed quotas by country that were crafted to reflect the U.S. population from 1890 before large waves of immigrants began arriving from southern and eastern Europe, or colonial-era Africa. This resulted in Ireland, the United Kingdom and Germany securing approximately 113,000 slots, and Northern Europe in general accounting for roughly 147,000 of the 164,456 slots worldwide.⁸⁸ Although Mexicans

84

⁸⁵ Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882).

⁸⁶ Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 876, repealed by Act of June 27, 1952, ch. 4, § 403(a)(13), 66 Stat. 163, 279

⁸⁷ Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, § 11, 43 Stat. 153 Pub. L. No. 68-139, ch. 190, § 11, 43 Stat. 153, 159. This act barred those who were ineligible to naturalize, defined in 1790 as “free whites.” and amended to include people of African descent in 1870. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256.

⁸⁸ Data derived from quotas announced by President Coolidge. President Calvin Coolidge, Proclamation: Comprehensive Immigration Law of 1924, <http://www.civics-online.org/library/formatted/texts/immigration1924.htm>.

were not *numerically* restricted from entering by the 1924 law, Mexicans began to enter illegally to avoid new barriers to entry like head taxes and literacy tests.⁸⁹ At the same time, as historian Mae Ngai has described, acts of exclusion shifted from places visible to Americans—ports and land crossings—to consulates overseas, and the would-be immigrant became “thus something of a specter, a body stripped of individual personage, whose very presence is troubling, wrong.”⁹⁰

The immigration laws of the early 20th century also barred entry of people because of certain characteristics they possessed beyond national origin: being prostitutes, having a criminal record, being mentally ill or being a “habitual drunkard,” among others, all of which reflected concerns for public safety. Public safety concerns also intersected with the national origin limitations discussed above. The exclusion of the Chinese likewise emerged from a perceived sense of threat to national wellbeing; in *Chae Chan Ping v. U.S.*, the case testing constitutionality of the Chinese Exclusion Act, the Court supported the political branches’ assessment that the Chinese might “overrun” the United States, and invoked national security as a justification for limiting constitutional scrutiny of the law. The legislative history concerning the passage of subsequent laws in 1917 and 1924 also invoked themes of criminality and national security threats comparable to those we see today, seeing unauthorized immigrants as “at best, a law violator from the outset.”⁹¹

Interestingly, perhaps because they occurred during times with less economic and geopolitical upheaval, the major immigration reforms of 1965 and 1986 never fully picked up these strands of illegality, criminality, and threats to national security. The Immigration and

⁸⁹ IMPOSSIBLE SUBJECTS, *supra* note __, at 64.

⁹⁰ IMPOSSIBLE SUBJECTS, *supra* note __, at 77

⁹¹ *Id.*, quoting INS Annual Report, 1927, pp. 15-16.

Nationality Act of 1965 conceptualized the immigration system around the twin pillars of family and the economy, and its passage occurred without widespread reference to “illegal immigrants.”⁹² The 1986 Immigration Reform and Control Act was a compromise establishing an employment authorization framework in exchange for amnesty for those without legal status, and it was debated as a way to continue to welcome immigrants, albeit in a more controlled fashion. Senator Simpson, who introduced the legislation, made a careful effort to remember that whatever problems were created by illegal immigration, there were “human beings” involved. The Senator ended his pitch for the legislation by stating that the reform was necessary lest there be “an increasing public intolerance—a lack of compassion, if you will—to all forms of immigration, legal and illegal. It is this unwanted and wretched result that this bill attempts to avoid.”⁹³ Likewise, Representative Rodino, who introduced the legislation in the House noted that “[i]t’s a mistake to let this go unaddressed... What’s going to happen if we don’t act is that a psychology will develop that says, ‘Don’t let anybody in.’”⁹⁴ Both politicians saw the bill as a means to prevent illegal immigration from resulting in xenophobic attitudes.⁹⁵

By contrast, today, status is the primary concern for restrictionists. For such voices from

⁹²A search of the New York Times archives shows that in 1965, the term “illegal immigrant” was used only three times, and never in conjunction with immigration reform. By contrast, the term was found 539 times in 2006, and 705 times in 2007. See also Jennifer Ludden, *1965 Immigration Law Changed the Face of America*, NPR, May 9, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5391395> (“It marked a radical break with previous policy and has led to profound demographic changes in America. *But that’s not how the law was seen when it was passed* — at the height of the civil rights movement, at a time when ideals of freedom, democracy and equality had seized the nation.”) (emphasis added).

⁹³Remarks of Mr. Simpson, introducing S. 1200 (A Bill to Amend the Immigration and Nationality Act to effectively control unauthorized immigration to the United States “Immigration Reform and Control Act”), CONG. REC. S7038-S7054 (May 23, 1985).

⁹⁴Editorial, *Peter Rodino Rides to the Rescue*, N.Y. TIMES, July 21, 1985, <http://www.nytimes.com/1985/07/21/opinion/peter-rodino-rides-to-the-rescue.html>.

⁹⁵*Id.*

the incendiary Peter Brimelow⁹⁶ to the more diplomatic, but no less restrictionist, Mark Krikorian,⁹⁷ the failure to comply fully and permanently with immigration laws in the past is the *sine qua non* of determining a person's unworthiness for any immigration benefits in the future; in other words, a violation of immigration laws becomes the mortal sin and no redemption is possible.⁹⁸ This view likewise informs the overall criminalization of immigration violations,⁹⁹ and shows up in such mainstream policies as the "smart enforcement" initiative of the Obama administration, seeking to deport only the highest priority individuals, defined as criminals and those who recently or repeatedly entered the country without inspection.¹⁰⁰ That immigration violations are so routinely perceived as criminal by the public, the media, restrictionist leaders, and politicians, reveals much about the way in which immigration status is fundamental.

Showing that discourse affects law-making, we can see that as the language of "illegal immigrants" and "immigrant lawbreakers" has dominated the political conversation, complementary legislation has steadily narrowed who is worthy of entering or remaining in the United States. As Keith Cunningham-Parmeter has written of Supreme Court jurisprudence on

⁹⁶ PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1996).

⁹⁷ See e.g., MARK KRİKORIAN, *THE NEW CASE AGAINST IMMIGRATION, BOTH LEGAL AND ILLEGAL* (2008).

⁹⁸ Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 104 (2008) ("While the November 2006 elections appeared on one level to ameliorate some of these resentments, there is obviously a substantial interest in the larger community and a simmering anger towards immigrants, especially those who are undocumented or who are perceived to be undocumented. These resentments flare up without warning or provocation.").

⁹⁹ Criminal convictions for immigration violations (particularly violations of 8 U.S.C. §§ 1325, 1326) rose 162.3% over the five-year period from 2007 through 2012 according to a research project examining government data. Transactional Records Access Clearinghouse, *Immigration Convictions for 2012* (Feb. 6, 2013), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyoct12/gui/>.

¹⁰⁰ Dep't of Homeland Security, *Secretary Napolitano's Remarks on Smart Effective Border Security and Immigration Enforcement* (Oct. 5, 2011) ("What those critics will ignore is that while the overall number of individuals removed will exceed prior years, the composition of that number will have fundamentally changed. It will consist of more convicted criminals, recent border crossers, egregious immigration law violators, and immigration fugitives than ever before."), <http://www.dhs.gov/news/2011/10/05/secretary-napolitanos-remarks-smart-effective-border-security-and-immigration>.

immigration, “if immigrants are viewed as illegal alien criminals, then they should be captured and deported. If immigration is an invasion from the south, then the government should construct a virtual fence across the border to resist the Mexican offensive. These ‘common sense’ responses are made possible by selective metaphoric framing.”¹⁰¹ The emphasis on illegal immigration has had a similar effect in Congress and the Executive branch. Where deportation had previously been reserved for a number of especially serious crimes, the 1996 laws extended the possibility of deportation to increasingly trivial convictions, and likewise added many more categories of screening for intending visitors and immigrants.¹⁰² Laws following the 2001 terrorist attacks placed heightened emphasis on screening for security concerns at both the point of entry and when initiating deportation, or removal, proceedings.¹⁰³ Spending on border security and interior enforcement is at record levels, and exceeding all other federal law enforcement spending *combined*.¹⁰⁴ Meanwhile, such historically non-controversial laws as the Violence Against Women Act faced significant opposition in part because they extended benefits to

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¹⁰² The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) added multiple crimes to the definition of aggravated felonies, either by enumerating new offenses, or lowering the sentence required to make a conviction an aggravated felony (for example, where previously \$100,000 in damage had been required, IIRIRA lowered the threshold to \$10,000; where the minimum possible sentence for finding an aggravated felony had been 5 years, IIRIRA expanded the category to include crimes where the possible sentence was 1 year or more). IIRIRA, P.L. 104–20830, 110 Stat. 3009, § 321(a) (Sept 30, 1996)

¹⁰³ For a history of security concerns embedded in immigration law, see Chacón, *supra* note ___, 1832-35 (2007). Terrorism specifically has been a grounds for denying admission or seeking removal since the Immigration Act of 1990, the post-9/11 changes extended the reach of the provisions, particularly with respect to the material support for terrorism provision, which precludes the admission and permits deportation of anyone who, in even trivial ways, supported the work of an entity named a “foreign terrorist organization.” INA § 212(a)(3); INA § 237. The Patriot Act created an exception for those who “did not know, and should not reasonably have known, that the act would further the organization’s terrorist activity.” USA PATRIOT Act of 2001, Pub. L. No. 107-56, §412(a), 115 Stat. 272, 351 (2001). The REAL ID Act, however, narrowed this exception significantly by requiring someone to prove that they did not know, or should reasonably have known, by clear and convincing evidence. REAL ID Act of 2005, Pub. L. No. 109-13, § 103(a), 119 Stat. 23231 (2005).

¹⁰⁴ Julia Preston, *Huge Amounts Spent on Immigration, Study Finds*, N.Y. TIMES, Jan.7, 2013, <http://www.nytimes.com/2013/01/08/us/huge-amounts-spent-on-immigration-study-finds.html? r=0> (citing a MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>).

“illegal immigrants.”¹⁰⁵

With their claim to being American already, DREAMers effectively disrupted this contemporary narrative of illegality. The narrative described in section A, *supra*, shifts the focus from legality/illegality to worthiness and blamelessness, asserting their American-ness to question the focus on illegality. Particularly in contrast to the greater population of immigrants who are called upon to pay fines, stand in the back of the line, and “earn” citizenship,¹⁰⁶ the DREAM movement’s effectiveness suggests that it is doing something powerfully different from the general political discourse around immigrants. Michael A. Olivas has written of the unique political space DREAMers, and those benefiting from *Plyler v. Doe*’s insistence upon non-discrimination based upon alienage in the context of public education, occupy:

[The students] have a resilience and persistence held by few native citizens - who are born at an advantage, relative to these students... That they succeed under extraordinary circumstances is remarkable to virtually all who observe them. These students' success partially explains why so many educators and legislators have accepted *Plyler* and worked to assist them in navigating the complexities of school and college. Despite the success of anti-immigrant rhetoric in shaping a discourse and of restrictionists in fashioning resentments, reasonable legislators of both parties have attempted to address the issues these students face, notwithstanding the political blowback.¹⁰⁷

The overwhelming focus on illegality in popular discourse necessitated this different vision, and the DREAM emphasis on the blamelessness and worthiness of these immigrant youth created that alternative political space.

¹⁰⁵ Frank James, *Some Political Lessons from the Violence Against Women Act*, NPR, Feb. 28, 2103, <http://www.npr.org/blogs/itsallpolitics/2013/02/28/173181346/some-political-lessons-from-the-violence-against-women-act-vote>. Professor Mariela Olivares is exploring this political dynamic in her forthcoming article on political decision-making for non-citizens, particularly immigrant women.

¹⁰⁷ Michael A. Olivas, *The Political Efficacy of Plyler v. Doe*, 45 U.C. DAVIS L. REV. 1, 10-11 (2011).

B. The Impossibility of Transitioning to Citizenship

Beyond disrupting the narrative of illegality and providing a different framework to advance their goals, the DREAMers have also had to contend with the fact that there is no existing path to help them realize their goal of matching their identity as Americans to a legal status as Americans. The absolute lack of a path to regularize their immigration status means that for DREAMers, there is no possibility (yet) that immigration can transition to the ultimate, full membership of citizenship, a transition has been integral to the vision of America as a “nation of immigrants.” This section first explores how the DREAMers fit into existing theories of immigrant transition and integration, and then explains how transition is impossible for the DREAMers under current law, showing how the DREAMers have crafted their legislative strategy to build back into America’s immigration law a way to make transitions possible.

1. Seeing DREAMers as Americans in Waiting

In his influential book *AMERICANS IN WAITING*, Hiroshi Motomura has set forth a series of conceptual frameworks for how the law has considered immigration, including both “immigration as contract” (whereby the rights and expectations for immigrants are treated as no more and no less than the terms of a contract) and “immigration as affiliation” (whereby the nation recognizes that immigrants become more citizen-like over time as they develop the ties and loyalties that shift their identities toward being American, whether or not they ultimately become citizens formally). Under “immigration as contract,” the answer to the DREAMers’ situation is clear and simple: they have not been granted permission to enter or remain, so they have not entered into a contract with the government, and can be excluded or removed at any time, although an argument can be made about tacit consent to their presence as a form of

contract.¹⁰⁸ As Motomura explains in his book, this view of immigration has diluted over generations from its purest, strongest formulations in the late 19th century, although the concept does retain some force, and certainly speaks to the concerns driving the emphasis on “illegal immigration” described above. “Immigration as affiliation” effectively captures the DREAMer self-identification as being more citizen-like over time, but provides them no path to having that affiliation recognized through the granting of formal status as citizens. The concept of immigration as affiliation shows up only in limited ways in the Immigration and Nationality Act, such as cancellation of removal, a form of relief from removal available to those who have lived long enough in the U.S. and formed deep enough attachments to merit a chance at remaining.¹⁰⁹ For various reasons, including statutory eligibility and the cap placed on cancellation applications, the remedies in immigration law that support the idea of “immigration as affiliation” do little to help the DREAMers.

Motomura’s third framework, “immigration as transition,” most vividly illustrates how the system has broken down with respect to DREAMers. In “immigration as transition,” immigrants are “Americans in waiting” who have presumed equality as they march toward and await formal citizenship. Such a view of immigration sees immigrants arriving in one status but taking the necessary steps to deepen their legal ties, ultimately by seeking citizenship through naturalization. For Motomura, “immigration as transition” explicitly encourages immigrants to move toward naturalization: indeed, in this view, immigration itself is defined relative to naturalization, with an expectation that naturalization is the normal end result of the act of

¹⁰⁸ Motomura, *Who Belongs?*, *supra* note ___, at 376.

¹⁰⁹ INA § 240A(a),(b).

emigrating.¹¹⁰ The obvious, but often unstated, *sine qua non* of this vision is the existence of a path to naturalization. But for DREAMers who would like nothing more than to transition to formal status as citizens, no such path exists, and the normal end result of naturalization is simply not possible.

The DREAMers provide a compelling example of “immigration as affiliation” and of another vision of citizenship that considers the intending-citizens’ ties, connections, and contributions. *Jus nexi* citizenship—citizenship based on “rootedness”—has been theorized by Ayelet Shachar, and is closest to that posited by the DREAMers themselves. The individuals most connected, most “rooted” in American society, should be recognized as citizens, per her argument.¹¹¹ She writes,

The idea of taking root as a basis for earning entitlement has been familiar to the common-law tradition for centuries. It was brilliantly captured in Oliver Wendell Holmes' resounding words: “a thing which you have enjoyed and used as your own for a long time, whether property or opinion, takes root in your being . . . , however you came by it.”¹¹²

Although Shachar does not specifically limit *jus nexi* to DREAMers, she does use the DREAMers to illustrate her argued need for a new way of thinking about earned citizenship.¹¹³ In her model, formality would yield to factual determinations of “where he or she actually lives, where his or her center of interests lie, and where, as a result, to place ‘the legal bond [of

¹¹⁰ “[I]mmigration as affiliation is also appealing because it is conveniently neutral on the very difficult question of whether the integration of immigrants into American society should be a goal of government policy...If ties emerge, immigration as affiliation recognizes them.” AMERICANS IN WAITING, *supra* note __ at 89.

¹¹¹ Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110 (Winter 2011).

¹¹² *Id.*, at 113-14.

¹¹³ *Id.* at 118-20.

citizenship] having as its basis the social fact of attachment.”¹¹⁴ She looks to specific relationships individual immigrants have formed, from family to career to community to assess whether someone is sufficiently rooted and sufficiently engaged in U.S. society to merit citizenship.¹¹⁵

The *jus nexi* vision of citizenship would trade the relatively objective markers of the birthright citizenship and naturalization, for more subjective factors, creating a functional and necessarily discretionary analysis of the existence of citizenship. Shachar’s elaboration of *jus nexi* relies repeatedly on ideas of “earning” citizenship, reflecting the idea’s roots in property law and conceptions of New Property, where ownership is connected with the question of who most valuably uses the property.¹¹⁶ By opening up citizenship even further to the content of citizen-like behaviors, this vision of citizenship marks the furthest expansion of the question of worthiness into the granting of citizenship. *Jus nexi* citizenship shares with naturalization, as will be discussed in Part III.B, *infra*, the quality of absorbing and reflecting specific named values. *Jus nexi* citizenship differs, however, (beyond its normative content) by emerging through the common law and not through legislation. Given ways in which adjudicators reflect the society around them, however,¹¹⁷ this may simply shift the “magic mirror” to a different venue, but not significantly change it.

2. The Impossibility of Transition

While Motomura’s and Shachar’s scholarship create frameworks for understanding why

¹¹⁴ *Id.* at 132 (quoting Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6)).

¹¹⁵ *Id.*, at 142-45.

¹¹⁶ *Id.* at 123-26.

¹¹⁷ Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, __ GEO. IMM. L. J. __ (forthcoming, 2013).

unauthorized immigrants, including the DREAMers, deserve a path toward full integration¹¹⁸—which would include legal status—as the law stands presently, no such a path exists. Indeed, considering “immigration as transition,” the DREAMers’ lack of status is fundamental, for there can be no transition to formal citizenship status without *lawful* immigration status beforehand. Only lawful permanent residents can apply for naturalization.¹¹⁹ However, for many immigrants, there is simply no path to lawful permanent resident status; this is especially true in the case of immigrants whose initial arrival was unlawful.¹²⁰ Those without a path include immigrants present with valid temporary (“nonimmigrant”) visas, like students or temporary agricultural workers, who cannot find a family member or employer to sponsor them for permanent residence (an “immigrant visa”).¹²¹ Also without a path are those without any lawful immigration status whatsoever, a category which includes both those who entered lawfully at the outset but overstayed their visas, and those whose initial entrance was unlawful, or “without inspection.”¹²²

¹¹⁸ In his recent scholarship, Motomura is extending his framework to examine how DREAMers and other undocumented immigrants can be—and need to be—seen as in transition, despite the absence of any legal path permitting it. He sets out arguments based upon contract (noting the implicit acceptance of the presence of undocumented immigrants) and affiliation (noting “the various mechanisms in immigration law for recognizing the roots that unauthorized migrants put down). Motomura, *Who Belongs?*, *supra* note __, at 367, 76. Because those two justifications exist—and the merits of those justifications, he concedes, are contested—it is possible to look at unauthorized immigrants as “in transition,” and question the best manner of addressing that transition for the purpose of promoting *integration* which “is the key to a civic solidarity that is consistent with equality and individual dignity” and therefore helps reconcile the tension between borders and equality. *Id.*, at 378.

¹¹⁹ 8 U.S.C.A. § 1427 (a) (2012) (“No person, except as otherwise provided in this title, shall be naturalized, unless such applicant... has resided continuously, after being *lawfully admitted for permanent residence*, within the United States”) (emphasis added).

¹²⁰ There are some exceptions for certain crime survivors, and others could potentially have inadmissibility waived if their deportation would result in exceptional and extremely unusual hardship to a U.S. citizen spouse or child. Still others who arrived before 2001 and had a U.S. citizen relative petition for them before April 30, 2001, may still adjust their status; the numbers of people in such categories is trivial, however, compared to the number of DREAMers likely to be living in the U.S. presently—estimated at 1.76 million. Jeanne Batalova and Michelle Mittelstadt, *Relief from Deportation: Demographic Profile of the DREAMers Potentially Eligible under the Deferred Action Policy*, Migration Policy Institute, available at http://www.migrationpolicy.org/pubs/fs24_deferredaction.pdf.

¹²¹ 8 U.S.C.A. § 1153(b) (2012).

¹²² 8 U.S.C.A. § 1182(a)(6)(A) (2012).

Visa-overstayers may be able to adjust status to permanent residence through marriage to a citizen, but they may have committed other civil violations in their quest to live in the shadows of the law that make their quest for legal immigration status very difficult.¹²³ The vast majority of those whose initial entrance was illegal are not eligible to adjust their status to lawful permanent residence, even if they have citizen spouses, parents, or children.¹²⁴

DREAMers therefore lack the first critical element of eligibility for *formal* citizenship through naturalization, and the *sine qua non* for being immigrants “in transition”: lawful permanent residence.¹²⁵ Without a means to acquiring lawful permanent residence, it simply does not matter that DREAMers meet all the other normative criteria for citizenship enshrined in U.S. naturalization law: patriotism, virtue, and community ties. For them, there is no line to stand in, and no path to the DREAM short of specialized legislation. It is this group, for whom no path toward citizenship exists, that Jose Antonio Vargas had in mind when he talked with Bill O’Reilly, and for whom O’Reilly agreed that there needed to be “a process.”¹²⁶ And it is this purpose that the DREAM Act meets. Although the DREAMer narrative speaks of already being American, the Act itself would simply provide initial lawful immigration status, from which the

¹²³ Vargas, for example, declared on employment forms that he had U.S. citizenship, a ground of inadmissibility that is very difficult to waive. His essay coming out as undocumented details this and many other issues that would trigger analysis of his likely inadmissibility for citizenship, absent any special exceptions or waivers. Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES, June 22, 2011.

¹²⁴ A U.S. citizen can petition for an undocumented spouse who entered illegally, but that spouse needs to leave the country to have the paperwork processed. Leaving the country triggers, for most immigrants, a ten-year bar against re-entry, which can only be waived upon a showing of extreme hardship to the U.S. citizen spouse. The Obama Administration, while unable to remove this barrier to lawful immigration status absent Congressional action, eased the process of seeking a waiver, allowing undocumented individuals to apply for and wait for the waiver while still in the United States. Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 FR 535 (Jan. 3, 2013).

¹²⁵ 8 U.S.C.A. § 1427 (a) (2012) (“No person, except as otherwise provided in this title, shall be naturalized, unless such applicant... has resided continuously, after being *lawfully admitted for permanent residence*, within the United States”) (emphasis added).

¹²⁶ O’Reilly Interview, *supra* note ____.

DREAMers could eventually—if all goes smoothly—apply for citizenship through naturalization.

While providing DREAMers an opportunity for legal permanent residence (and thereby a path to naturalization) is the proposed remedy, amending naturalization law to immediately make DREAMers citizens would better reflect the sense that they are already American. Because naturalization requirements are statutory, and amendable through legislation (as opposed to birthright citizenship through the Fourteenth Amendment, which would require a constitutional amendment to change), it would be possible for Congress to amend the naturalization law to allow the DREAMers to apply immediately for status as citizens. Unfortunately, such a move is utterly impractical in our current political era. With the discourse on illegality, it is impossible to imagine such a transition from undocumented to citizen without some intermediate stage legalizing the individuals' status and requiring them to “earn” their formal citizenship.

Thus the DREAM movement's strategy handles the question of illegality in two ways, first by countering it, and second by adapting to it. First, it attempts to soften rhetoric around illegality by painting a counter-narrative about immigrants that picks up threads of America's immigration mythology, offering the public—and Congress—a different lens through which to view these young men and women who seem worthy, blameless and “already American.” In this way, the worthiness narrative asserted by the DREAMers was a conscious choice driven by the lack of space in the ever-narrowing political discourse of immigration. And yet second, the DREAMers' strategy implicitly adopts the illegality narrative by admitting that they are not

already American (“at least not legally,” as the Time Magazine cover noted¹²⁷) by seeking a process for achieving initial legal status as a means of transitioning to citizenship, instead of amending naturalization law to seek immediate citizenship.

C. Claiming Citizenship Radically; Seeking a Path Pragmatically

The DREAMers’ cause, rooted in their subjective project of defining “American,” embodies citizenship as *identity* at a time when citizenship as legal status is the preeminent viewpoint on membership. The DREAM narrative emphasizes citizenship as identity while the strategy focuses on citizenship as status. The DREAMers’ inability to have their legal status match their self-identity vividly illustrates the existing limitations of “citizenship as legal status,” and its vividness helps explain the normative force of the DREAMers’ movement, and their success at gaining unexpected allies.¹²⁸ The DREAMers show America that citizenship as legal status creates a problem of under-inclusion: individuals who are already “good citizens” should be included within the formal framework of citizenship.

In contrast with the existing and imagined visions of citizenship set forth above, it is truly novel that the DREAMers claim their own citizenship, even in the absence of a legal framework to support that view. In citizenship and naturalization law, and even in the *jus nexi* vision of citizenship, citizenship and its elements are defined by the polity whom the immigrant seeks to join. The DREAMers have a different starting place: the would-be citizen’s self-perception. Self-perception matters profoundly to the DREAMer narrative of “already being American.” They often define themselves as Americans—individuals whose subjective self-perception is that they

127

¹²⁸ Vargas also found an open ear in Tea Party Patriots leader Mark Meckler (description of encounter posted on his Facebook page, July 14, 2012).

are already citizens without the legal paperwork to prove it. There is therefore a more radical underpinning to the discourse that citizenship is something that can be claimed, and not simply something that must be granted by the state. The strength of this vision is the role it gives to the individual to demonstrate the behaviors that constitute being a “good citizen”: a set of factors defined around civic participation, loyalty to the United States, and perhaps time spent in the United States.

The potential shift of power in this vision is profound. Although the history of citizenship in English and American common law creates some space, discussed briefly below, to imagine such a radical power shift, the DREAMers themselves do not seek such a restructuring. The DREAMers articulate ideas that push their audience toward seeing citizenship and “defining American” in new ways. Still, they recognize that the correct political course is not to place citizenship in this radical setting because such a dramatic power shift might alienate a large swath of the electorate. Instead, DREAMers have sought an exception to the existing legal regime that would put them on the path to naturalization in an orderly way—even if the motivations for that exception are fully based upon rootedness principles and the importance of self-perception as citizens.

D. DREAMers Changing the Story of Race and Citizenship

The DREAM movement stands out for another reason, beyond its assertion of citizenship against the prevailing winds of restriction. The history of citizenship in the United States has always also been equally a history of race, but the DREAMers constitute a multi-racial movement focused entirely on the question of who is worthy of full membership. Although, as Section IV explores, some of the notions of worthiness and blamelessness implicitly perpetuate

questions of race, the movement deserves to be celebrated as a departure from the troubled history of race and citizenship in the United States. This section begins with a synthesis of literature showing how race and citizenship have always been connected in U.S. history, and turns to ways in which race vexes the DREAMers' efforts to navigate the existing pipeline to citizenship.

1. Race and Citizenship-Acquisition Historically

Before the Fourteenth Amendment, African-Americans could not be recognized as citizens, whether slave or free. Beyond the infamous provision in the original Constitution declaring that slaves constitutes three-fifths of a person, the Supreme Court itself determined in *Dred Scott* that even when free, black Americans could not be considered citizens.¹²⁹ The Fourteenth Amendment not only corrected that wrong with respect to African-Americans, but established the principle of *jus soli* citizenship in U.S. law, providing the cleanest, clearest and most abiding definition of who has citizenship in America: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."¹³⁰ Although the question of "who is subject to the jurisdiction

¹²⁹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

¹³⁰ Mark Shawhan provides a thorough analysis of how race mattered to the creation of *jus soli* citizenship. Mark Shawhan, "By Virtue of Being Born Here:" *Birthright Citizenship and the Voting Rights Act of 1866*, 15 HARV. LATINO L. REV. 1, 6 (discussing how "antebellum state courts, largely in the South, ignored extant precedents on citizenship acquisition in favor of a racially based consensualist doctrine.") Shawhan also points to contemporaneous voices noting and decrying this divergence, such as Republican James Wilson of Iowa:

Wilson started with Blackstone's articulation of the principle that 'natural-born subjects are such as are born within the dominions of the Crown of England . . . as it is generally called, the allegiance of the king.' This principle, which 'applies to this country as well as to England . . . makes a man a subject in England, and a citizen here,' without 'distinction on account of race or color.'

Id. at 23.

thereof” has recently been debated,¹³¹ the principle that the Fourteenth Amendment covers all those born in the United States and subject to its jurisdiction, including the children of unauthorized immigrants, was upheld by the Supreme Court in 1898 in *United States v. Wong Kim Ark*, and has been undisturbed since then.¹³²

The expansion of *jus soli* citizenship merely deals with the Fourteenth Amendment, and it stands apart from explicit and implicit racial underpinnings of immigration and naturalization statutes in early American history. Explicitly, prior to passage of the Fourteenth Amendment, the first naturalization law, the Naturalization Act of 1790 limited naturalization to “free white men.”¹³³ Implicit were mid-19th century efforts to encourage European settlers to become American citizens through the American Homestead Act of 1862. The Act was passed in

¹³¹ Katrina Trinko, *The New Immigration Debate*, NAT. REV. ONLINE, Jan. 27, 2011, available at <http://www.nationalreview.com/articles/257647/new-immigration-debate-katrina-trinko>.

¹³² *Wong Kim Ark*, the seminal case defining *jus soli* citizenship shows comfort with a full range of foreign-born individuals seeking the protection of the state. Although *Wong Kim Ark* concerns itself with the specific question of the citizenship of children born in the United States, the Court noted in dicta that a justification for extending citizenship to those born within a nation’s borders existed whether the parents had any formal allegiance to the nation in the first place. The reciprocal relationship between the governed and the government exists regardless of whether the governed are citizens or whether they had formally sworn allegiance:

The principle [of birthright citizenship] embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual...and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance, but were predicable of *aliens in amity* so long as they were within the kingdom. *Wong Kim Ark*, 169 U.S. 649, 655 (1898)

The tradition of mutual protection and loyalty articulated by the phrase “aliens in amity” mirrors the fluidity that often exists among different immigration statuses: formal legal designations may differ, but an essential relationship between the government and the governed stays constant. DREAMers are the quintessential “aliens in amity,” seeing themselves already as American, and speaking frequently about their commitment to the United States and desire to give back to the country where they were raised—and as the *Plyler* court powerfully asserted, the undocumented of today could be the citizens of tomorrow, and extending public education to children became essential to maintaining the “amity” part—for who would be more likely to be an “alien in amity” than an individual who shared the quintessential American experience of graduating from public school. See Hiroshi Motomura, *Making Legal: The DREAM Act, Birthright Citizenship and Broad-Scale Legalization*, 16 Lewis & Clark L. Rev. 1127, 1131-32 (2012).

¹³³ Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, repealed by Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

response to concern about the relative emptiness of the still new western territories. The Act excluded people of African ancestry because it was limited to those who could become citizens—and at that time, black people could not be citizens, per *Dred Scott*. Although not nominally an immigration law, the government actively promoted this policy in Europe to encourage immigrants to participate, and to build the stock of future citizens. European immigrants were welcome to partake in the homesteading process so long as they signed a declaration of their intent to become citizens when eligible after five years.¹³⁴ Indeed, the five-year homesteading period coincided with the five-year waiting period before citizenship could be obtained, so during the homesteading, these were “Americans in waiting,” developing the ties and loyalties that were ultimately recognized by the granting of citizenship through naturalization.¹³⁵

The 1880s saw a return to explicit racism in naturalization laws with the Chinese Exclusion Act, the decades-long prohibition of Asian migration and the explicit denial of the possibility of naturalization for Asians. In brief, the mid-19th century arrival of Asian—and specifically Chinese—immigrants that was instrumental in the building of the railroads from the West Coast to the center of the country (where they connected with the rails constructed largely by Irish immigrants) became a political flashpoint after the rails were completed and the economy was in recession.¹³⁶ Much like during the anti-immigrant policies emerging in the

¹³⁴ See e.g., Kerry Abrams, *The Hidden Dimension of Nineteenth Century Immigration Law*, 62 VAND. L. REV. 1353 (2009); KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR, 1820-1924, at 36 (1984).

¹³⁵ See *id.* As Motomura would likely note, such ties were not required under a view of immigration as transition (as contrasted with immigration as affiliation, where such ties are central). Nonetheless, for many, if not most, of those homesteading for several years, such ties almost certainly developed, just as those ties exist for DREAMers today by virtue of the time they have spent in the United States, studying, working, and beginning families.

¹³⁶ See generally Gabriel Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in DAVID A. MARTIN AND PETER H. SCHUCK (EDS), IMMIGRATION LAW STORIES (2005).

recessions of the early 21st century, immigrants received the blame for a large number of social ills, including undercutting American labor during the Gold Rush¹³⁷ leading to calls for their banishment. It was in this context that Congress passed the Chinese Exclusion Acts, banning the immigration of Chinese nationals.¹³⁸

In upholding the constitutionality of the Act and subsequent pieces of legislation providing for the deportation of Asian immigrants,¹³⁹ the Supreme Court relied on language shocking to modern ears. The court noted that it “seemed impossible for [the Chinese] to assimilate” and described the “great danger that at no distant day that portion of our country would be overrun by them.”¹⁴⁰ The court continued by asserting that “their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization.”¹⁴¹ Indeed, even those defending the rights of the Chinese to remain in the United States used the language of race, upholding rights despite the how “obnoxious” the Chinese might be.¹⁴² From *Chae Chan Ping* through *Fong Yue Ting* (the case upholding the federal

¹³⁷ *Chae Chan Ping* documents the origins of the conflict in terms of the negative effects on American workers much as current debates do:

They were generally industrious and frugal. Not being accompanied by families except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace.

Chae Chan Ping v. U.S., 9 S.Ct. 623, 625-26 (1889).

¹³⁸ As *Chae Chan Ping* describes it, “events were transpiring on the Pacific coast which soon dissipated the anticipations indulged as to the benefits to follow the immigration of Chinese to this country.” *Id.*, at 625.

¹³⁹ The Court upheld the constitutionality by establishing that immigration power was plenary, assigned to the political branches of government, and largely immune to judicial review. *Id.*

¹⁴⁰ *Id.* at 595.

¹⁴¹ Notably, when Mr. Chae did leave, the New York Times described him as “a Chinese gentleman who has given the United States courts a great deal of trouble in his endeavors to force his unwelcome presence upon the citizens of this fair and free country.” *Chae Chan Ping Leaves U.S.; He Refuses to Pay his Fare and the Company Takes Him as a Guest*, N.Y. TIMES, Sept. 2, 1889).

¹⁴² *Fong Yue Ting*, (J. Brewer, dissent), 13 S.Ct. 1016,1034 (1893)

deportation power, brought by another Chinese worker seeking to remain in the United States), the constitutionalization of the federal immigration power was thus racialized from its inception. Statutes flowing from this largely unchecked power continued the pattern of explicit racial bias in immigration laws, including the blanket ban on the naturalization of Asians,¹⁴³ and the national-origins quota system established in 1924, which “stimulated the production of illegal aliens,” as historian Mae Ngai has described the period.¹⁴⁴

Although the legal history of Mexican migration to the United States differs sharply from that of Asian migration, the history shares the same pattern of racialization. The 1917 Immigration Act doubled the tax to be paid by immigrants upon entry, and added a literacy test as a requirement for entry, both of which requirements were designed to deter would-be Mexican immigrants.¹⁴⁵ Likewise, long after medical inspections were terminated at Ellis Island and other ports of entry (replaced by medical screening at consulates), Mexicans had to endure humiliating naked inspections, delousing, and other screens at their entry to the United States.¹⁴⁶ The Border Patrol treated its mission as one of crime-control at that time, spreading its enforcement efforts into the interior in unregulated ways until the Attorney General set the functional equivalent of the border as 100 miles from the actual, political border.¹⁴⁷ As Ngai has written,

¹⁴³ Immigration Act of 1917, Pub. L. No. 67-5, 42 Stat. 5 (1921).

¹⁴⁴ Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Re-examination of the Immigration Act of 1924*, J. OF AM. HIST. 67, 86 (1999) (hereinafter Ngai, *Architecture of Race*). Ngai assesses how the quota system had a differential impact upon European immigrants, compared with immigrants from other regions, at least partly because European immigrants could migrate legally after spending five years in Canada, and once here lawfully could petition for family members to arrive without being subjected to quota restrictions. *Id.* at 84. Ngai also demonstrates how provisions to temper the rise in “illegal” immigrants were restricted to Europeans. *Id.* at 102-3 (discussing the “pre-examination” process, a precursor to modern-day I-601 waivers of inadmissibility).

¹⁴⁵ *Id.* at 82.

¹⁴⁶ *Id.* at 85.

¹⁴⁷ 8 U.S.C. § 1357(a)(3) provides for warrantless searches of automobiles within a reasonable distance of the border, as determined by the Attorney-General. Regulations have set that distance as 100 miles from the border. 8

It was ironic that Mexicans became so associated with illegal immigration because, unlike Europeans, they were not subject to numerical quotas and, unlike Asiatics, they were not excluded as racially ineligible to citizenship. But as numerical restriction assumed primacy in immigration policy, its enforcement aspects—inspection procedures, deportation, the Border Patrol, criminal prosecution, and irregular categories of immigration--created many thousands of illegal Mexican immigrants. The undocumented Mexican laborer who crossed the border to work in the burgeoning industry of commercial agriculture emerged as the prototypical illegal alien.¹⁴⁸

During this time, although categories for deportation were not explicitly limited to Mexican or Asian immigrants, only 1% of those deported came from Europe.¹⁴⁹

The Immigration and Nationality Act of 1965¹⁵⁰ theoretically did away with most of these exclusions, and contributed to a dramatic shift in the demographics of the United States.¹⁵¹ Scholars point to the way that the hardship stories of immigrants of color began to resonate on par with those of white immigrants.¹⁵² Questions of race endure, however, and affect every stage of the immigration pipeline, as explored in the section below.

2. Race and Citizenship Today: The Immigration Pipeline

To understand the legal status of the DREAMers, it is useful to turn briefly to the immigration process, considering it as a pipeline toward citizenship, with entries and exits along the way. Although extremely oversimplified below, merely looking at the points of (1) entering,

C.F.R. § 287.1.

¹⁴⁸ IMPOSSIBLE SUBJECTS. *supra* note __, at 71.

¹⁴⁹ *Id.*, at 19.

¹⁵⁰ Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

¹⁵¹ Charles B. Keely, Effects of the Immigration Act of 1965 on Selected Population Characteristics of Immigrants to the United States, DEMOGRAPHY, May 1971. *See also* Jennifer Ludden, *1965 Immigration Law Changed Face of America*, NPR, May 9, 2006, <http://www.npr.org/templates/story/story.php?storyId=5391395>.

¹⁵² *See* Lisa Sandoval, *Race and Immigration Law: A Troubling Marriage*, 7 Mod. Am. 1(6), at: <http://digitalcommons.wcl.american.edu/tma/vol7/iss1/6>; IMPOSSIBLE SUBJECTS, *supra* note __, at 2.

(2) staying and (3) naturalizing, this image provides a way to understand why and how concepts of worthiness and race enter into immigration decisions.

3. *ENTRY*

Entry to the United States can occur in any number of ways, from legal entry for temporary purposes (such as study, tourism, or business visits), or legal entry for permanent residence (available through petitions filed by certain close family members who are already permanent residents or citizens, or by businesses hiring long-term workers, among other avenues), to illegal entry -- crossing a border without being inspected by an immigration officer. A popular critique of the last category—illegal border crossers—is that they should have “gotten in line” as did those in the first two categories, but a closer examination of those two categories shows how limited, and sometimes non-existent, such lines are.

Temporary visas are issued by U.S. consulates overseas, and these consulates have full, unreviewable discretion to issue visas or not.¹⁵³ This non-reviewability exists because the alternative is potentially the creation of an extraordinary caseload of appeals requiring resources beyond anything politically feasible. Non-reviewability does, however, carry with it the risk of discriminatory decision-making, difficult to detect and almost impossible to overcome. The discriminatory practices of a consulate in Brazil came to light only because of a whistle-blowing employee.¹⁵⁴ The practices uncovered there showed discrimination based upon race, gender, and class. Moreover, the countries where these decisions must be made in the first place reflect

¹⁵³ See generally James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, WASH. L. REV. 25, 25-35 (1991).

¹⁵⁴ Philip Shenon, *Judge Denounces U.S. Visa Policies Based on Race or Looks*, N.Y. TIMES, Jan. 23, 1998, <http://www.nytimes.com/1998/01/23/world/judge-denounces-us-visa-policies-based-on-race-or-looks.html>.

certain class and race preferences, as citizens from most European countries need not seek a waiver at all; these countries are part of the U.S. Visa Waiver Program, and simply possessing a passport from one of those countries permits the individual to visit the U.S. without being issued a special visa.¹⁵⁵

Miguel¹⁵⁶ illustrates the high burden that this unreviewable visa system places upon certain would-be visitors to enter the United States lawfully. Miguel lived in El Salvador, where he had middle-class, steady employment with a quasi-governmental agency. Miguel's son, Juan, was a lawful permanent resident (LPR) of the United States, where he lived with his mother (also an LPR, romantically still involved with Miguel, but never married to him, and therefore unable to share her immigration status with him). Juan, at age 11, was diagnosed with a terminal heart condition which could kill him at any time, and he was unlikely to survive more than a year or two at best. Miguel sought a visa to enter as a tourist to visit his son, and was denied twice. The family in the U.S. had their local Congressional representative write a letter to the consulate seeking a different decision, and the consulate replied that Miguel could not be granted a visa because his return to El Salvador "could not be guaranteed." The assumption that Miguel, a Latino from a country with a significant population of undocumented immigrants in the U.S., was a risk for overstaying his visa overwhelmed the humanitarian considerations of the situation. Eventually, Miguel was able to enter through a special program known as humanitarian parole, and he stayed three weeks before returning, well within the time permitted him. Had Miguel not received humanitarian parole and chosen to emigrate unlawfully, he would have become one of

¹⁵⁵ 8 U.S.C.A. § 1187 ("Visa Waiver Program for Certain Visitors").

¹⁵⁶ Although the name is changed to protect his identity, Miguel is a real person, the father of a former client of the author.

the 11 million undocumented who are so often told to “stand in line.” In Miguel’s case, however, no such line would have even been available..

Indeed, the idea that there are readily available lines for orderly immigration is one of the most pervasive misunderstandings affecting the debate over immigration reform. Politicians from both parties adopt the rhetoric of “getting to the back of the line” without ever acknowledging that, for many people, there is no line. Even where lawful immigration routes exist (perhaps through close family members), per-country annual quotas exist so that no country may claim more than 7 percent of immigrant visas annually no matter the demand from a particular country.¹⁵⁷ This means that some stand in line for years or, in some cases, decades.¹⁵⁸ For those without a relative or employer to sponsor them, and without the ability to easily procure a visitor visa, there simply is no way to join the line. As Mae Ngai wrote in the *New York Times*, “When critics admonish prospective immigrants — as well as the 11 million plus undocumented migrants currently in America — to ‘go to the back of the line,’ they should realize that for many people the line is a cruel joke.”¹⁵⁹ The joke is particularly strong for immigrants of color, as Kevin Johnson has studied, noting “Importantly, the abolition of the national origins quota system, though removing blatant discrimination from the immigration laws, failed to cleanse all remnants of racism. Various characteristics of the modern immigration laws, though facially neutral, disparately impact noncitizens of color from developing

¹⁵⁷ 8 U.S.C.A. § 1152 (2012).

¹⁵⁸ The most recent State Department Visa Bulletin shows that the shortest line for entering with permanent residence is for spouses of lawful permanent residents, who have to wait approximately three years; their children must wait between eight and eleven years. Married children must wait between ten and twenty years. State Dep’t Visa Bulletin (Feb. 2013), http://www.travel.state.gov/visa/bulletin/bulletin_5856.html.

¹⁵⁹ Mae Ngai, *Reforming Immigration for Good*, N.Y.TIMES, Jan. 29, 2013, http://www.nytimes.com/2013/01/30/opinion/reforming-immigration-for-good.html?_r=0.

nations.”¹⁶⁰ Because the ability to enter lawfully determines the ability to subsequently adjust to lawful permanent residence, these racial disparities at the outset matter for the rest of the pipeline.

4. REMAINING

For those who do come to the United States lawfully, maintaining the right to stay in the pipeline to citizenship requires exemplary behavior. Since 1996, immigrants with any interaction with the criminal justice system put themselves at high risk of deportation.¹⁶¹ In Maryland, for example, a theft conviction may make an immigrant removable, whether it was shoplifting a pack of cigarettes or something much more substantial, because theft offenses are considered crimes involving moral turpitude (CIMTs)—and a CIMT committed within five years of admission, or two CIMTs committed at any time, render immigrants removable¹⁶² and generally preclude any discretionary relief.¹⁶³ Likewise, in New York, turnstile jumping could render an immigrant removable.¹⁶⁴ Jennifer Chacón has examined this increasing conflation of the criminal and immigration systems, noting “the 1996 immigration laws were not only the product of a world view that conflated ‘illegal immigrants’ with crime—the laws also operated to reify the links between all immigrants and criminality.”¹⁶⁵

¹⁶⁰ Kevin Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 *Ind. L.J.* 1111, 1132 (1998). See also Michael A. Olivas, *Plyler’s Legacy: Immigration and Higher Education in the 21st Century*, 2011 *MICH. ST. L. REV.* 261, 265 (2011).

¹⁶¹ See generally MARY E. KRAMER, *IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS* (4th ed. 2009); Jason Cade, *The Plea Bargain Crisis*, __ *CARDOZO L. REV.* __ (forthcoming, 2013).

¹⁶² 8 U.S.C. § 1227(a)(2)(A)(ii) (2012).

¹⁶³ INA § 237(a)(2)(A)(ii) (deportability for two or more convictions for crimes involving moral turpitude).

¹⁶⁴ Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 *HARV. L. REV.* 1936, 1941 (June 2000)).

¹⁶⁵ Chacón, *supra* note __ (2007). See also Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy*

The story of Mariana¹⁶⁶ illustrates this problem. Mariana entered the U.S. as an 8 year old, with lawful permanent residence. She and her mother moved in with a cousin who began sexually abusing her. The abuse continued over a four-year period and escalated to rape. The cousin was ultimately convicted and jailed, but Mariana received little support for the trauma she endured, and she turned to alcohol and then marijuana and cocaine for relief. She amassed several marijuana possession convictions and one cocaine conviction which ultimately led to the government placing her in both immigration detention¹⁶⁷ and removal proceedings. She ultimately found relief through a provision of immigration law known as Cancellation of Removal, by proving that her U.S. citizen children would suffer extreme and exceptionally unusual hardship if their mother were deported, but the case was hard-fought and shows the tenuousness of her lawful permanent residence.

The confluence of this criminalization of immigration with questions of race is abundantly clear. Jason Cade has laid out in alarming detail the multilayered ways in the distortions and failures of process in misdemeanor courts that ensnare noncitizens, and particularly noncitizens of color.¹⁶⁸ Unsurprisingly, data on who has been removed from the United States based upon any kind of criminal conviction¹⁶⁹ show that the top ten countries of

in the Lower Criminal Courts, 45 U.C. Davis L. Rev. 277, 297-99 (2011) (emphasizing the extent to which minor criminal convictions can carry significant collateral consequences for immigration).

¹⁶⁶ Mariana is another client whose name and certain details have been changed to protect her identity.

¹⁶⁷ Drug offenses, other than possession of less than 30 grams of marijuana, subject immigrants to mandatory detention while their cases are being litigated, a period of time that can last many months (and for Mariana, lasted well over a year). INA § 236(c).

¹⁶⁸ Jason Cade, *The Plea Bargain Crisis*, __ CARDOZO L. REV. __ (forthcoming, 2013).

¹⁶⁹ Criminal convictions (which include guilty pleas and deferred sentencing agreements, among others) affect a would-be immigrant's initial admissibility under INA § 212, and can render an immigrant removable under INA § 237. *See generally* MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY (2009).

removal are countries with predominantly non-white populations.¹⁷⁰ Notably, this data only accounts for those whose reason for removal was a criminal conviction, and not those who were removed for committing the immigration offense of being present without admission¹⁷¹ or without status.¹⁷² A significant number of these latter groups, however, come to the attention of Homeland Security after being booked, arrested, or detained in the criminal justice system. Homeland Security has the authority to initiate removal proceedings regardless of whether the individual is ultimately convicted of any criminal charge, let alone convicted of an offense that would be grounds for removal in and of itself. For example, an individual arrested and charged with drunk and disorderly conduct, a charge that is often dismissed, could still face removal proceedings for simply being present without admission after being screened for immigration status by local law enforcement during the booking process. Law enforcement cooperation with civil immigration authorities, combined with the poor quality of justice available in misdemeanor dockets, dramatically limits the chances an immigrant has of avoiding deportation for even minor infractions of the law, and thus removes many immigrants—and largely immigrants of color—from the pipeline to citizenship.¹⁷³

5. NATURALIZING

Naturalization is the end of the pipeline to citizenship and here, too, questions of worthiness and race enter the analysis. As Kevin Johnson has written, naturalization is a “magic

¹⁷⁰ Data for 2012 has been compiled by the Transactional Records Access Clearinghouse (TRAC). TRAC, U.S. Deportation Proceedings in Immigration Courts (2013), *available at* http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (finding the top ten countries were Mexico, Cuba, Dominican Republic, El Salvador, Jamaica, Honduras, Guatemala, Haiti, Colombia and Vietnam).

¹⁷¹ 8 U.S.C.A. § 1182 (a)(6)(A)).

¹⁷² 8 U.S.C.A. § 1227(a)(1).

¹⁷³ Jason Cade, *The Plea Bargain Crisis*, __ CARDOZO L. REV. __ (forthcoming, 2013).

mirror” for understanding whom a nation-state most wants to include as full members of the polity. Over the centuries, those desirable traits have included various periods of residency,¹⁷⁴ proficiency in English,¹⁷⁵ and for much of the history of naturalization in the United States, being white.¹⁷⁶ Explicit race barriers and quotas ended by 1965,¹⁷⁷ but the use of naturalization law to encompass other aspects of desirability continues, as discussed below.

The way naturalization, or “acquired-citizenship,” can incorporate evolving ideas about worthiness contrasts with the two forms of birthright citizenship: *jus soli* and *jus sanguinis*. *Jus soli* citizenship (citizenship by place of birth) captures an important value of openness underlying U.S. citizenship, one that makes America unusual among nation-states.¹⁷⁸ Questions of parentage and worth simply do not enter into the *jus soli* equation. Place of birth and being subject to U.S. jurisdiction are the only facts that matter for *jus soli* citizenship, and neither ascribes any particular values to the individual child in question. Implicit in the analysis is some small degree of connection to America, by virtue of having at least one parent present in America at the birth, but more significant is the implicit understanding that persons born in America are likely to maintain ties to America—something that is not a foregone conclusion (perhaps explaining America’s outlier status in having this form of birthright citizenship)-- but

¹⁷⁴ A 14 year residency period was required from 1798 through 1802, but a five year period has been more typical (and exists currently for all but those who derive lawful permanent residence through marriage to a U.S. citizen).

¹⁷⁵ 8 U.S.C.A. § 1423 (2012).

¹⁷⁶ See *supra* text accompanying notes [roughly 131] (discussion of race-based history of naturalization and exclusion of Asian immigrants).

¹⁷⁷ Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911 (1965)).

¹⁷⁸ See J.M. Mancini & Graham Finlay, *Citizenship Matters: Lessons from the Irish Citizenship Referendum*, 60 *Am. Quarterly* 575 (2008) (assessing the countervailing trends in Europe). Moreover, the form of *jus soli* citizenship that exists in the United States is a particularly strongly defined commitment to extending citizenship to all but a very small number of those born on U.S. soil. See generally, Matthew Lister, *Citizenship, in the Immigration Context*, 70 *MD. L. REV.* 175 (2010).

that meshes with our self-perception as a “nation of immigrants.”¹⁷⁹

Jus sanguinis citizenship (citizenship through blood)¹⁸⁰ recognizes the need for parents to be able to share citizenship with their children. In some systems, it may be passed along without conditions for generations, regardless of whether the parents have ever lived in the country of citizenship, but in the United States, there are limits designed to ensure some level of ongoing and meaningful affiliation with the United States.¹⁸¹ Lacking the physical connection inherent in *jus soli* citizenship, *jus sanguinis* citizenship uses the citizen parent as a proxy for a different kind of connection; the extent of the citizen parent’s connection to America will be, to some extent, interrogated to be sure that the proxy is a strong one.¹⁸² The requirements for establishing citizenship through parentage have changed periodically, but the statutes generally reflect a sense that parental citizenship without more—particularly significant periods of residence—does not justify bequeathing citizenship generation after generation without some renewal of connection

¹⁷⁹ *Jus soli* citizenship gives primacy to the place of birth, drawing on the English and American common law traditions that recognized the reciprocity and mutual loyalty that needs to exist between the government and the governed. *Wong Kim Ark* suggests that any other interpretation of the Fourteenth Amendment would create a conundrum for those who already feel American:

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage who *have always been considered and treated as* citizens of the United States.

Wong Kim Ark, at 694 (emphasis added). This implicit recognition of pre-existing ties to the United States comes after lengthy discussion of the common law of citizenship, which established an idea that birth in a country created a powerful and pragmatic bond between the government and the governed. *Wong Kim Ark* honors that common law tradition.

¹⁸⁰ 8 U.S.C. §§ 1401(c), (d) (2012).

¹⁸¹ 8 U.S.C.A. § 1401 (g) (2012).

¹⁸² Matthew Lister has named the potential for over-inclusiveness when the parent’s ties to the country of citizenship are not particularly strong. Discussing the purest form of *jus sanguinis* countries, he writes:

Strong *jus sanguinis* extends citizenship, or at least the right to access to citizenship as a matter of right, to some who are not, and who need not be, members of the political community in question. Any citizenship policy that distributes citizenship along ethnic lines will grant these rights to some individuals who are not members of the political community.

to American intermittently.¹⁸³

Jus sanguinis citizenship—because of the generational limitations imposed upon it—marks a less pure form of birthright citizenship than *jus soli*, and in that way conceptually bridges the straightforwardness of strong *jus soli* citizenship, where worthiness simply does not enter into the analysis, and naturalization, where worthiness is much closer to being an explicit requirement. *Jus sanguinis* shows the middle ground where Congress periodically struggles to capture one piece of worthiness (connection to America) by recalibrating the requirements for passing along citizenship to one's children, but we also see that once those requirements are met, no further inquiry need be made.¹⁸⁴ Worthiness is not part of the language or understanding of *jus sanguinis* citizenship.

By contrast with the two systems of birthright citizenship, where worthiness is either absent or muted, citizenship acquired through naturalization contains many markers of worthiness. Where *jus soli* citizenship more effectively captures actual, current connection to a country (with some problems of over-inclusion of those who do not intend to maintain those connections), and *jus sanguinis* citizenship more effectively captures cultural, ethnic, and family ties to a country (with some problems of exclusion of those present for many years, or dilution of ties through generational distance for those who emigrate), naturalization reflects the conscious

¹⁸³ The statute's requirements presently are gradated with fewer residence requirements when both parents are citizens (or one is a citizen and one a national of the United States), and more requirements where only one parent is a U.S. citizen; specifically, in one-parental citizen situations, citizenship only conveys to the child if that citizen parent was physically present in the United States for at least five years, two of which being after the age of 14. For example, someone born in the United States to foreign-born parents is a citizen. This citizen attended elementary school in America before going to another country at age 11. Subsequently, this citizen had a child with a non-American partner. Because she or he had no residence in America beyond the age of 14, she or he could not pass citizenship along to the child, because of a lack of connectedness to America, as defined through INA § 301(g). Isabel Medina has developed a powerful critique of the disparate impacts *jus sanguinis* citizenship has depending on the child's race, or a parent's gender, marital status or sexual orientation, *see supra* note __ (Medina).

¹⁸⁴ 8 U.S.C.A. §§ 1401(c)-(h).

desire of a country to allow certain individuals who meet all the desired characteristics to enter the polity later in life. In this way, naturalization can be seen as an “earned” status,¹⁸⁵ and this aspect encompasses the worthiness question created by the DREAMers’ quest.

Naturalization offers nation-states a means to experiment with requirements addressing the perceived faults in each of these two birthright citizenship systems. With its constitutional authority to establish a “uniform Rule of Naturalization,”¹⁸⁶ Congress has undertaken such experimentation regularly since the Naturalization Act of 1790, adjusting the qualities people must possess for the transition from lawful permanent residence to citizenship. We see in the history of these adjustments a steady narrowing of the understanding of who is worthy of citizenship.

The racial dimensions of naturalization law over time were explicit for many decades. As noted in Part X, *infra*, the 1790 law itself limited naturalization to “free white persons;”¹⁸⁷ the Immigration Act of 1924 relied on this law to exclude Asians who, as non-whites, were ineligible for citizenship.¹⁸⁸ Kevin Johnson, in his seminal 1998 article *Race, The Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, has paid particular attention to how Congress explicitly built race into naturalization laws (and

¹⁸⁵ Jennifer Chacón, *Earning Citizenship*, in BENJAMIN LAWRENCE AND JACQUELINE STEPHENS (EDS) *CITIZENSHIP IN QUESTION* (forthcoming, 2013).

¹⁸⁶ U.S. Const. art. I, § 8, cl. 4.

¹⁸⁷ Naturalization Act of 1790, 1 Stat. 103 (1790).

¹⁸⁸ Immigration Act of 1924, ch. 190, § 11(d), 43 Stat. 153, 159 (repealed 1952). Note that in the passage of the Act, race was an explicit concern. As one Senator commented,

Thank God we have in America perhaps the largest percentage of any country in the world of the pure, unadulterated Anglo-Saxon stock; certainly the greatest of any nation in the Nordic breed. It is for the preservation of that splendid stock that has characterized us that I would make this not an asylum for the oppressed of all countries . . . Without offense, but with regard to the salvation of our own, let us shut the door and assimilate what we have, and let us breed pure American citizens and develop our own American resources.

Remarks of Sen. Ellison Durant Smith.

immigration laws more generally) as a means of excluding those deemed undesirable.¹⁸⁹

Although now implicit, the racial dimensions of naturalization are still powerful. Among other factors, lawful permanent residence is required for a period of either three¹⁹⁰ or five¹⁹¹ years, and, as detailed above, acquisition of lawful permanent residence itself remains highly racialized.¹⁹²

Knowledge of written and spoken English is also required¹⁹³ and, while fairly minimal, privileges those who, by education or by opportunity, are better able to learn English. Poor immigrants—and class often correlates with race for immigrants¹⁹⁴—are the least likely to be able to spend the time needed to learn English sufficiently well for purposes of naturalization.¹⁹⁵

Most significantly, naturalization also requires good moral character. This requirement closes the door to citizenship for immigrants with a wide variety of criminal convictions, among others. This marks a dramatic departure from the treatment of character requirements in the past. When this requirement was first inserted into naturalization statutes, Congress sought to identify individuals whose “reputation which will pass muster with the average man [that] need not rise above the level of the common mass of people.”¹⁹⁶ In addition to having a higher threshold of understanding for what level of flaws might nonetheless permit a finding of good moral

¹⁸⁹ Johnson, *supra* note __.

¹⁹⁰ 8 U.S.C.A. § 1430(a) (2012).

¹⁹¹ 8 U.S.C.A. § 1423 (2012).

¹⁹² See *supra*, text accompany notes 128 through 146

¹⁹³ 8 U.S.C.A. § 1423 (2012).

¹⁹⁴ The Migration Policy Institutes regularly publishes reports on demographic data for different immigrant groups. A March 2013 report on Central American immigrants reflected a 23% poverty rate compared to 15% for native-born Americans. Migration Policy Institute, *Central American Immigrants in the United States*, March 2013, <http://www.migrationinformation.org/USfocus/display.cfm?ID=938#17>.

¹⁹⁵ LUCY TSE, WHY DON'T THEY LEARN ENGLISH? SEPARATING FACT FROM FALLACY IN THE U.S. LANGUAGE DEBATE (2001) (describing difficulties for adult learners with long work weeks, although noting that overwhelmingly immigrants *are* learning English).

¹⁹⁶ Ngai *supra* note __ at 105 (citing Act of June 28, 1940 (54 Stat. 670)). See also Lapp, *supra* note __ at 1586 (citing *In re Spenser*, 22 F. Cas. 921 (C.C.D. Or. 1878) (noting of the character requirement that “probably the average man of the country is as high as it can be set”)).

character, adjudicators through the early and mid-20th century were encouraged to apply principles of redemption and rehabilitation to their findings.¹⁹⁷ Such discretion, however, was sharply limited by the 1990 and 1996 amendments to the Immigration and Nationality Act which expanded the definition of the “aggravated felonies” that precluded a finding of good moral character.¹⁹⁸ What discretion remained (for example, the ability to look only at the most recent five years), is sharply constrained in practice by operating manuals encouraging adjudicators to look at a much longer period of time.¹⁹⁹

What remains is a sharply narrowed definition of good moral character that is further narrowed by well-documented racial disparities in the criminal justice system. Excellent legal and sociological scholarship and policy work demonstrates how the criminal justice system affects people of color in a grossly disproportionate way,²⁰⁰ demonstrating in turn how the good moral character requirement has become a *de facto* racial barrier today. Immigrants have long been misperceived to be more highly criminal than native-born individuals.²⁰¹ Such misperceptions worsen when immigration status and race intersect, because people of color are

¹⁹⁷ Lapp, *supra* note __ at 1587-9.

¹⁹⁸ *Id.*, at 1590-91.

¹⁹⁹ “The character inquiry “should extend to the applicant's conduct during his or her entire lifetime.” U.S. Citizenship & Immigration Servs., Adjudicator's Field Manual ch. 73.6(a) (2011), *available at* <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html>. Lapp also points to other guidance from the Field Manual encouraging the most limited possible interpretation of good moral character. Lapp, *supra* note __ at 1607-8.

²⁰⁰ See generally, Cynthia Jones, *Confronting Race in the Criminal Justice System*, 27 CRIM. JUST. 12 (Summer 2012); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN LEGAL SYSTEM; William Moffitt, *Race and the Criminal Justice System*, 36 GONZAGA L. REV. 305 (2000-1).

²⁰¹ See Jayesh Rathod, forthcoming. See also Ted Brader and Nicholas A. Valentino, *Is It Immigration or the Immigrants? The Emotional Influence of Groups on Public Opinion and Political Action*, Conference Paper, http://cess.nyu.edu/conferences/2-07-2008/Immigration_or_Immigrants.pdf (discussing how elite discourse about illegal immigration focuses on the negative aspects of immigration such as crime, particularly when the immigrants in question are not white).

vastly overrepresented in the criminal justice system²⁰² and face fewer procedural protections once enmeshed in that system.²⁰³

E. THE DREAMERS' NEW FACE OF RACE AND CITIZENSHIP

Compared with this complicated, highly racialized pipeline to naturalization, the DREAM movement's vision represents a profound shift. This is the story of people of color, demanding citizenship for themselves by seeking the permanent residence that is ultimately the *sine qua non* for their applications for citizenship. Citizenship has been out of reach for DREAMers until now simply because it would be impossible for them to qualify for the necessary prior status of lawful permanent residence. Thus we have a situation where the heavily racially-influenced pipeline to citizenship has deprived them of that necessary prior status, but where the DREAMers have been able to transcend race to bypass the typical routes to permanent residence and demand that status based upon their claims of membership and being American already. A new narrative forced open a new path.

Moreover, the activists putting forward this legislation are the ones most able to jump through the additional hoops required for naturalization, including good moral character. Indeed, that emphasis on good character is part of the basis of their appeal, with their narrative's emphasis on being "law-abiding," and details from stories that typify what is popularly connoted

²⁰² See *supra*, notes 141-42. The Center for American Progress reports that "[w]hile people of color make up about 30 percent of the United States' population, they account for 60 percent of those imprisoned... 1 in every 15 African American men and 1 in every 36 Hispanic men are incarcerated in comparison to 1 in every 106 white men." Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, Center for Amer. Progress, Mar. 13, 2012, <http://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>. The same report cites the U.S. Sentencing Commission, noting that "in the federal system black offenders receive sentences that are 10 percent longer than white offenders for the same crimes." *Id.*

²⁰³ Jason Cade, *The Plea Bargain Crisis*, __ CARDOZO L. REV. __ (forthcoming, 2013) (enumerating the many ways in which trial courts fail to protect the rights of those charged with misdemeanors).

by “good citizenship”—the excellence in school, civic engagement, and bright plans for contributing to society.²⁰⁴

Historically used as a means of limiting access to citizenship based on race, naturalization is the source of the promise in the vision being put forward by DREAMers, and shows one way that American citizenship is expanding by embracing people of color as worthy of the path to citizenship. despite its failure to pass, as yet, momentum is on the side of the DREAM movement. The Obama Administration’s 2012 Deferred Action for Childhood Arrivals initiative accomplished some of the DREAM Act’s objectives by means of an executive order, and largely mirrored the eligibility criteria long set forth by DREAM Act legislation.²⁰⁵ The movement has also gained the support of such immigration critics as Bill O’Reilly,²⁰⁶ and other Republicans previously opposed to the Act.²⁰⁷ Most powerfully, current Senate and Administrative plans, as discussed above, put the situation of DREAM-eligible youth at the forefront of immigration reform.

III. DANGERS OF WORTHINESS-BASED CITIZENSHIP

The worthiness narrative that makes the DREAM movement compelling raises a challenging question: If worthiness is the way that these immigrants of color are able to claim

²⁰⁴ See Part I.B., *supra*.

²⁰⁵ Julia Preston, *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-someillegalimmigrants.html?pagewanted=all>. See also Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, (June 15, 2012,), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

²⁰⁶ O’Reilly Interview, *supra* note ___.

²⁰⁷ Senator Marco Rubio, who voted against the DREAM Act in 2010, began putting forward his own version of the law in 2012. Lizette Alvarez, *With G.O.P’s Ear, Rubio Pushes DREAM Act Proposal*, N.Y. TIMES, Apr. 26, 2012, http://www.nytimes.com/2012/04/27/us/politics/with-gops-ear-marco-rubio-pushes-dream-act-proposal.html?_r=2&.

citizenship--if the politics demand that high burden--does that open the door to denying citizenship to those deemed unworthy?

Beyond the political costs to immigrants' broader hopes for expansive reform of a system widely defined as "broken," the DREAM movement has the potential to tie in to strands of worthiness-based citizenship that already exist in other dimensions of American political life. Such a re-examination of the rights of those who already have citizenship may be a logical extension of any vision of citizenship focused on worthiness. In her thought-provoking article suggesting a vision of citizenship based upon connection ("*jus nexi*" citizenship), Ayelet Shachar applies the New Property concept of ownership being tied to whether someone is valuably using a property, providing a basis for those who would use citizenship productively (like the DREAMers) to claim that citizenship.²⁰⁸ But the nature of making such a determination necessarily suggests an ability, or perhaps a duty, to determine who is *not* using their citizenship productively.²⁰⁹ While Shachar focuses on connection, in contrast to my focus on worthiness, the concern is comparable: pushing the limits of who is seen to be American can advantage many people significantly, but the act of creating this flexibility itself puts others at risk.

The possible dangers of defining citizenship around a concept of worthiness show up both within the context of immigration itself, and beyond the sphere to perceptions of the rights of citizens who are perceived as less worthy, or unworthy, of the exercise of their rights of

²⁰⁸ See generally Shachar, *supra* note ____.

²⁰⁹ In her thought-provoking article applying New Property concepts to questions of citizenship, Ayalet Shachar writes, "When applying these [new property] understandings to citizenship, perhaps the most obvious parallel is that immigration laws create precisely such a system of rules governing access to, and control over, scarce resources—in this case, membership rights (and their accompanying benefits)... . . . [f]rom the perspective of *each* member of the polity, re-conceptualizing his or her entitlement to citizenship as a special kind of property fits well within the definition of new property." Shachar, *supra* note ____, at 125 (emphasis added).

citizenship--often people of color. As explored below, there are ways in which a worthiness-based understanding of citizenship dovetails with arguments advanced by those who see U.S. citizenship, as currently constituted, as being *over*-inclusive. Among the variations on this theme are attacks on birthright citizenship, disenfranchisement of felons, and attempts to make voter registration more difficult. Each of these issues predominantly affects Americans of color.

A. *THE COST OF WORTHINESS TO IMMIGRATION REFORM*

1. *COMPREHENSIVE, BUT NOT EXPANSIVE, IMMIGRATION REFORM*

When television personality Bill O'Reilly debated Jose Antonio Vargas on his show in June 2012, the two men agreed on at least one thing: for immigrant youth who, like Vargas, came to America at a young age and embraced the idea of American opportunity by achieving a high school diploma and seeking higher education or pursuing military service, there should be a path toward citizenship. O'Reilly also insisted, however, on a corollary point: for people *unlike* Vargas, and the tens of thousands of young immigrants collectively known as the DREAMers, there should be no such path. This article now turns to the question of who is left out--who is seen as so "unlike" the DREAMers as to not merit a path.

The division created inadvertently by the DREAM rhetoric occurs in a number of ways. First is the movement's emphasis on the DREAMers' lack of culpability for their own immigration situation; the blameless child is contrasted to the "wrong-doing" parent. For example, one DREAM supporter wrote a letter to the *Washington Post* stating that "there is no other example in this country where a 5- or 10-year-old would be prosecuted for committing a crime in collusion with a parent or other adult." This makes a nice argument in favor of the DREAMer, but it certainly implies—if not explicitly states—that the *parent* has acted criminally

for bringing the child. Put more nimbly, Steve Coll writes in the *New Yorker*, “The same reasoning that presumes innocent children also presumes guilty parents.”²¹⁰ The discourse thus benefits one part of the immigrant population in opposition to another—in this specific case, the DREAMers’ own family members.²¹¹

In emphasizing that the DREAMers entered through no fault of their own, the people who brought them here are thus implicitly differentiated and criticized. This line-drawing extends back a generation to the Court in *Plyler v Doe*, which noted “[t]hose who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated.”²¹² Although helpful to establish sympathy for the children, this line-drawing ignores the many ways in which the parents could have been otherwise depicted, including as excellent parents seeking the best interests of their children by coming to a country where they could provide for and support their children—a narrative the DREAMers themselves are trying to advance—but which is largely absent from political and popular discourse about immigration reform.

A second source of differentiation comes from the DREAMers’ experiences and hopes. DREAMers have completed, or are on track to complete, high school educations. This is in contrast to those who immigrated as adults without a chance for education (or even, in many cases, literacy). Partly this is a function of economics where poorer immigrants work multiple jobs with hours (and work conditions) that make it difficult to take the English classes that are a

²¹⁰ Steve Coll, *The Criminalization of Immigration Law*, NEW YORKER July 2, 2012, available at http://www.newyorker.com/talk/comment/2012/07/02/120702taco_talk_coll.

²¹¹ Zoe Amerigian, Letter to the Editor, *As American as Anyone*, WASH. POST., Aug. 18, 2012), at A12.

²¹² *Plyler v. Doe*, 457 U.S. 202 (1982).

necessary pre-condition for GED programs (and likewise make it challenging to complete a GED program itself). Partly this is a function of age, in two ways: older immigrants are more likely to be juggling work and family responsibilities, impinging on time available for study, and may also struggle more to learn English.²¹³ The DREAM movement's emphasis on the commitment of youth to integrating into American culture by means of their studies is therefore contrasted with those immigrants who, for any of a variety of reasons, simply cannot match that accomplishment.²¹⁴ Indeed, the Migration Policy Institute has estimated that between 35% and 56% of the roughly 11 million undocumented immigrants in the United States would be ineligible for immigration relief which contained a requirement of being able to speak English.²¹⁵

Another thread of the DREAM discourse that sets off many other immigrants is the emphasis on being "law abiding" individuals who entered the country through no fault of their own. Media in the aftermath of the DACA announcement emphasized this narrative thread.²¹⁶

²¹³ Age is among the factors affecting language-acquisition. See Jayesh Rathod, *The Transformative Potential of Attorney Bilingualism*, ___ UNIV. OF MICH. J. OF L. REF. 17-18 (citing Francois Grosjean, *Studying Bilinguals: Methodological and Conceptual Issues*, 1 BILINGUALISM: LANGUAGE AND COGNITION 131, 132-33 (1998)).

²¹⁴ Moreover, as other scholars have noted, adult immigrants, particularly from Mexico and Central America, are seen as unworthy of investment in the same way that children are. As Hiroshi Motomura writes, "For much of living memory, Latino immigrants—and Asian immigrants before them—have been received not as Americans in waiting, but as merely temporary, seasonal, or inexpensive laborers for fields and factories, often with the disposability that comes with being tolerated to be here unlawfully." Motomura, *Who Belongs?*, *supra* note ___, at 372.

²¹⁵ Marc R. Rosenblum, Randy Capps, Serena Yi-Ying Lin, *Earned Legalization: Effects of Proposed Requirements on Unauthorized Men, Women and Children*, Migration Policy Institute 8 (Jan. 2011), <http://www.migrationpolicy.org/pubs/legalization-requirements.pdf>.

²¹⁶ The lede of the Christian Science Monitor's article on the initiative was typical, emphasizing both the DREAMers' own lack of culpability and the passive, invisible culpability of those who brought them here illegally: "Ever since President Obama announced in June that he was halting deportations of *otherwise law-abiding* young immigrants brought to the US illegally, the immigrants (and restive members of Congress) have been eager to learn how the program would work." David Grant, *Obama's 'DREAM Act': How it will work is still a work in progress*, CHRISTIAN SCIENCE MONITOR, Aug. 7, 2012), (emphasis added), available at <http://www.csmonitor.com/USA/Politics/2012/0807/>

An editorial for the Albany Times Union picked up similar language: "Congress should adopt the Dream Act, so young people here illegally *through no fault of their own* can stay and either serve or attain a college degree." Editorial, *Well Are We There Yet?* ALBANY TIMES-UNION, Jan. 31, 2013 (emphasis added), available at <http://www.timesunion.com/opinion/article/Editorial-Well-are-we-there-yet-4237574.php>.

Politicians welcome the ability to cast these individuals in the light of being “law-abiding” as well.²¹⁷ The immediate contrast is to immigrants who came as adults, who can be seen as knowingly and voluntarily breaking the law by entering or remaining without permission. Clearly, however, those who suffer even more by direct comparison are immigrants with a broad range of criminal convictions. As successive amendments to the INA show, policy-makers are steadily expanding the kinds of crimes that make immigrants unfit for presence, let alone citizenship, in the United States, and although this expansion has been rued and criticized (with a few voices wondering whether there is still a place for “mercy” in our treatment of immigrants²¹⁸), the DREAMers inadvertently validate the trend by distancing themselves from immigrants with criminal convictions who would be “unworthy” of the relief being offered.

We can begin, then, to name the people who are left out for having stories too different from those of the DREAMers. The construction worker with no criminal convictions who came to the United States at age 20, or the grandmother who came illegally in 1990 to care for her grandbabies while their mother finished vocational school—both individuals old enough to be held accountable for their decisions to illegally enter the country—are culpable in a way that a DREAMer is not, and are less worthy of the path. Under the current Senate proposal, such individuals would be placed on the slower track, the one requiring the consent of border state commissions before gaining anything but probationary status.²¹⁹ Likewise, the woman with two

²¹⁷ Considering the path created for DREAMers in 2013 immigration reform proposals, Rep. Cooper of Tennessee noted, “I voted for the DREAM Act in 2010 because I believe that *law-abiding students* and those willing to serve in our military, *who came to this country through no fault of their own*, should be encouraged to pursue the American dream of citizenship.” *Tennessee Lawmakers Wary About Drafting Path to Citizenship*, JACKSON SUN (Feb. 3, 2013) (emphasis added).

²¹⁸ Bill Ong Hing, *Detention to Deportation: Rethinking the Removal of Cambodian Refugees*, 38 U.C. DAVIS L. REV. 891 (March 2005).

old theft convictions who has been working as a teacher's aide in a daycare for twenty years would be left out because of her criminal history, as would the refugee and torture survivor who turned to controlled substance abuse as a means of coping with untreated trauma, or the day laborer with two DUIs who has been sober for a decade or more. Even though the DREAM movement has recently made efforts to include more of these stories, and emphasized that their parents were the original "dreamers," the reforms being debated in 2013 have tracked the implicit divide that has been part of the movement since its beginnings..

Indeed, while the proposed reforms are labeled "comprehensive" immigration reform, they are far from being *expansive* immigration reform. Both the President's proposal and the Senate blueprint distinguish among the people worthy and unworthy of reform, either blocking some people from the path to citizenship entirely, or providing a less desirable process for others. Immigrants with criminal convictions are particularly disadvantaged under the Senate blueprint, which denies *any* path for immigrants with criminal convictions (without specifying whether severity matters, or if convictions from the distant past would be considered differently, a notion that used to be critically important in immigration law). Although his plan promises to undo some of the excesses of the 1996 conflation of criminal convictions with immigration consequences, President Obama still likewise distinguished quickly, in his remarks on reform, between those who only broke the law to come (or stay) without permission, and those outside the "overwhelming majority of these individuals [who] aren't looking for any trouble."²²⁰ By inference, those who *were* looking for trouble—those with criminal convictions, presumably—were problematic, and later in his remarks, he contrasted the worthy "contributing members of

²²⁰ President Barack Obama, Remarks by the President on Immigration, *supra* note ____.

the community” who are “looking out for their families” and who are “woven into the fabric of our lives,” with those “who are here illegally and who endanger our communities. And today, deportation[] of criminals is at its highest level ever,” a line that met with applause.²²¹

Both proposals also distinguish between the DREAMers and almost every other undocumented immigrant, creating an inferior process for the latter. The Obama proposal sets up a series of measures that sound punitive in nature—holding immigrants accountable for the initial law-breaking of entering (or remaining) without permission, “a process that includes passing a background check, paying taxes, paying a penalty, learning English, and then going to the back of the line, behind all the folks who are trying to come here legally. That's only fair, right?”²²² The Senate Blueprint likewise demands that not a single individual will move off probationary status until all those currently in the pipeline for permanent residence—decades, as noted above—have their green cards. As noted in Part III(B), *supra*, such a process consigns immigrants to years or decades before regularizing their status, compared to the almost instant granting of lawful permanent residence should the DREAM Act pass.

DREAM Act legislation would surely help a deserving constituency, but it would not address the larger concerns of a broken immigration system. The DREAM Act would not represent comprehensive immigration reform which deals in a meaningful way with our nation's undocumented population. That is because vast swaths of undocumented persons would be excluded because they do not hold the same level of blamelessness (this, ironically includes the

²²¹ *Id.* The extent to which the deportation of criminals reflects stated Administration priorities for deporting *dangerous* criminals is disputed. See, e.g., Corey Dade, *Obama Administration Deported Record 1.5 Million People*, NPR, Dec. 24, 2012, <http://www.npr.org/blogs/itsallpolitics/2012/12/24/167970002/obama-administration-deported-record-1-5-million-people>

²²² *Id.*

parents of many DREAMers) or the same level of worthiness (a point which is increasingly problematic due to the substantial expansion of criminal convictions with immigration consequences) as the DREAMers.

2. THE LIMITS OF THE DREAMER COATTAILS

There is at least a theoretical possibility that coming to terms with one group's "illegality" opens the public's minds to accepting other groups into the polity as well: a positive policy feedback loop. Without making a complete response to this view, which has been ably put forward by Michael A. Olivas in his scholarship,²²³ this article contends that such a hope is implausible for three distinct reasons. First, the political energy generated by and for the DREAMers is likely to dissipate once they achieve their goal of membership. Second, positive policy feedbacks are notoriously difficult to create. Last, DREAMers initially defined themselves so narrowly that they are easier to classify as *sui generis*.

First, DREAMers' coattails are likely limited because the movement is unlikely to continue with the same force after its goals are realized. The formal divide between them and the American polity they feel part of provides fire for their efforts, but once the divide subsists, the organizing fire may likewise diminish, as has happened with other movements in American history. Noted political scientist Theda Skocpol analyzes a comparable dynamic with the women's suffrage movement. Women's sharply delineated exclusion from the polity explains the

²²³ Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009). Olivas builds on the work of political scientists Benjamin Marquez and John Witte, who see piecemeal legislation as an effective way of advancing through politically difficult reform of complex systems. *Id.* at 1789-99. While expressing optimism that the DREAM Act could have moved immigration reform forward as a whole, he acknowledges the reasons for which immigration may simply be different: "basics of the system are so complex, the policy issues are so politicized and so intertwined, and the different coalitions are so evanescent that the polity cannot feed all the smaller parts through the legislative scheme and process one component at a time." *Id.* at 1806-7.

intensity of organizing efforts that went into women's suffrage, but then she contrasts that with what happened next:

*“After formal inclusion...most members of the category may move toward accommodation with standard political routines. How soon this happens depends on the degree to which the group retains its own self-consciousness and organization after being granted access to the electorate. For the most part, American women failed to do this after they began to participate fully in elections and regular party and bureaucratic politics in the 1920s.”*²²⁴

Second, positive policy feedback loops—where a policy changes public opinion—are notoriously difficult to achieve. The welfare reform effort of 1996 is illustrative here, as one reason given by some progressives for accepting certain aspects of the law that were unpalatable was the hope that agreeing to those reforms would create a new political space to perceive the poor differently; as Democratic Leadership Council president Al From said in 2000, “Who's running against welfare now?...Who's running against poor people?... By taking [crime and welfare] away as political issues, we did a lot of good for minorities and low-income communities.”²²⁵ Welfare reform would thus “create a political climate more favorable to the needy. Once taxpayers started viewing the poor as workers, not welfare cheats, a more generous era would ensue. New benefits would flow.”²²⁶ This view, however, proved overly optimistic and public opinion did not shift as desired,²²⁷ and no significant revision to federal welfare laws

²²⁴ THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 52-3, Harvard Univ. Press (1992).

²²⁵ Jason DeParle and Steven A. Holmes, *A War on Poverty Subtly Linked to Race*, N.Y. Times, Dec. 26, 2000, at A1).

²²⁶ Joe Soss and Sanford F. Schram, *A Public Transformed? Welfare Reform as Policy Feedback*, 101 AM. POL. SC. REV. 111,113 (2007) (citing Jason DeParle and Steven A. Holmes, *A War on Poverty Subtly Linked to Race*, N.Y. Times, Dec. 26, 2000, at A1).

²²⁷ *Id.*, at 119 (“We find no evidence for the major outcomes sought by progressive revisionists. . . . With

has been made in the intervening years.

Third, the DREAMers initially defined themselves so specifically and in such a favorable light that they are likely *sui generis* and may not be able to bring in other groups on their coat-tails if those groups are seen as less worthy. The DREAMers began attempting to broaden the discourse and create those powerful coat-tails by the end of 2012, but as argued above in Section X, the rhetorical broadening did not manifest in any of the legislative proposals put forward, all of which treated the DREAMers as *sui generis*. Worthiness-framed membership questions necessarily permit an ongoing framing of membership questions in terms of worthiness and unworthiness—a discourse that bodes poorly for broader immigration reform. As Skocpol has written, “[i]nstitutional and cultural oppositions between the morally ‘deserving’ and the less deserving run like fault lines through the entire history of American social provision.”²²⁸ The earliest origins of welfare programs show this fault line (deserving U.S. civil war veterans against those who did not fight, or who fought in the Confederacy; worthy widowed mothers but not unworthy single mothers). The line persists through modern-day reforms since 1996 which also centered on defining and redefining who was “deserving” of receiving benefits.²²⁹ Indeed, the 1996 reforms—by tightening restrictions and trying to destroy the possibility for “welfare queens,” whose demonization led to so much popular and political vilification of the welfare

‘welfare’ off the agenda, Americans did not become more willing to spend on the poor, on blacks or on welfare, and public opposition to reducing inequality and raising living standards for the poor actually increased.”)

²²⁸ SKOCPOL, *supra* note ___, at 149. In answering the question of why early Civil War veteran pension schemes did not lead to a European-style welfare state in the United States, Skocpol notes that, among other factors, the initial categorizations between worthy (veterans, no matter their class or race) and unworthy (southerners, no matter their poverty level or race) mitigated against the expansion of welfare programs as a matter of broader, basic government responsibility. Skocpol contrasts the benefits made increasingly available to Civil War veterans with the reluctance to provide resources to “paupers.”

²²⁹ See, e.g. Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?* 11 GEO. J. ON POVERTY L. & POL’Y 389 (Fall 2004).

system—hoped to build a fresh base of support for welfare itself, a goal that has, to say the least, gone unfulfilled. Such a history should give pause to those who hope that showing the worthiness of some in the field of immigration reform can lead to an expansion of policies for the many.

The same fault line runs through immigration law itself, from the early 20th century through the proposals of today. Ngai writes of the deportation efforts intensifying after the 1924 Act, imagining “deserving and underserving illegal immigrants and, concomitantly, just and unjust deportations.”²³⁰ Likewise legislation in the 1930s followed along two tracks: one track providing harsh treatment for immigrants with criminal convictions, and another for “exceptionally meritorious” cases involving separation of families, with one track providing political cover for the latter.²³¹ The 1986 passage of IRCA tracked these two stories as well, between worthy and unworthy immigrants.²³² Indeed, we need not prognosticate about whether an impulse to segregate the ‘worthy’ DREAMers from others exists; we are already beginning to see the divisions between proposals aiming at providing DREAMers citizenship when others would need to wait—or not be placed on the path at all.²³³

B. EFFECTS ON CALLS TO RESTRICT THE 14TH AMENDMENT

A second aspect of the worthiness-based framing of citizenship emerges in political debatessurrounding the contours and edges of the Fourteenth Amendment. Where the

²³⁰ IMPOSSIBLE SUBJECTS, *supra* note ___, at 57.

²³¹ *Id.*, at 81.

²³² LINA NEWTON, *ILLEGAL, ALIEN OR IMMIGRANT: THE POLITICS OF IMMIGRATION REFORM* (2008).

²³³ Peter Wallsten & Rosalind S. Helderan, *Citizenship Question Roils Both Parties as Immigration Debate Gets Under Way*, WASH. POST, Jan. 31, 2012, http://www.washingtonpost.com/politics/citizenship-question-roils-both-parties-as-immigration-debate-gets-underway/2013/01/31/0588b44a-6b97-11e2-bd36-c0fe61a205f6_story.html?hpid=z2.

DREAMers highlight a problem of citizenship's under-inclusiveness, and demand a path to inclusion, critics point to *jus soli* citizenship as being *overly*-inclusive. The "over-inclusion" problem, simply stated, is that *jus soli* citizenship imperfectly fits prized attributes of what "being American" means. People without ties to America become equal, under this operation of law, to those with significant ties.²³⁴ Critics like Peter Brimelow, Georgie Geyer and Rush Limbaugh have over-stated and manipulated this concern, often in entirely unmasked racial language, but with enough effectiveness to keep their concerns part of multiple policy debates.

Jus soli citizenship, with the perceived danger it brings of over-inclusion, has been criticized in different contexts. Peter H. Schuck has strongly critiqued it in consideration of the case of American citizen and accused terrorist Anwar Al-Awlaki.²³⁵ Al-Awlaki received citizenship based upon being born in the United States to parents who lived here while Al-Awlaki's father was studying and working. Al-Awlaki returned to Yemen at age 7, and never returned to the United States.²³⁶ He joined Al-Qaeda and became a leader, with alleged involvement in the Christmas Day airline plot, among others.²³⁷ After he was killed in a targeted drone strike, and his U.S. citizen son killed in a separate strike two weeks later, the American Civil Liberties Union filed a lawsuit asserting that as a U.S. citizen, he was deprived of life without due process

²³⁴ Jennifer Chacón is presently exploring with great thoughtfulness how politicians and the public consider different forms of citizenship to be more and less "earned," even when the law treats citizens equally, as is the case with the Fourteenth Amendment. Jennifer Chacón, *Earning Citizenship*, in BENJAMIN LAWRENCE AND JACQUELINE STEPHENS (EDS) *CITIZENSHIP IN QUESTION* (forthcoming, 2013).

²³⁵ Peter H. Schuck, *Can We Revoke Faisal Shahzad's Citizenship?* WALL STREET JOURNAL, May 14, 2010, <http://online.wsj.com/article/SB10001424052748704250104575238754192957856.html> (outlining legal arguments for stripping members of Al-Qaeda of their citizenship).

²³⁶ *U.S. Officials Warn of Possible Retaliation After al Qaeda Cleric Is Killed*, CNN, Sept. 30, 2011, <http://www.cnn.com/2011/09/30/world/africa/yemen-radical-cleric/index.html>.

²³⁷ Josh Meyer, *U.S Born Cleric Linked to Airline Bombing Plot*, L.A. TIMES, Dec. 31, 2009, <http://articles.latimes.com/2009/dec/31/nation/la-na-terror-intel31-2009dec31>.

of law.²³⁸ This argument relies upon the clarity of the Fourteenth Amendment, which is not subject to considerations of worthiness and affiliation. The Administration seemed to be convinced that Al-Awlaki's status as 'merely' a citizen by birth tempered constitutional concerns; this view came out in two ways. First, concerning the death of the son, Administration spokesperson Robert Gibbs minimized the death; as Atlantic reporter Conor Fridersdorf writes, "Gibbs nevertheless defends the strike, not by arguing that the kid was a threat, or that killing him was an accident, but by saying that his late father irresponsibly joined al Qaeda terrorists. Killing an American citizen without due process on that logic ought to be grounds for impeachment."²³⁹ Here we see rhetoric that the unworthiness of the father is so potent that it extends to and diminishes the U.S. citizen son; the son is unworthy by association with the father, and his unworthiness becomes the justification for the denial of due process. Second and more recently, the white paper summarizing the legal justification for targeted killings of U.S. citizens reflects this entry of a worthiness framework—in a most dramatic fashion—into constitutional rights. As ACLU Legal Director Jameel Jaffer summarized, "The paper's basic contention is that the government has the authority to carry out the extrajudicial killing of an American citizen if 'an informed, high-level official' deems him to present a 'continuing' threat to the country."²⁴⁰ The paper thus tempers the Fourteenth Amendment's absolute equality with compelling, but inherently subjective, factors about who is worthy of citizenship's protections.

²³⁸ Complaint, *Al-Aulaqi v. Panetta*, Case 1:12-cv-01192-RMC (filed 07/18/12), available at http://www.aclu.org/files/assets/tk_complaint_to_file.pdf.

²³⁹ Conor Friedersdorf, *How Team Obama Justifies the Killing of a 16 Year Old American*, THE ATLANTIC (Oct. 24, 2012), <http://www.theatlantic.com/politics/archive/2012/10/how-team-obama-justifies-the-killing-of-a-16-year-old-american/264028/>.

²⁴⁰ Jameel Jaffer, *The Justice Department's White Paper on Targeted Killing*, ACLU (Feb. 4, 2013, 10:04 PM), <http://www.aclu.org/blog/national-security/justice-departments-white-paper-targeted-killing>.

Away from the glare of terrorism, the summer of 2011 saw another controversy reflect a level of popular discontent with birthright citizenship for those deemed unworthy of it. Over that summer, media embraced the term “anchor baby,” bestowed upon children born to undocumented immigrants, particularly Mexican immigrants.²⁴¹ This slang, as offensive²⁴² as it is devoid of legal meaning, captures the factually-contested²⁴³ idea that immigrants have children in the United States specifically so that the parents might derive citizenship through the baby—something that, even if true, would only be possible once the child turns eighteen. Nonetheless, the rhetoric spawned Congressional efforts to amend the Fourteenth Amendment to prevent such a manner of citizenship-acquisition.²⁴⁴

The “anchor baby” debate showed how strands of worthiness have crept into political discourse. Those sensationalizing the issue saw a cheapening of the value of citizenship in the image of a nine-months pregnant mother coming to the U.S. only so that her child would gain *jus soli* citizenship (regardless of the paucity of reliable data underlying that image).²⁴⁵ To these

²⁴¹ Symptomatic of its explosion was the use of “anchor baby” to discuss the child of Oscar winning actor and actress Javier Bardem and Penelope Cruz, two individuals who surely had other more promising means to achieve legal immigration status in the United States. Jorge Rivas, *Fox News: “Penelope Cruz is Having an Anchor Baby”*, COLORLINES. Dec. 14, 2010, http://colorlines.com/archives/2010/12/fox_news_penelope_cruz_is_having_an_anchor_baby.html.

²⁴² American Heritage Dictionary, which had originally included the term simply as “slang” added the term “offensive” to the definition after receiving complaints. Mary Giovagnoli, *American Heritage Dictionary Redefines “Anchor Baby” Term as “Offensive” and “Disparaging.”* HUFFINGTON POST, Dec. 6, 2011, http://www.huffingtonpost.com/mary-giovagnoli/anchor-baby-definition_b_1132196.html. The revision met with its own attack from those who felt the dictionary had capitulated to political correctness. Bob Dane, *Dictionary's ‘Anchor Baby’ Decision Is Definition of Foolish*, FOXNEWS (Dec. 9, 2011), <http://www.foxnews.com/opinion/2011/12/09/dictionaries-anchor-baby-decision-is-definition-foolish/>.

²⁴³ Describe the methodological problems in this entire debate. But the debate was never about the actual problem, but more the *idea* of the problem. Ted Brader, Nicholas A. Valentino and Elizabeth Suhay, *What Triggers Public Opposition to Immigration? Anxiety, Group Cues, and Immigration Threat*, 52 AM. J. OF POL. SCIENCE 959 (2008).

²⁴⁴ Birthright Citizenship Act of 2011, H.R. 140, S. 723; Birthright Citizenship Act of 2009, H.R. 1868. *See also* Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. TIMES, Jan. 4, 2011, <http://www.nytimes.com/2011/01/05/us/politics/>

05babies. Attacks on birthright citizenship are discussed in more detail, *see infra* Section III.

²⁴⁵ For an example of the imprecise mixture of anecdotes and statistics, *see* Steve Sailer, “Birthright

critics, bestowing something of such value on those whose ties may be extremely limited was “offensive.”²⁴⁶ Schuck suggested conditioning the granting of citizenship on “genuine connection” to the United States (a term that summons the expectations of DREAMers), and suggests measuring that connection by time spent in the American educational system.²⁴⁷ Those responding to attempts to limit *jus soli* citizenship point to the ways in which *jus soli* citizenship has prevented the creation of a race-based group of “second class citizens”²⁴⁸ and point to more troubling sources of devaluation of citizenship, including the American educational system itself.²⁴⁹

How does the DREAM movement affect such controversies? Those championing the DREAMers are also those protesting, vociferously, the rise in terminology such as “anchor babies.”²⁵⁰ Clearly, sympathy for one part of the immigration reform movement has not led to

Citizenship: (a.k.a. jus soli) and the Cheating of America (Aug. 22, 2010), available at <http://www.vdare.com/articles/birthright-citizenship-aka-jus-soli-and-the-cheating-of-america> (sharing an anecdote of a Chinese woman intending to come to the U.S. while nine months pregnant specifically to give her child U.S. citizenship, and immediately stating that births to undocumented parents constitute eight percent of all births in the U.S., clearly—but wrongly—implying that those births are all to last-minute border-crossers).

²⁴⁶ Peter Schuck, *Birthright of a Nation*, N.Y. TIMES, Aug. 13 2010, <http://www.nytimes.com/2010/08/14/opinion/14schuck.html> (citing to the narrative about “anchor babies” of women cross the border simply to have a child who will benefit from U.S. citizenship). Similar criticisms have been made of *jus soli* systems in Europe where, with the exception of Germany, states have been moving toward restricting *jus soli* citizenship. See generally Mancini & Finlay *supra* note 144. The situation also spawned less scholarly calls for revisiting the Fourteenth Amendment. Typical of these is Sailer, *supra* note __ (commenting on “a sophisticated policy issue deeply affecting America’s future. In this case, it’s cheaters misappropriating the legal privileges of being an American.”).

²⁴⁷ Schuck, *supra* note 246.

²⁴⁸ Matthew Lister, *Should the U.S. Maintain Its Strong Jus Soli Rule*, The Faculty Lounge Blog, July 8, 2010, <http://www.thefacultyounge.org/2010/07/should-the-us-maintain-its-strong-jus-soli-rule.html> (“It is my belief that, without the strong *jus soli* principle we have in the U.S., immigrants from “non-white” countries would have been forced into a permanently 2nd-class non-citizen status.”).

²⁴⁹ Luis F.B. Plasencia powerfully examines how the cause for concern about the devaluation of citizenship through immigration is both overstated and misplaced. LUIS F.B. PLASENCIA, *DISENCHANTING CITIZENSHIP: MEXICAN MIGRANTS AND THE BOUNDARIES OF BELONGING* (2012), 51-83.

²⁵⁰ For example, the Immigration Policy Center has championed immigration reform broadly, and the DREAMers specifically, and its Director, Mary Giovagnoli, led the charge against the American Heritage Dictionary’s adoption of the term “anchor baby” in December 2011. Mary Giovagnoli, *American Heritage*

the abandonment of others. Nonetheless, the worthiness frame used to justify extending a path to citizenship for DREAMers softens the lines around citizenship potentially to the disadvantage of those who are less worthy and who have not “earned” their citizenship.²⁵¹ Shifting to a more malleable view of citizenship makes excellent sense where we see the limitations of the Fourteenth Amendment from capturing the membership of these worthy youth: an answer to the problem of under-inclusiveness. What can be used for under-inclusiveness, however, can also be used to consider *over*-inclusiveness. If citizenship becomes more malleable in this way, the next logical step is a reassessment of the worthiness of those who already possess citizenship to maintain it. The controversies surrounding American-born terror suspects and the American-born children of undocumented parents demonstrate that those reassessments are already happening.

C. Outside of Immigration: Unworthy Americans

Beyond the questions surrounding citizenship acquisition, worthiness discourse also infuses who *maintains* the rights and benefits of citizenship. As a theoretical matter, the question of what it should take to maintain citizenship has already been suggested by Eric Liu, writing for *The Atlantic*:

What is jesting is any expectation that we would in fact enact [an agenda of making citizenship revocable and renewable every ten years only by merit]. But the jest is meant to make plain that some of the people now called "citizens" are far less worthy of citizenship in this civic republican sense than some of the people now called "undocumented" or "illegal" or "anchor babies."²⁵²

Dictionary Redefines "Anchor Baby" as "Offensive" and "Disparaging" HUFFINGTON POST, Dec. 6, 2011, http://www.huffingtonpost.com/mary-giovagnoli/anchor-baby-definition_b_1132196.html.

²⁵¹ Cite to Chacón

²⁵² Eric Liu, *Should All Americans Have to Earn Their Citizenship?*, THE ATLANTIC, Feb. 2, 2012, available at <http://www.theatlantic.com/national/archive/2012/02/should-all-americans-have-to-earn-their-citizenship/252433/>.

Liu's essay actually creates a provocative defense of the American aspirations of undocumented immigrants, but his rhetorical exercise also fits uncomfortably well within two real debates happening currently well beyond the field of immigration itself: voter identification laws and felon disenfranchisement.

Voter identification laws are often justified, at least in part, by the argument that voting is a *privilege*²⁵³ and that those who cannot undertake the necessary steps to vote by getting valid identification documents are not worthy of the privilege.²⁵⁴ As one Pennsylvania legislator commented, “[w]e have a lot of people out there that are too lazy to ... get up and get out there and get the ID they need.”²⁵⁵ When the court ruled against implementation of the law, the same legislator again denounced the laziness of those who lacked IDs, and added “Justice Simpson and the Corbett administration have chosen to openly enable and fully embrace the ever-increasing entitlement mentality of those individuals who have no problem living off the fruits of their neighbors’ labor.”²⁵⁶ Such rhetoric suggests that the disenfranchisement of those without identification need not trouble us because they are not *worthy* of it. This connection between unworthiness and laziness emerged in welfare reform discussions to reflect fears about poor

²⁵³ For a full discussion of the fallacy of voting as a privilege, see Garrett Epps, *Voting: Right or Privilege?* THE ATLANTIC, Sept. 2012, available at <http://www.theatlantic.com/national/archive/2012/09/voting-right-or-privilege/262511/###>.

²⁵⁴ See, e.g., Ron Christie, Opinion, *Voting is a Privilege, Not a Right*, WNYC.ORG (March 2012, 3:30 PM), <http://www.wnyc.org/blogs/its-free-blog/2012/mar/20/opinion-voting-america-privilege-not-right/>. Critics contend vociferously that the intent is far less benign (to disenfranchise the poor, and communities of color least likely to possess the required documentation), and that in any event, voting is a right, not a privilege. See Epps, *supra*.

²⁵⁵ Pam Fessler, *Pa. Voters Battle Bureaucracy Ahead of ID Law Ruling*, NPR (Sept. 2012), <http://www.npr.org/2012/09/27/161826027/pa-voters-battle-bureaucracy-ahead-of-id-law-ruling> (quoting State Representative Daryl Metcalfe).

²⁵⁶ Brentin Mock, *Pennsylvania GOP Leader Insists Voter ID Opposition Is About ‘Lazy’ Voters*, COLORLINES, Oct. 3, 2012, http://colorlines.com/archives/2012/10/pa_republicans_think_youre_too_lazy_to_vote_after_voter_id_ruling.html.

people and people of color.²⁵⁷ As Peter Edelman has noted, “Americans had always distinguished between “deserving” and “undeserving” poor people, and people of color were typically regarded as “undeserving.”²⁵⁸ Such divisions are part of a long-standing narrative that seeks to justify racism and exclusion on more rhetorically palatable grounds.²⁵⁹

The second major debate relevant to maintaining citizenship rights arises in the context of felon disenfranchisement and particularly affects the citizenship rights of people of color. Many states have enacted laws variously forbidding felons from voting while incarcerated, or from voting at any time thereafter—even when sentences are fully served.²⁶⁰ As Jamin Raskin has argued, such laws serve no punitive or deterrent purpose, but are a “strategy of mass electoral suppression.”²⁶¹ It is, moreover, a mass suppression that disproportionately targets citizens of

²⁵⁷ As one commentator said at a Virginia roundtable discussion of welfare reform, “There's clearly always been a concept in this country, and it's still here today, about the ‘deserving poor.’ We're willing to give public tax money to people we think deserve it. But if we think somebody is conning the system or scamming or not doing their share, then we're not willing to do that. . . . And it has a heavy race connotation. It always has.” *Hampton Roads Roundtable: What to Do About Welfare*, VIRGINIA PILOT AND LEDGER-STAR, Oct. 29, 1995 (remarks of Howard Cullum).

²⁵⁸ Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. ON POVERTY L. & POL'Y 389 (2004).

The disproportionate impact of voter identification laws upon communities of color has been well documented, and formed the basis for the series of courtroom defeats of voter identification laws in multiple states in 2012. *See generally* Advancement Project, *Segregating American Citizenship* (2012), http://b3cdn.net/advancement/691d4ca5f1fb88ac7f_gum6yz1ie.pdf.

²⁵⁹ *See* SKOCPOL, That voter identification laws disparately impact communities of color is widely accepted (although the extent to which that impact is intentional is fiercely contested). Courts struck down many of these proposed laws, noting in each case their likely disparate racial impact. *State of Texas v. Holder*, ___ F.Supp.2d ___ (2012), 2012 WL 3743676 (D.D.C.) (finding that “record evidence suggests that SB 14, if implemented, would in fact have a retrogressive effect on Hispanic and African American voters. This conclusion flows from three basic facts: (1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty. Accordingly, SB 14 will likely ‘lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.’”).

²⁶⁰ Virginia, Kentucky, Florida and Iowa extend disenfranchisement past the time that the individual has served his or her prison sentence. ACLU Virginia, *About Felon Disenfranchisement*, <https://acluva.org/restore-our-vote2/>

²⁶¹ Jamin Raskin, *Lawful Disenfranchisement: America's Structural Democracy Deficit*, 32 HUM. RTS. 12 (2005) (examining the “democracy deficit” created by felon disenfranchisement, ballot validation problems, and other

color, who are disproportionately likely to have the kind of criminal record that would result in disenfranchisement.²⁶² Many scholars have noted how people of color endure disparities at every stage from arrest to pleading to convictions to sentencing.²⁶³ The results of disenfranchisement laws thus have a strongly disparate impact upon people of color. In Virginia, for example, twenty percent of the state's adult African-American population has been disenfranchised by the Virginia felon disenfranchisement law, which creates a permanent bar to voting.²⁶⁴

In this civil rights debate, citizenship and worthiness again collide dramatically, as those with criminal convictions are deemed permanently unworthy of the most fundamental right of citizenship: the right to vote. Such rhetoric dates to the, arguable, creation of a constitutional basis for felony disenfranchisement, the post-Civil War amendments that extended the franchise to African-Americans.²⁶⁵ Richard Re has illuminated this history, which he deems an “irony,” noting that the extension of the franchise relied upon a political philosophy favoring the actions of people over status-based classifications of people; someone's race, in this view, was not

measures that disproportionately impact African-American and Hispanic voters).

²⁶² A 2012 report estimates that 5.85 million people were disenfranchised as a result of a criminal conviction, with African-Americans disenfranchised at a rate four times great than non-African-Americans (7.7% compared with 1.8%). Christopher Uggen, Sarah Shannon & Jeff Manza, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010* (2012),

http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

²⁶³ See, e.g., Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt* 117 PENN. ST. L. REV. 351-52 (2012); Marc Mauer, *Race, Class and the Development of Criminal Justice Policy* 21 REV. OF POLICY RESEARCH 79 (2004); Alice E. Harvey, *Ex-Felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1147 (1994).

²⁶⁴ ACLU Virginia, *Briefing Paper: Restore Our Vote*, Jan. 2013, <https://acluva.org/wp-content/uploads/2013/01/RestoreOurVoteBriefingPaperJan2013.pdf>.

²⁶⁵ I use the word “arguable” because the constitutionality of felony disenfranchisement is not explicit, but rather inferred from the exception written into § 2 of the Fourteenth Amendment, noting that states would not have representation reapportioned for those numbers lost to felon disenfranchisement. *Richardson v. Ramirez*, 418 U.S. 24 (1974). See generally Richard M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1589-90 (2012) [hereinafter *Voting and Vice*] (“all three Reconstruction Amendments, as well as a number of important Reconstruction-era statutes, were motivated and shaped by what this Article calls ‘the irony of egalitarian disenfranchisement’ --that is, the tendency of radical egalitarians in the Reconstruction era to justify the enfranchisement of black Americans by simultaneously defending the disenfranchisement of criminals.”).

determinative of citizenship-worthiness, but someone's actions could be.²⁶⁶ When then-Governor George Allen defended Virginia's felon disenfranchisement law, he noted that the right to vote *could* be restored if someone's actions proved their worthiness: "The things most Governors would look at, regardless of party, are what kind of life has the ex-felon led since serving their time? I would consider whether or not they were involved in wholesome community-based activities, or just leading the life of a law-abiding citizen and not committing crimes."²⁶⁷ Given the plethora of well-documented barriers affecting ex-felons ability to find employment or housing, demonstrating this kind of worthiness may be exceedingly difficult. Someone who cannot find regular, steady employment because of his criminal record, for example, may be cobbling together odd jobs with difficult hours that make "wholesome community involvement" impossible.²⁶⁸ Just as the DREAMers set a standard of worthiness which many other immigrants, for reasons from age to education to opportunity, cannot easily meet, here, too, ex-felons are being asked to demonstrate worthiness of their right to vote in ways that are too often out of

²⁶⁶ Re quotes legislative history from the Reconstruction Amendments, particularly the remarks of Representative Loughridge:

if a man be of white blood, though he may be destitute of talent, intelligence, patriotism, or virtue . . . all the privileges of the governing class are freely accorded to him . . . But if a man unfortunately be of African descent . . . although he may have an intellect of the highest order, a cultivated mind, and a character unsullied by vice . . . yet notwithstanding all this he is ruthlessly and cruelly thrust down and consigned, without question and without reason, to hopeless degradation.

(Cong. Globe, 40th Cong., 3d Sess. app. at 200 (Jan. 29, 1869) (statement of Rep. William Loughridge), quoted in *Voting and Vice*, *supra* note __). As Re notes, "Representative Loughridge not only praised the 'virtue' of black Americans, but also condemned the 'vice' of many immoral whites. In arguing so insistently that the former did not deserve 'hopeless degradation,' Loughridge insinuated that the latter might." *Id.* at 1596.

²⁶⁷ JEFF MANZA AND CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 81 (2006).

²⁶⁸ The National Institute for Justice cites two studies showing that between 60 and 75% of felons have not found employment within one year of completing their sentences. National Institute for Justice, *Research on Reentry and Employment*, <http://www.nij.gov/nij/topics/corrections/reentry/employment.htm#noteReferrer1> (citing J. PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003) and J. TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005)).

reach.²⁶⁹

IV. CONCLUSION

This article has attempted to name the dangers in introducing notions of worthiness into our understanding of citizenship. While recognizing the enormous normative appeal of the DREAMer narrative, and acknowledging its undeniable political effectiveness, the article argues that basing claims to citizenship upon worthiness carries costs and dangers with it. Some of these costs have emerged in the realm of immigration law in 2013 as legislators take a bifurcated approach to immigration reform, creating one fast process for the worthiest, the DREAMers, another much more time-consuming and complex system for the less worthy, and entirely excluding the unworthy (those who cannot speak English, who lack the money to pay fines and filing fees, or who possess even minor criminal convictions). Other dangers are less immediate, but no less troublesome: using standards of worthiness to undo or limit the open clarity of our *jus soli* citizenship law that has been a laudable exception to the overall history of excluding people from citizenship by race. And in its most extreme form, there is danger in becoming comfortable with the idea of using worthiness to justify bestowing citizenship on *some*, when that means we also become comfortable with taking citizenship *away* as people prove unworthy of it. Current law does permit for denaturalization, although instances of denaturalization are extremely rare. Do we want a vision of citizenship so contingent that someone who is deemed worthy at one stage in their life, and who earns citizenship based upon that worthiness, can have it taken away

²⁶⁹ The similarity in discourse between these disparate contexts—the citizenship prospects of immigrants and the rights of existing citizens—calls to mind Kevin Johnson’s thesis from the *Magic Mirror*: “[h]arsh treatment of noncitizens reveals just how this society views citizens of color.” Johnson, *supra*, note _ at 1116_

as life intervenes or as understandings of worthiness change? Such fluid conceptions of citizenship would leave American citizenship generally uncertain—and not just for those who acquired it at some point after birth—and as such must be considered with apprehension.

The DREAMers have been able to use the discourse of worthiness to advance a difficult political cause, and they are fighting to extend that success to others. While they have also done something radical and laudable for expanding the idea of citizenship itself, an over-emphasis on worthiness has the danger of using the inspiring efforts of this exceptional movement to justify exclusion, and even vilification, of those who fall short of the ideal.