

## IMMIGRANT COVERING

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### ABSTRACT

*Over the last ten years there has been a marked shift in U.S. immigration law away from reliance upon statutory authorization and regulatory provisions to subregulatory or “liminal” rules and discretionary decision-making. This trend is apparent in both federal immigration law and in state and local rulemaking affecting immigrant communities. This Article proposes a new theoretical framework within which to analyze this phenomenon. It uses “covering,” a legal theory first developed in the context of employment discrimination and equal protection, as a lens through which to view these recent developments in immigration law and policy. It shows how immigration laws operate to promote immigration status “conversion,” “passing,” and “covering.” It charts the proliferation, in the last decade, of “covering” provisions that do not alter immigrants’ underlying immigration statuses but nonetheless facilitate their integration into American society, and it discusses the normative advantages and disadvantages of this increasingly prevalent phenomenon.*

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*When you talk about ... what the legacy of the American Dream is, what I think about is this freedom to migrate and freedom to move and freedom to dream.*

*Jose Antonio Vargas*<sup>1</sup>

## INTRODUCTION

Each year, hundreds of thousands of immigrants arrive in the United States in search of their own American Dream. Refugees are fleeing war-torn Syria, Iraq, and Afghanistan.<sup>2</sup> Unaccompanied children are seeking refuge from gang violence in Central America.<sup>3</sup> STEM workers trained overseas are being recruited by U.S. companies.<sup>4</sup> International students are pursuing degrees at colleges and universities in the United States.<sup>5</sup> U.S. citizens are falling in love with and marrying foreigners.<sup>6</sup> Migrant workers are risking their health and safety by crossing the southwest border without inspection.<sup>7</sup> But for millions of immigrants who have tried to make their homes in the United States in recent years, pursuit of the American Dream appears ever more elusive. Vehement anti-immigrant

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1. Anna Holmes, *Jose Antonio Vargas on Immigration and the American Dream*, FUSION (Nov. 24, 2014, 10:01 AM) (quoting *Self Evidence: Jose Antonio Vargas* (Fusion web broadcast Nov. 24, 2014)), <http://fusion.net/story/29413/self-evidence-jose-antonio-vargas-on-immigration-and-the-american-dream/> [<https://perma.cc/P99J-EB58>].

2. See MICHAEL IGNATIEFF, SHORENSTEIN CTR. ON MEDIA, POLITICS, & PUB. POLICY, THE UNITED STATES AND THE SYRIAN REFUGEE CRISIS: A PLAN OF ACTION 3 (2016), <http://shorensteincenter.org/wp-content/uploads/2016/01/Syria-Crisis-Plan-of-Action.pdf> [<https://perma.cc/9SKH-4B5Z>].

3. See Annie Hylton & Sarah Salvadore, *"They Said We Would Pay with Our Lives,"* SLATE (Aug. 31, 2016, 7:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/gender\\_and\\_migration/2016/08/as\\_central\\_american\\_gangs\\_target\\_younger\\_kids\\_more\\_minors\\_are\\_fleeing\\_to.html](http://www.slate.com/articles/news_and_politics/gender_and_migration/2016/08/as_central_american_gangs_target_younger_kids_more_minors_are_fleeing_to.html) [<https://perma.cc/R3B7-LBJD>].

4. See RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42530, IMMIGRATION OF FOREIGN NATIONALS WITH SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS (STEM) DEGREES 2 (2012).

5. See Miriam Jordan, *International Students Stream into U.S. Colleges*, WALL STREET J. (Mar. 24, 2015, 10:00 PM), <http://www.wsj.com/articles/international-students-stream-into-u-s-colleges-1427248801> [<https://perma.cc/KBC8-MXEG>].

6. See Jake Grovum, *1 in 5 Married Households in USA Has Foreign-Born Spouse*, USA TODAY (Sept. 6, 2013, 11:05 AM), <http://www.usatoday.com/story/news/nation/2013/09/06/stateline-marriages-foreign-spouse/2775271/> [<https://perma.cc/TJT4-7WPS>].

7. See Brian Bennett, *Illegal Border Crossings by Central American Families Increase Again*, L.A. TIMES (Oct. 17, 2016, 12:25 PM), <http://www.latimes.com/nation/la-na-border-crossings-20161017-snap-story.html> [<https://perma.cc/Q6E4-FQJK>].

rhetoric was a hallmark of the 2016 presidential election.<sup>8</sup> Public figures, ranging from state governors to popular entertainers, have condemned immigrant communities.<sup>9</sup> Comprehensive immigration reform, once a widely debated and seemingly attainable goal, appears to be completely out of reach.<sup>10</sup>

In the face of congressional recalcitrance and widespread hostility to legislative or regulatory reforms to immigration laws, various governmental actors at the federal, state, and local levels have adopted a different approach, turning instead to subregulatory or “liminal” rules and discretionary decision-making. Perhaps the most well known of these initiatives are President Obama’s two deferred action programs. The first, Deferred Action for Childhood Arrivals (DACA), was originally introduced in 2012 and then expanded in 2014 to provide temporary relief from deportation to undocumented immigrants who had been brought to the United States as children and are now young adults.<sup>11</sup> The second, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), was introduced in 2014 and was designed to provide similar temporary relief from deportation for the undocumented parents of children who are U.S. citizens or lawful permanent residents.<sup>12</sup> On June 23, 2016, the Supreme Court of the United States, in a one-line per curiam opinion, affirmed “by an equally

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8. See Alexander Burns, *Republicans Fire Up Immigration Talk Heading into South Carolina*, N.Y. TIMES (Feb. 12, 2016), <http://www.nytimes.com/2016/02/13/us/politics/republicans-fire-up-immigration-talk-heading-into-south-carolina.html> [https://perma.cc/8ZDA-X8VA]; Jonathan Martin & Patrick Healy, *In Republican Debate, Candidates Battle Sharply on Immigration*, N.Y. TIMES (Nov. 10, 2015), <http://www.nytimes.com/2015/11/11/us/republican-debate-fox-business.html> [https://perma.cc/7EHP-YD3S].

9. See, e.g., Patrick Healy & Julie Bosman, *G.O.P. Governors Vow to Close Doors to Syrian Refugees*, N.Y. TIMES (Nov. 16, 2015), <http://www.nytimes.com/2015/11/17/us/politics/gop-governors-vow-to-close-doors-to-syrian-refugees.html> [https://perma.cc/59EM-64YA] (describing how twenty-five Republican governors vowed to block the entry of Syrian refugees to their states).

10. See, e.g., Aaron Blake, *Immigration Reform Just Went from Extremely Unlikely to Impossible*, WASH. POST (Sept. 10, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/09/10/immigration-reform-just-went-from-impossible-to-more-impossible/> [https://perma.cc/7FD8-W4DF] (describing how the surge of unaccompanied minors at the southern border led to unprecedented levels of opposition to comprehensive immigration reform).

11. See *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/immigrationaction> [https://perma.cc/AG6G-D4J3] (last updated Apr. 15, 2015).

12. See *id.*

divided Court” a federal appellate court ruling preventing the DAPA and expanded DACA programs from going forward at this time.<sup>13</sup> DACA and DAPA have been the subject of extensive and thoughtful scholarly analysis.<sup>14</sup> But they are just one iteration of the wider phenomenon of discretionary, contingent, and subregulatory immigration-related rulemaking at the federal, state, and local levels. This wider topic has recently begun to receive scholarly attention.<sup>15</sup> It remains, however, undertheorized. This Article attempts to fill that gap by proposing a new theoretical framework within which to analyze this phenomenon. The Article uses “covering,” a legal theory first developed in the context of employment discrimination and equal protection, as a lens through which to view these recent developments in immigration law.

In 2002, Professor Kenji Yoshino published his groundbreaking article, *Covering*, in the *Yale Law Journal*.<sup>16</sup> Drawing upon the work of sociologist Erving Goffman on stigma,<sup>17</sup> Professor Yoshino identified three potential approaches to assimilation<sup>18</sup> for traditionally

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13. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam). The Supreme Court, divided 4-4, upheld the Fifth Circuit’s affirmance of the trial court’s preliminary injunction. *Id.* Thus, the injunction remains in place, and the case is now set to go to trial.

14. See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 136-42 (2015); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 *TEX. L. REV.* 781, 856-57 (2013); Hiroshi Motomura, Lecture, *The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 *WASHBURN L.J.* 1, 3-5 (2015); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 *VAND. L. REV.* 671, 768-69 (2014).

15. Several scholars have provided illuminating accounts of the existence of liminality in immigration law and the experiences of the immigrant communities subject to it. See, e.g., SAMEER M. ASHAR ET AL., *NAVIGATING LIMINAL LEGALITIES ALONG PATHWAYS TO CITIZENSHIP: IMMIGRANT VULNERABILITY AND THE ROLE OF MEDIATING INSTITUTIONS* (2015), [http://www.russellsage.org/sites/default/files/RSFReport\\_FINAL\\_2-16-2016.pdf](http://www.russellsage.org/sites/default/files/RSFReport_FINAL_2-16-2016.pdf) [<https://perma.cc/EY5U-AA99>]; Geoffrey Heeren, *The Status of Nonstatus*, 64 *AM. U. L. REV.* 1115, 1134 (2015); Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 *AM. J. SOCIOLOGY* 999, 1010-19 (2006); Stephen Manning & Juliet Stumpf, *Liminal Immigration Law* 17-20 (Oct. 16, 2015) (unpublished manuscript) (on file with author).

16. Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769 (2002); see also KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 26-27 (2006) (offering personal experiences to illustrate the concept of covering).

17. Yoshino, *supra* note 16, at 772 (citing ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 102-04 (1963)).

18. The term “assimilation” is itself somewhat freighted. For many years, both in the United States and elsewhere, scholars and advocates have proposed focusing on immigrant “integration” or “inclusion” rather than “assimilation.” See, e.g., John C. Harles, *Integration*

marginalized or discriminated-against groups. According to Professor Yoshino, assimilation could involve “conversion,” “passing,” or “covering.”<sup>19</sup> Conversion occurs when an individual alters her underlying identity in such a way as to remove the disfavored aspect.<sup>20</sup> Passing occurs when a person presents herself in such a way as to hide the underlying identity, which nonetheless remains unchanged.<sup>21</sup> Covering occurs when an individual neither alters nor actively hides her underlying identity, but downplays disfavored characteristics, enabling others to disattend that aspect of her identity.<sup>22</sup> As Professor Yoshino acknowledged, the latter two forms of assimilation are not always readily distinguishable because the same actions could be either passing or covering, depending on the preexisting knowledge of the audience to such actions.<sup>23</sup> This Article explores recent developments in immigration law, and the attendant experiences of immigrants themselves, using the covering framework.

The Article begins by addressing conventional understandings of assimilation by conversion, passing, and covering. Part I discusses the scholarly literature that employs the covering framework to analyze discrimination against groups such as racial minorities, women, LGBTQ individuals, and members of certain religious communities. It briefly outlines how this traditional approach to covering theory may apply to sociocultural understandings of immigrant identity. Of course, a difference exists between an individual’s legal status as an immigrant and his social status and experience as a “foreigner” or “outsider.” For all immigrants, the need to convert, pass, or cover is sometimes based on the social issues of being from elsewhere, sometimes based on formal immigration status, and sometimes based on the intersection of the two. In that respect, immigration law both converges with and diverges from the broader culture of immigrant assimilation.

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Before *Assimilation: Immigration, Multiculturalism and the Canadian Polity*, 30 CANADIAN J. POL. SCI. 711, 713-15 (1997). However, “assimilation” is the term used by Professor Yoshino and is therefore the term used throughout this Article.

19. Yoshino, *supra* note 16, at 772.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

In some circumstances, the operation of immigration law may permit or foster conversion—both as a matter of legal status and as a matter of identity. In other circumstances, it may mandate passing or facilitate covering. However, it does not exist in a vacuum; immigrants may convert or pass or cover along multiple axes—racial, religious, gender-based, or orientation-based, as well as with respect to their immigrant identity or formal immigration status. The intersectionality of these multiple identities may make it difficult to understand the relative importance of immigration-law-related concerns.<sup>24</sup> For example, a pregnant undocumented worker may seek to conceal or downplay her pregnancy for a variety of identity-based reasons. As a consequence, whether she is passing or covering because of her gender, her employment status, her identity as an immigrant, or her lack of formal immigration status is a complex question. Nonetheless, it is a question worth parsing, particularly when immigration law itself may determine the options available to her. The primary focus of this Article is on the operation of federal, state, and local government laws and policies, rather than on the sociocultural experience of immigrant identity. Of course the latter is highly significant,<sup>25</sup> but the main focus of this piece is the current legal framework—that is, the immigration-related statutes, regulations, subregulatory rules, and legal doctrine. The remainder of the Article, therefore, while touching on the role covering plays with regard to the sociocultural immigrant experience, principally addresses the salience of the covering theory in the context of formal immigration status.

Part II considers the ways in which recent developments in immigration laws and policies may be characterized as embodying the concepts of “conversion,” “passing,” and “covering” with respect to immigration status. Part II.A begins with a discussion of immigration status “conversion.” First, it examines the traditional

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24. For a detailed exploration of intersectionality in the context of racial and gender identities, see generally *CRITICAL RACE FEMINISM: A READER* (Adrien Katherine Wing ed., 2003).

25. The work of scholars such as Leisy Abrego, Cecilia Menjivar, and Debora Ortega, in particular, sheds much-needed light on the realities of these experiences. See Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 *LAW & SOC'Y REV.* 337, 349 (2011); Menjivar, *supra* note 15, at 1010-17; Ashley-Marie Vollmer Hanna & Debora Marie Ortega, Salir Adelante (*Perserverance*): *Lessons from the Mexican Immigrant Experience*, 16 *J. SOC. WORK* 47, 53 (2016).

avenues for immigration status conversion under federal law, such as conversion of an immigrant to a citizen via naturalization, or conversion of a temporary migrant to a permanent resident via adjustment of status.<sup>26</sup> It then outlines the limited and indirect role that state law may play in status conversion through, for example, state regulation of marriage and adoption—which are often predicates for immigration status conversion by the federal government. Part II.A also discusses the role that state courts may play in immigrant conversion via the grant of special immigrant juvenile status to immigrant youth.

Part II.B discusses immigration status “passing,” which occurs as a result of the practical operation of various federal, state, and local laws. First, it considers the ways in which the framework of selective enforcement of federal immigration laws with respect to both immigrant exclusion and immigrant employment have created a long-standing pattern and practice of undocumented immigrants present in the United States passing as documented migrants.<sup>27</sup> Second, it discusses state laws, including federal-state immigration enforcement cooperation agreements, “attrition through enforcement” state initiatives, and state laws restricting immigrant employment.<sup>28</sup> Third, it discusses local laws and ordinances, such as Illegal Immigration Relief Acts and “don’t ask, don’t tell” ordinances, which have been passed in recent years and which effectively require immigrants to pass as holders of a different immigration status in order to interact with state government officials.

Finally, Part II.C discusses immigration status “covering,” which has flourished and multiplied at the federal, state, and local levels in the last decade. First, it considers recent developments in federal law, including the DACA and DAPA programs, as well as the other initiatives providing some unlawfully present immigrants contingent “lawful presence” in the United States without formal immigration status.<sup>29</sup> Second, it discusses immigrant covering embodied in

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26. Adjustment of status is the process by which an eligible individual already in the United States can get permanent resident status (a “green card”) without having to return to their home country to complete visa processing. See 8 U.S.C. § 1255b (2012) (discussing the adjustment of status of nonimmigrant to that of person admitted for permanent residence).

27. See Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 60 (2013).

28. See *id.* at 37.

29. See Heeren, *supra* note 15, at 1120.



state laws, such as state “DREAM Acts”<sup>30</sup> and state protocols for issuing driver’s licenses to the undocumented. Third, and finally, it discusses immigrant covering at the municipal and local levels, including, but not limited to, sanctuary city ordinances and municipal and community identification cards.

The Article concludes in Part III by exploring the normative dimensions of this perspective on the widespread emergence of government-sanctioned immigrant covering and its potential long-term implications. It draws upon the work of scholars writing about covering in other legal contexts and applies and further develops their insights in the new context of immigration status covering. Whether the growing trend toward covering by operation of federal, state, and local laws benefits or harms immigrants is a complex question. On the one hand, the move from passing to covering opens up opportunities and facilitates greater participation in mainstream society by hitherto marginalized immigrant groups. For example, undocumented immigrants were traditionally only able to assert certain rights or access certain services by concealing their status and passing, and so the introduction of federal, state, and local initiatives facilitating covering are surely an improved alternative. On the other hand, each of the initiatives that functionally foster immigrant covering are temporary, contingent, and dependent upon the grace of the majority, rather than the individual rights or human dignity of the immigrants affected by them. These sub-regulatory initiatives offer no permanent, stable resolution for individual immigrants and no recognition of their communities. Instead, these policies calcify the stigma of undocumented status at the very same time that they provide a vehicle for the majority to disattend to that status. Covering in other contexts permits majority groups to ignore or minimize the plight of minorities because they have less visibility. The same is true in the immigration arena. Here, the initiatives that perform functionally as a form of covering may ultimately blunt the urgency with which comprehensive immigration reform is addressed. In large part, nonconversion covering solutions may be seen as “good enough” by some immigrants and

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30. The term “DREAM Act” for legislation benefiting young undocumented minors derives from a bill originally introduced in Congress in 2001. *See* Development, Relief, and Education for Alien Minors (DREAM) Act, S. 1291, 107th Cong. (2001).

their allies, thereby leading to less (or less ambitious) advocacy for fundamental change and potentially cementing a stigmatized undocumented identity at the unobserved core of political discourse about immigration law.

In *Covering*, Professor Yoshino posited that “[a]ssimilation is the magic in the American Dream.”<sup>31</sup> That has always been the case for immigrant communities. Today, for the millions of immigrants living throughout the United States, an increasing array of federal, state, and local laws, regulations, and subregulatory policies provide both barriers to and opportunities for the realization of that dream. The covering paradigm provides valuable insight into hitherto underexplored aspects of this phenomenon. Immigrant covering, in its many and varied guises, therefore warrants considerable discussion and exploration. This Article is intended to begin that conversation.

## I. THE COVERING PARADIGM

This Part provides a brief overview of the framework of assimilation—conversion, passing, and covering—that was first outlined by Professor Yoshino.<sup>32</sup> It discusses Professor Yoshino’s work and that of other scholars who have subsequently critiqued and developed his theories to analyze discrimination on the basis of race, ethnicity, sex, religion, and other identity-based characteristics.

### A. Conversion

“Conversion” is defined by Professor Yoshino as the permanent alteration of underlying identity-based characteristics.<sup>33</sup> He describes assimilation via conversion as the “magic in the American dream ... [that] permits us to become not only Americans, but the kind of Americans we seek to be.”<sup>34</sup> Through the process of conversion from the status of “other” or “outsider,” the newcomer may set aside divisive classifications or identifications and may embrace, or

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31. Yoshino, *supra* note 16, at 771.

32. *See id.* at 772.

33. *Id.*

34. *Id.* at 771.

be embraced by, the majority culture.<sup>35</sup> Or at least that is the theory.

The term “conversion” has traditionally had strongly religious overtones. As part of its entry for the term, the Oxford English Dictionary defines “conversion” as “[t]he turning of sinners to God; a spiritual change from sinfulness ... to love of God and pursuit of holiness” and “[t]he bringing of any one over to a specified religious faith ... from what is regarded as falsehood or error.”<sup>36</sup> It then gives examples of such experiences, ranging from the mass conversion of the Anglo-Saxons by Christian missionaries to an individual’s conversion from Judaism to Christianity.<sup>37</sup> As conventionally understood in this context, conversion is a profound experience whereby an individual leaves behind his prior worldview and embraces his new faith. Conversion is thus absolute, changing not just the way that individuals express their identity, but also the fundamental underpinnings of that very identity. For example, a Muslim woman who converts to Christianity may abandon the visible or outward expressions of the tenets of her prior faith, such as wearing a hijab or praying five times per day. But equally important is her inner repudiation of Islam and her commitment to salvation through acceptance of the teachings of the Christian gospel. Once she has committed herself to her new faith—usually through confirmation, baptism, or some other profession of faith—she becomes, in theory at least, accepted as an equal member of the majority faith community. In other words, she has moved from outsider to member of the majority in-group and has fundamentally altered a hitherto disadvantaged characteristic.

In his *Covering* article and book of the same name, Professor Yoshino describes instances in which gay men and lesbians were pressured to “convert” and embrace a straight identity.<sup>38</sup> He highlights, in particular, the prevalence of so-called conversion therapy during the mid-twentieth century.<sup>39</sup> For the individuals and organizations advocating for conversion therapy, homosexuality is either a “metaphorical disease” to be cured or a permissive lifestyle choice

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35. *See id.* at 772.

36. *Conversion*, 3 OXFORD ENGLISH DICTIONARY 870-71 (2d ed. 1989).

37. *See id.*

38. *See* YOSHINO, *supra* note 16, at 33-35; Yoshino, *supra* note 16, at 784.

39. Yoshino, *supra* note 16, at 784-85.

to be rejected, rather than an immutable aspect of an individual's identity.<sup>40</sup> Professor Yoshino effectively critiques the suggestion that conversion is desirable (or, indeed, even possible) for LGBTQ-identified individuals<sup>41</sup> and he underscores that today none of the major mental health organizations in the United States endorse conversion therapy.<sup>42</sup> But, at the same time, he acknowledges that despite increased understanding of the centrality of sexuality to an individual's fundamental identity, there is still a gap between widespread perception of the relative "fixedness" of sexual orientation and other core characteristics.<sup>43</sup> Hence, Professor Yoshino argues, the long-standing focus of antidiscrimination laws and policies was on groups, such as racial minorities and women, that were marked by "immutable" and "visible" characteristics that made them "physiologically incapable of blending into the mainstream."<sup>44</sup>

Like gay men, lesbians, and members of religious minority groups, immigrants are not instantly, visibly recognizable as outsiders because of their identity as noncitizens.<sup>45</sup> Moreover, for some commentators, in common with religious belief or sexual preference, immigration status or immigrant identity is perceived as a choice, rather than as a nonbehavioral characteristic.<sup>46</sup> As a consequence, at least theoretically, and along some axes, conversion to full (or at least fuller) participation in the mainstream is possible for some members of immigrant groups. An immigrant's outsider status may be defined by a lack of U.S. citizenship, lack of permanent residency, lack of English-language proficiency, or experiences of social or cultural exclusion. In the case of the latter two examples, there is a long history in the United States of immigrants and their children choosing to abandon the languages and cultural practices of their

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40. *Id.* at 801.

41. *Id.* at 781-83.

42. See YOSHINO, *supra* note 16, at 40-41; Yoshino, *supra* note 16, at 799-800.

43. See Yoshino, *supra* note 16, at 876-77.

44. *Id.* at 771, 877.

45. Such an immigrant's race, ethnicity, or religious practices may, of course, distinguish her from the majority in other ways.

46. *But see* Carolyn Tyjewski, *Ghosts in the Machine: Civil Rights Laws and the Hybrid "Invisible Other,"* in *CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY, AND LAW* 106, 110 (Dianne Pothier & Richard Devlin eds., 2006) ("None of these categories [race, gender, sex, and sexuality] is fixed, and anyone can become disabled, raced, gendered, sexed, or sexualized depending on the time, space, place, and moment of any given experience.").

countries of origin to more fully embrace mainstream “American” life. The prevalence of monolingual English speakers among second- and third-generation Americans is well documented,<sup>47</sup> as is the popularity of “Americanization” of “foreign-sounding” names.<sup>48</sup> In both instances, this conversion of cultural identity is absolute; reclaiming lost linguistic competency or revisiting hitherto abandoned naming conventions, while not impossible, is often infeasible. However, the focus of this Article is on the legal mechanisms that permit immigrant conversion from one formal legal status to another. In Part II, I therefore show how immigration status conversion operates—and fails to operate—in the context of federal, state, and local laws.

### *B. Passing*

“Passing” involves the hiding of disfavored identity characteristics by the individual endowed with those characteristics. The Oxford English Dictionary defines this use of the term as “being accepted, or representing oneself successfully as, a member of a different ... group.”<sup>49</sup> Historically, the groups in question were predominantly racial, ethnic, or religious, with nonwhite, non-Anglo Saxon, and non-Protestant individuals seeking to pass as members of the dominant white, Anglo-Saxon, Protestant majority.<sup>50</sup> Today, the term “passing” is also used in the context of lesbians, gay men, and bisexual people passing as heterosexual.<sup>51</sup> Unlike conversion, where

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47. See Richard Alba, *Bilingualism Persists, but English Still Dominates*, MIGRATION POLY INST. (Feb. 1, 2005), <http://www.migrationpolicy.org/article/bilingualism-persists-english-still-dominates> [https://perma.cc/6KN8-6938] (“[S]peaking only English is the predominant pattern by the third generation.”).

48. See Costanza Biavaschi et al., *The Economic Payoff of Name Americanization* 25 (Inst. for the Study of Labor, Discussion Paper No. 7725, 2013), <http://ftp.iza.org/dp7725.pdf> [https://perma.cc/2UQP-L8Y8] (analyzing longitudinal data to show that since the 1930s immigrants changing their names to more stereotypically American versions have benefited from enhanced employment opportunities).

49. *Passing*, OXFORD ENGLISH DICTIONARY (3d ed. 2005). The *Oxford English Dictionary* definition continues to specify that this term is used in the United States to refer to a person with some black ancestry “passing” as white. *Id.*

50. See generally *PASSING AND THE FICTIONS OF IDENTITY* (Elaine K. Ginsberg ed., 1996).

51. See Daniel G. Renfrow, *A Cartography of Passing in Everyday Life*, 27 *SYMBOLIC INTERACTION* 485, 493, 495-96 (2004). See generally *PASSING: IDENTITY AND INTERPRETATION IN SEXUALITY, RACE, AND RELIGION* (María Carla Sánchez & Linda Schlossberg eds., 2001).

the prior identity is abandoned or subsumed by the new, passing involves the modification of outward expressions of identity “for popular consumption” while the underlying identity is preserved.<sup>52</sup> Professor Randall Kennedy suggests that, seen in this light, passing is a necessary “deception that enables a person to adopt specific roles or identities from which he or she would otherwise be barred by prevailing social standards.”<sup>53</sup> In this respect, passing may be a way in which to evade identity-based discrimination.

At the same time, however, the prevalence of passing, and the experience of pressure by minority individuals to pass as members of the majority, is an effect of the same identity-based discrimination. Professor Yoshino argues that to pass is to seek actively to be “misjudged” and therefore misunderstood by one’s colleagues and peers.<sup>54</sup> For example, a gay man passing as straight in the workplace may involve making a wide range of behavioral changes to conform to stereotypical expectations of performative masculinity.<sup>55</sup> These changes may range from controlling “nuances of appearance and gesture,” to inventing a fictitious girlfriend, to feigning interest in sports, to laughing at homophobic jokes.<sup>56</sup> For lesbians, passing in the workplace may involve gender conformity to “feminine” norms. This may involve altering one’s physical appearance by wearing make-up and jewelry, or having long hair.<sup>57</sup> It may also involve acting less confrontationally, speaking more softly, and undertaking stereotypically feminine roles in group projects or exercises.

For many individuals who opt to pass in some environments, such as the workplace, there may be other contexts—such as the home, the family, or social circles—in which they are “out of the closet” and therefore free to express their authentic selves.<sup>58</sup> However, the workplace is not the only domain in which individuals

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52. Yoshino, *supra* note 16, at 786.

53. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 283 (2003).

54. Yoshino, *supra* note 16, at 813.

55. Professor Judith Butler introduced the notion of performativity in the context of gender identity. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 179 (1999).

56. Yoshino, *supra* note 16, at 813.

57. *See id.* at 780.

58. *See id.* at 820.

from minority groups experience the pressure to pass. The same gay men and lesbians who alter their behavior and appearance in the workplace to pass as straight may face similar pressures within their family groups. They may even experience countervailing pressures to conform to different stereotypes in other social contexts. Professor Angela Onwuachi-Willig describes this latter phenomenon as “in-group passing,” highlighting the ways in which gay people may feel compelled to perform their identities in certain ways to maintain credibility as members of the queer community.<sup>59</sup> Thus, “lipstick lesbians” may experience pressure to behave in more “butch” ways,<sup>60</sup> and “straight-acting” gay men may feel that they need to adopt more “effeminate” mannerisms.<sup>61</sup> Just as with out-group passing amongst the majority culture, in these circumstances the individuals in question are trying to gain acceptance by attempting to fulfill roles that their own identity group has deemed “appropriate” for them.<sup>62</sup>

Passing as a legitimate member of the dominant majority group is a phenomenon that implicates many aspects of the immigrant experience—an immigrant may pass with respect to her formal immigration status, her national origin, or her sociocultural background. Certain lawfully present immigrants may opt to not disclose their immigration status when interviewing with potential employers for fear that the mere fact that they will need some form of visa sponsorship will preclude them from consideration for a position. Similarly, lawful permanent residents (LPRs), also known as green card holders, may decline to identify as noncitizens in any number of social or professional settings. Undocumented immigrants, who crossed a U.S. border without inspection or who overstayed their visas, face an even greater pressure to conceal their status and identity in a variety of circumstances.

One immigration scholar has already identified the parallels between being closeted in the LGBTQ context and concealing immigration status and immigrant identity. In *The Undocumented*

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59. Angela Onwuachi-Willig, Essay, *Undercover Other*, 94 CALIF. L. REV. 873, 894-95 (2006).

60. See LISA WALKER, LOOKING LIKE WHAT YOU ARE: SEXUAL STYLE, RACE, AND LESBIAN IDENTITY 183-84 (2001).

61. See Yoshino, *supra* note 16, at 844.

62. See Onwuachi-Willig, *supra* note 59, at 896.

*Closet*, Professor Rose Cuison Villazor examines the ways in which the closet metaphor and coming-out narrative may provide useful templates for those who seek to advocate for immigrants' rights, including a path to citizenship for undocumented immigrants.<sup>63</sup> This Article builds upon Professor Villazor's work to further explore how legal regulation of immigrants' lives, through federal, state, and local laws and regulations, contributes to the pressure upon some immigrants to pass as either U.S. citizens or LPRs. This mandatory immigration status passing is particularly salient in the context of undocumented migration and unauthorized employment. As the discussion in Part II.B will show, for some categories of migrants, passing is coerced because it is necessary to conceal formal immigration status in order to enjoy a basic quotidian existence—to seek employment, to attend school, to drive a vehicle, or to access health-care services. Once again, this illustrates the normative ambiguity of passing as a form of assimilation. Passing can create otherwise unattainable opportunities for immigrants. But, the very fact that it is necessary for those immigrants to pass as something that they are not in order to attain those opportunities underscores just how dire their situations are under current U.S. law.

### C. *Covering*

“Covering,” as described by Professor Yoshino, involves “ton[ing] down a disfavored identity to fit into the mainstream.”<sup>64</sup> Unlike conversion, there is no fundamental alteration to the individual's underlying, traditionally disfavored characteristic.<sup>65</sup> Unlike passing, the individual does not actively conceal the minority identity trait and makes no claim to belong to a different racial, ethnic, religious, or other group.<sup>66</sup> Instead, the person covering downplays their “otherness” to enable those around her to disattend to that aspect of her identity.<sup>67</sup> In so doing, the person covering allows the members of

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63. See Villazor, *supra* note 27, at 72.

64. YOSHINO, *supra* note 16, at ix.

65. See Yoshino, *supra* note 16, at 772.

66. See *id.*

67. See *id.*



the majority group to feel at ease, rather than being challenged or discomfited by nonmajoritarian traits or behaviors.<sup>68</sup>

Professor Yoshino identifies four ways in which people may cover. First, they may cover with respect to their outward appearance.<sup>69</sup> For example, an African American woman who would wear braids or cornrows in other environments may avoid doing so in the workplace,<sup>70</sup> or an “out” gay man, who is ordinarily gender-nonconforming, might conform to traditional gender norms when with his extended family. Second, people may cover with respect to affiliation.<sup>71</sup> This might include LGBTQ people immersing themselves in “straight-focused,” as opposed to “gay-focused” culture, or avoiding predominantly gay social settings such as clubs or bars.<sup>72</sup> Third, people may cover with respect to activism.<sup>73</sup> Young Muslim professors may avoid engaging in scholarship involving Islam, even if it is a topic about which they are passionate,<sup>74</sup> or female board members may refrain from critiquing their organization’s pregnancy and maternity leave policies, even if they disagree with them. Fourth and finally, people may cover with respect to association.<sup>75</sup> For same-sex couples this may involve avoiding public displays of affection or other overt signaling of their relationship status.<sup>76</sup> In each of these instances, the societally disfavored characteristic—whether racial identity, sexual orientation, religious commitment, sex, or gender—remains an acknowledged part of the covering individual’s identity. But, the difference or “otherness” is downplayed by the persons covering to make it less salient to the majority culture around them and, as a consequence, to make themselves more palatable or acceptable to the mainstream. As with passing, covering may facilitate the inclusion of those who would otherwise be marginalized. It may lead to professional and personal success that would not otherwise be attainable, given the prevalence of discrimination against minority groups and individuals. However,

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68. Cf. Onwuachi-Willig, *supra* note 59, at 894-95.

69. See YOSHINO, *supra* note 16, at 79-82.

70. Cf. Yoshino, *supra* note 16, at 890.

71. See YOSHINO, *supra* note 16, at 82-84.

72. Cf. Yoshino, *supra* note 16, at 845.

73. See YOSHINO, *supra* note 16, at 85-89.

74. Cf. Yoshino, *supra* note 16, at 846.

75. See YOSHINO, *supra* note 16, at 89-91.

76. See Yoshino, *supra* note 16, at 843.

Professor Yoshino and others argue convincingly that there is potentially a high cost to pay for acceding to pressures to conform to majority norms.<sup>77</sup> For this reason, Professor Yoshino argues that covering constitutes a “hidden assault” on civil rights.<sup>78</sup>

Cultural or social covering by immigrants has a long tradition in the United States. Bilingual immigrants who care deeply about their mother tongue may nonetheless choose to communicate predominantly in American English, rather than in Spanish, Haitian Creole, Arabic, or Tagalog.<sup>79</sup> Newly arrived migrants, concerned about acceptance by their neighbors, may choose to display the stars and stripes in their workplaces and homes, even if they feel ambivalent about the symbol.<sup>80</sup> Long-term residents, wary of appearing “foreign,” may forsake their traditional national dress.<sup>81</sup> LPRs may ally themselves with American-born U.S. citizens opposed to undocumented migration in order to distance themselves from others whom they believe are perceived to be “undesirable.”<sup>82</sup> In all of these ways, and more, individuals from different countries of origin may take steps to downplay any differences created by their national origin and assimilate into the sociocultural mainstream.

The relatively recent phenomenon of “DREAMers,” young undocumented immigrants who entered the United States as minor children and who have been raised exclusively in this country,<sup>83</sup>

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77. See YOSHINO, *supra* note 16, at xi.

78. *Id.*

79. See Alba, *supra* note 47 (discussing the prevalence of English language among bilingual immigrants).

80. See Jackleen M. Salem, *Arabs and Arab Americans, 1940-Present*, in 2 IMMIGRANTS IN AMERICAN HISTORY: ARRIVAL, ADAPTATION, AND INTEGRATION 713, 719-20 (Elliott Robert Barkan ed., 2013).

81. See Anny Bakalian & Mehdi Bozorgmehr, *Middle Eastern and North African Immigrants and Middle Eastern and North African Americans, 1940-Present*, in 3 IMMIGRANTS IN AMERICAN HISTORY: ARRIVAL, ADAPTATION, AND INTEGRATION, *supra* note 80, at 1135, 1142.

82. See Rudy P. Guevarra Jr., *Mexicans and Mexican Americans, 1940-Present*, in 3 IMMIGRANTS IN AMERICAN HISTORY: ARRIVAL, ADAPTATION, AND INTEGRATION, *supra* note 80, at 1119, 1122.

83. See Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 103 (2013) (describing the term “DREAMers”). Over the last decade, a number of bills for the Development, Relief, and Education for Alien Minors (DREAM) Act have been presented to Congress seeking to provide undocumented high school students with a potential path to legal status in the United States. See, e.g., American Dream Act, H.R. 1751, 111th Cong. §§ 3-4 (2009); American Dream Act, H.R. 1275, 110th Cong. §§ 3-4 (2007); DREAM Act of 2005, S. 2075, 109th Cong. §§ 3-4 (2005); DREAM Act of 2003, S. 1545, 108th Cong. §§ 3-4 (2003); DREAM Act, S. 1291, 107th Cong. §§ 2-3 (2001).

poses a unique challenge to our understanding of sociocultural covering of immigrant identity. These young people are “out” as both immigrants and as lacking in formal legal status, two facts that they are open about with their family, friends, acquaintances, and, in many cases, the federal government.<sup>84</sup> Indeed, speaking out in public about undocumented status is a key element of self-identification as a DREAMer.<sup>85</sup> There is no suggestion, therefore, that DREAMers are attempting to pass as something that they are not. Yet, at the same time, they appear in many respects to be seamlessly assimilated into the cultural mainstream. For these young “undocumented Americans,” the line is blurred between any consciously Americanized covering or public presentation and their authentic selves.<sup>86</sup> Indeed, they have proven to be a powerful voice for political change precisely because of their widely perceived “Americanness.”

However, the focus of this Article is not on the sociocultural experience of covering by different immigrant groups. Rather, the Article attempts to illuminate the ways in which federal, state, and local laws and regulations function in practice to facilitate immigrant covering. As the discussion in Part II.C will show, in the absence of comprehensive immigration reform at the federal level that would allow status conversion by large numbers of immigrants, and in the face of increased state and federal enforcement and other initiatives pressuring immigrants to pass as holders of different statuses, a variety of initiatives in recent years have sought to elide formal immigration status-based distinctions to enable otherwise-marginalized immigrants to blend into the mainstream. This immigration status covering, whether authorized by operation of federal, state, or local law, has many guises. But in each instance,

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84. See Keyes, *supra* note 83, at 110-11.

85. See *id.* at 103.

86. *Cf. id.* at 123 (discussing immigrants as “Americans in waiting”); Dulce Paloma Baltazar Pedraza, *Alumna Works to Pass the DREAM Act*, ST. PRESS (Sept. 26, 2012, 5:14 PM), <http://www.statepress.com/article/2012/09/alumna-works-to-pass-the-dream-act> [https://perma.cc/4M8M-UFE8] (discussing a Mexican immigrant describing herself as “an American without papers” and a “DREAMer”); Jose Antonio Vargas, *What Would You Ask an Undocumented Immigrant?*, HUFFINGTON POST (June 2, 2013), [http://www.huffingtonpost.com/jose-antonio-vargas/jose-antonio-vargas-facebook-chat\\_b\\_2997232.html](http://www.huffingtonpost.com/jose-antonio-vargas/jose-antonio-vargas-facebook-chat_b_2997232.html) [https://perma.cc/7WZZ-PL7U] (discussing an undocumented Filipino immigrant describing himself as “an American without papers”).

the purpose, and to some extent effect, is to minimize the differences created by immigration status, fostering disattention to that aspect of an individual's identity. As the discussion below will demonstrate, many of these initiatives are intended to benefit, rather than harm, immigrants. But, as with sociocultural covering of immigrant identity, or covering on the basis of race, religion, sex, gender, or sexual orientation, immigration status covering is a form of assimilation that does not per se benefit or harm an individual. It can have either effect, and sometimes can even have both, as the discussion below will demonstrate.

## II. IMMIGRANT COVERING

This Part explores the ways in which federal, state, and local statutes and regulations relating to immigration and alienage currently affect different immigrants' rights to live and work in the United States. It uses the covering paradigm, outlined in Part I, to shed light on the ways in which these laws function in theory and in practice to either facilitate or constrain immigrant assimilation.

### *A. Immigration Status Conversion*

Formal immigration status is one of the very few areas where true "conversion" from one state to another is possible to achieve. The Immigration and Nationality Act (INA) of 1952, as amended, provides for several different categories of immigration status, including, most notably, U.S. citizen, LPR, refugee or asylee, non-immigrant visa holder, and undocumented immigrant.<sup>87</sup> The same federal statute sets forth several mechanisms through which immigrant residents in the United States may alter their immigration status.<sup>88</sup> An LPR who fulfills certain criteria may apply for naturalization as a United States citizen.<sup>89</sup> In so doing, she effectively changes her formal legal status from member of the immigrant "out-group" to member of the citizen "in-group." An immigrant living in the United States on a temporary visa—somewhat

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87. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered section of 8 U.S.C.).

88. *See id.*

89. 8 U.S.C. § 1427 (2012).

confusingly referred to as a “nonimmigrant” in the statute—may, in some circumstances, adjust his status to that of an LPR.<sup>90</sup> Through that adjustment, he moves from the tenuousness of temporary residence to the right to permanently live and work in the United States.<sup>91</sup> An undocumented immigrant may even, in extraordinarily rare circumstances, adjust status to that of nonimmigrant visa holder or LPR.<sup>92</sup> Through this process, she moves from a precarious position on the margins of mainstream American society and takes one step closer to full assimilation. The diagram below, composed of concentric circles, provides a very simple illustration of these different levels of assimilation into the mainstream.<sup>93</sup>

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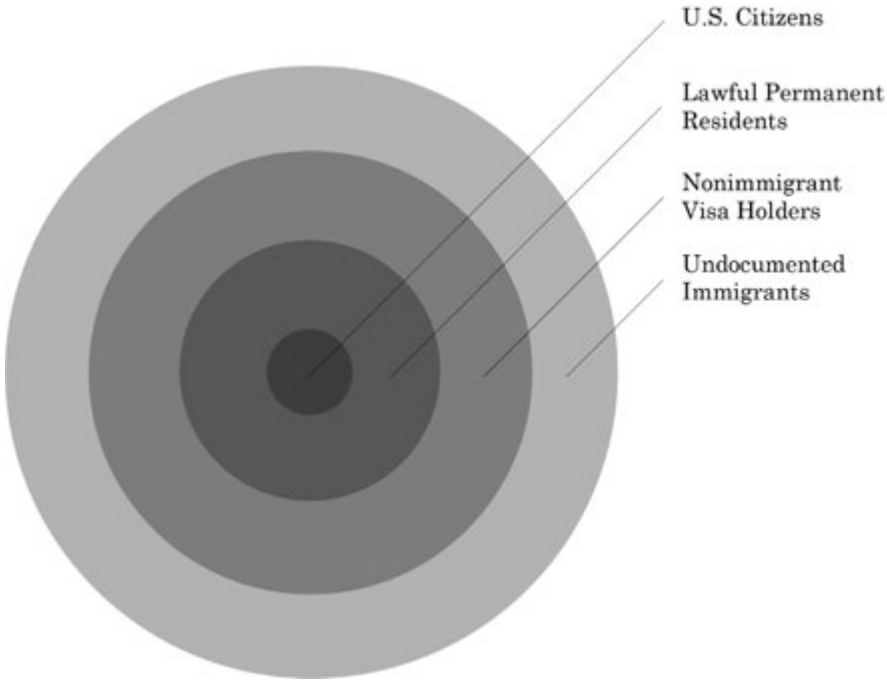
90. *Id.* § 1255.

91. *See id.*; *Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 15, 2015), <https://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident> [<https://perma.cc/SGL3-TFUW>].

92. *See, e.g.*, 8 U.S.C. § 1154 (providing requirements for adjustment of status based on marriage to a U.S. citizen); *id.* § 1158 (providing requirements for adjustment of status based on asylum); *id.* § 1255 (providing requirements for adjustment of status for various nonimmigrant visa holders).

93. Professor David Martin offers a slightly different hierarchy of migrant assimilation. *See* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 92 (ranking the hierarchy of immigrants in order of decreasing community membership as follows: (1) citizens, (2) LPRs, (3) admitted nonimmigrants, (4) entrants without inspection, (5) parolees, and (6) applicants at the border); *see also* Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 374 (2013) (“Today non-citizens are balkanized into a host of hierarchical categories.”).

Figure 1.



These circles show the different possible stages of “conversion” of status, reaching from the undocumented immigrants on the margins of society, to the United States citizens who occupy the fully assimilated center. Each of the potential alterations of status and identity, represented by a move from the outer fringes of the diagram to its center, are widely regarded as desirable, affording some additional rights and privileges to the migrant.<sup>94</sup>

This Part discusses the processes of immigrant status conversion enshrined in federal law and influenced by state law—local and municipal laws, to the chagrin of many local lawmakers, have no

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94. For example, the move from nonimmigrant visa holder to LPR accords the immigrant important new, albeit limited, due process and constitutional rights. *See, e.g.,* *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) (granting full constitutional due process rights to LPRs when threatened with deportation); *Rafeedie v. INS*, 795 F. Supp. 13, 22 (D.D.C. 1992) (finding the plaintiff, an LPR, was “entitled to the same First Amendment protections as United States citizens”).

effect on immigration status conversion. At the federal level, the Article discusses naturalization, as well as adjustment of status from refugee or asylee status, from nonimmigrant visa holder status, or from undocumented status to lawful permanent residency, and from undocumented migrant to temporary nonimmigrant visa holder. At the state level, the Article explores the limited role that state laws play in establishing the predicate requirements for adjustment of status—whether through marriage, adoption, or state court orders facilitating special immigrant juvenile status. In each instance, as the discussion that follows will show, status conversion has the potential to accelerate or facilitate immigrant assimilation into mainstream American society.

### 1. Full Conversion Under Federal Law

*[Having a green card] wasn't enough for me.... I believe strongly in the Constitution of this country and just having the right to work here wasn't enough. I wanted the right to vote and I wanted the right to call myself American.*

*Stephen Park, naturalized U.S. citizen, Georgia*<sup>95</sup>

*I came to the US on the Iraqi Young Leaders Exchange Program.... [M]y visa was for 1 month.... Now my village was taken [sic] over by ISIS and they are killing people for their religious beliefs and thousands of the young girls are now taken as sex slaves. So I applied for asylum in US [sic] before my visa expired and I did my interview 2 months ago. Now I'm just waiting for the letter to come and if they say yes then I'm safe here. If not then I might have to go back and I could be killed there.*

*Azswan, asylum applicant, Oregon*<sup>96</sup>

Immigration status conversion, as set forth in the INA, is the almost-exclusive prerogative of the federal government.<sup>97</sup> The most complete form of immigrant conversion and assimilation into the

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95. Rachel Rodriguez, *Naturalized Citizens Explain Why They're American by Choice*, CNN (July 4, 2012, 10:09 AM), <http://www.cnn.com/2012/07/04/us/naturalized-american-citizens-ireport> [https://perma.cc/5TVK-AAEP].

96. MY IMMIGR. STORY, <https://myimmigrationstory.com> [https://perma.cc/EJ4D-L7JM].

97. Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 943 (1995) (describing the nature of federal supremacy in immigration matters).

mainstream of American society is represented by the acquisition of United States citizenship.<sup>98</sup> Under the current naturalization requirements set forth in the INA, an immigrant must meet a number of criteria before she can become a U.S. citizen. She must first live in the United States for five years as an LPR,<sup>99</sup> but this period is reduced to three years for individuals who obtain lawful permanent residence through marriage to a United States citizen.<sup>100</sup> Such residence must be “continuous”; in other words, there must not be a continuous absence of six months or more.<sup>101</sup> The would-be citizen must have “good moral character,” an opaque phrase that signifies that she has no disqualifying criminal history in the years preceding naturalization.<sup>102</sup> In addition, she must prove her “attachment to the principles of the Constitution” of the United States by agreeing to recite an oath of allegiance.<sup>103</sup> Further she must demonstrate, at an interview with an officer of the United States Citizenship and Immigration Services, that she can understand, speak, read, and write English,<sup>104</sup> and that she has sufficient knowledge and understanding of the fundamentals of U.S. history and principles of government, according to the terms of the U.S. citizenship test.<sup>105</sup> Once the aspiring citizen has met all of these prerequisites, she is invited to attend a ceremony, at which she recites the oath of allegiance and receives her certificate of naturalization.<sup>106</sup>

At the conclusion of the oath ceremony, the immigrant has been fully converted to a citizen—at least with respect to her formal legal status.<sup>107</sup> She is no longer subject to the strictures and controls of

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98. See Martin, *supra* note 93, at 92 (“[C]itizens occupy the highest rung of the community membership ladder.”).

99. 8 U.S.C. § 1427(a) (2012).

100. *Id.* § 1430(a).

101. *Id.* § 1427(a)-(b).

102. *Id.* § 1427(d); see 8 C.F.R. § 316.10 (2016).

103. 8 U.S.C. § 1448(a).

104. *Id.* § 1423(a)(1).

105. *Id.* § 1423(a)(2); see 8 C.F.R. § 245a.3(b)(4)(iii)(A)(2).

106. 8 U.S.C. § 1448(a).

107. Of course, formal legal status is just one dimension of citizenship. See, e.g., LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 18-20 (2006) (describing citizenship as formal legal status, citizenship as the enjoyment of a particular bundle of rights and benefits, citizenship as political participation, and citizenship as social and identity membership).



myriad immigration laws: she does not face deportation if she commits a crime,<sup>108</sup> she no longer has any restrictions on her ability to seek employment,<sup>109</sup> she is eligible for public services and benefits,<sup>110</sup> she may vote,<sup>111</sup> and she may serve on a jury.<sup>112</sup> Her identity as an immigrant has been fundamentally changed, and now she is a citizen, a fact that is celebrated in various ways by her new government.<sup>113</sup>

LPRs occupy a middle ground between fully assimilated U.S. citizens and migrants on temporary visas. LPRs have been granted an “immigrant visa,” which gives them authorization by the federal government to live permanently in the United States.<sup>114</sup> LPRs enjoy many, but not all, of the rights of U.S. citizens. LPRs have authorization to work in the United States—although they are barred from certain government positions for which only citizens are eligible.<sup>115</sup> LPRs are eligible for some, but not all, government benefits.<sup>116</sup> They can freely travel to and from the United States, although they may be barred from entering the country if United States Customs and Border Protection officials have reason to believe that they have violated the terms of their immigrant visa in some way either before leaving the country or while abroad.<sup>117</sup> They also enjoy generally greater, but far from absolute, protection from deportation under

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108. See 8 U.S.C. § 1227(a)(2) (applying deportation sanctions for criminal offenses only to “aliens”).

109. See *id.* § 1182(a)(5) (limiting the fields in which an “alien” may work).

110. See *id.* § 1613, 1621 (limiting the accessibility of public benefits to “aliens”).

111. See 18 U.S.C. § 611 (2012) (limiting the right of noncitizens to vote in federal elections).

112. See 28 U.S.C. § 1865 (2012) (limiting the right to sit on juries to citizens).

113. See, e.g., U.S. CITIZENSHIP & IMMIGRATION SERVS., M-767, IMPORTANT INFORMATION FOR NEW CITIZENS (2012), <https://www.uscis.gov/sites/default/files/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20Site/Publications/PDFs/M-767.pdf> [<https://perma.cc/4HB4-R5EV>].

114. See 8 U.S.C. § 1101(a)(15)-(16) (defining “immigrant” and “immigrant visa”).

115. See *Cabell v. Chavez-Salido*, 454 U.S. 432, 444-47 (1982) (discussing permissible employment restrictions on LPRs).

116. See, e.g., 8 U.S.C. § 1612(a)(2)(B)(i) (exempting LPRs from ban against immigrants receiving federal benefits). *But see* TANYA BRODER ET AL., NAT’L IMMIGRATION LAW CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 1 (2015), <https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf> [<https://perma.cc/M4VE-CQ9L>] (noting that modern welfare and immigration laws created unprecedented restrictions for LPR access to federal public benefits).

117. See, e.g., 8 U.S.C. § 1101(a)(13)(C) (explaining that LPRs with criminal convictions returning from abroad may not reenter the country).

immigration law than do noncitizen immigrants without LPR status,<sup>118</sup> as well as certain due process protections in nonimmigration court proceedings.<sup>119</sup> They can petition the federal government for certain family members to join them in the United States, although they are a lower priority than the family members of U.S. citizens and thus typically must endure a longer wait.<sup>120</sup> Finally, after five years of lawful permanent residence—or three years in the case of an individual married to a U.S. citizen<sup>121</sup>—LPRs are eligible to apply for naturalization.<sup>122</sup> In short, they enjoy a reasonable degree of assimilation into mainstream American society.

There are several different routes to become an LPR. Many LPRs in the United States obtain that status because they are sponsored by a family member who is a U.S. citizen or an LPR themselves.<sup>123</sup> Others are sponsored by an employer.<sup>124</sup> Others enter through the “diversity” program,<sup>125</sup> which is sometimes called the “green card lottery.”<sup>126</sup> Others originally enter the United States as refugees or asylum seekers and subsequently adjust status to become LPRs.<sup>127</sup> There are also a variety of humanitarian programs that enable certain undocumented immigrants or immigrants in the United

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118. See *id.* § 1229b(a) (explaining cancellation of removal for certain LPRs).

119. See *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) (granting full constitutional due process rights to LPRs as to their admission).

120. See *Family of Green Card Holders (Permanent Residents)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 14, 2015), <https://www.uscis.gov/family/family-green-card-holders-permanent-residents> [<https://perma.cc/KPX5-7HA2>] (describing petition procedure for entry of LPRs' family members); *Visa Availability and Priority Dates*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 5, 2015), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-and-priority-dates> [<https://perma.cc/E8XK-6YW4>] (noting that family-sponsored immigrant visas are numerically limited).

121. See 8 U.S.C. § 1430(a).

122. See *id.* § 1427(a).

123. See 8 U.S.C. § 1153(a) (laying out numerical allotment of visas); *Green Card Eligibility*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 30, 2011), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/green-card-eligibility> [<https://perma.cc/YF88-VUAD>].

124. See 8 U.S.C. § 1153(b).

125. See *id.* § 1153(c).

126. See Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Apr. 14, 2016), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states> [<https://perma.cc/PP4W-C2FK>] (referring to the § 1153(c) program as the “Diversity Visa Lottery,” “the DV lottery,” and “the green-card lottery”).

127. See 8 U.S.C. §§ 1157-1159 (governing admission and adjustment of status for refugees and asylum-seekers).

States on temporary visas to file applications to become LPRs without family or employer sponsorship.<sup>128</sup> An individual can enter the United States as an LPR by crossing the border in possession of a valid immigrant visa.<sup>129</sup> In that case, federal immigration law has converted her legal status from that of nonresident alien to LPR upon her arrival in the United States. Alternatively, she can enter the country on a temporary nonimmigrant visa as a refugee or even without inspection at the border and subsequently convert her status using the formal mechanism of adjustment of status while she resides in the United States.<sup>130</sup> As with naturalization, this conversion by adjustment of status or issuance of the immigrant visa fundamentally changes the immigrant's position in the eyes of the law.<sup>131</sup> She moves from being an outsider with very few rights to being more of an insider, enjoying a variety of privileges and protections.

Despite the term “lawful permanent resident,” conversion from nonimmigrant, nonresident alien, or undocumented immigrant to LPR is not necessarily permanent. The somewhat oxymoronic status of “conditional lawful permanent resident” applies to certain categories of immigrants, most notably those who obtain green cards on the basis of a marriage of short duration to a United States citizen.<sup>132</sup> At the end of a set period, most commonly two years, holders of that status must apply for “permanent” permanent residence—a process that involves paying more fees, submitting more documentary evidence, and, in some circumstances, attending additional interviews with immigration officials.<sup>133</sup> Failure to do so results not only in a denial of long-term permanent residency, but also a

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128. See, e.g., Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, §§ 40701-40703, 108 Stat. 1796, 1902-55 (codified as amended in scattered sections of 8 U.S.C. (2012)) (outlining the procedures that “aliens” may use to self-petition for relief); 8 C.F.R. § 204.11 (2016) (describing application process for specialized visas); *Green Card Eligibility*, *supra* note 123.

129. See 8 U.S.C. § 1151 (listing the “alien” groups that may be admitted to the United States with immigrant visas).

130. See *id.* § 1255 (adjustment of status of nonimmigrant to that of person admitted for permanent residence).

131. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) (granting constitutional due process rights to LPRs as to their admission status).

132. See 8 U.S.C. § 1186a.

133. See *id.* § 1186a(c); see also H.R. REP. NO. 99-906, at 7 (1986), as reprinted in 1986 U.S.C.C.A.N. 5978, 5979 (explaining the petition process for permanent residency).

revocation of conditional permanent resident status itself.<sup>134</sup> Moreover, even those who obtain unconditional permanent residence, which is presumptively indefinite, could lose that status and be placed in removal (colloquially called deportation) proceedings at any time if they engage in behavior that violates the terms of their immigrant visa.<sup>135</sup> This may occur when an LPR commits a crime (even a crime that would be considered of minor importance if committed by a citizen),<sup>136</sup> is suspected of ties to a terrorist organization,<sup>137</sup> becomes a “public charge,”<sup>138</sup> or is found to have provided false information to obtain the immigrant visa in the first place.<sup>139</sup> Therefore, LPR status provides no fixed guarantee of permanent and complete assimilation into the U.S. polity. Rather, it represents a broad, but incomplete, degree of assimilation into mainstream society that is inherently fragile and unstable.

However, because LPR status offers greater opportunities for assimilation and greater security than any other immigration status,<sup>140</sup> refugees and asylum seekers, nonimmigrant visa holders, and undocumented immigrants aspire to achieve LPR status. In many respects, refugees and individuals granted asylum (unlike nonimmigrant visa holders and undocumented migrants) might be regarded as “LPRs in waiting.” In order to obtain refugee or asylee status, an immigrant must demonstrate to the satisfaction of an immigration official that she has experienced past persecution or has a well-founded fear of future persecution in her country of origin on account of her race, religion, nationality, political opinion, or membership in a particular social group.<sup>141</sup> Once the immigration official determines that she has a valid claim for asylum, she is authorized to work in the United States, is eligible for some public benefits, and may, after one year’s residence in the United States, apply to become an LPR.<sup>142</sup> Thus, for refugees and asylees, the possibility for conversion of status, first from temporary status to

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134. *See* 8 U.S.C. § 1186a(c)(2).

135. *See id.* § 1227(a)(2)-(6).

136. *See id.* § 1227(a)(2) (outlining various criminal grounds of removal).

137. *See id.* § 1227(a)(4).

138. *See id.* § 1227(a)(5).

139. *See id.* § 1227(a)(3)(B).

140. *See supra* text accompanying notes 114-22.

141. *See* 8 U.S.C. §§ 1157-1159.

142. *See id.* § 1227(a)(4).

LPR status and then from LPR status to citizen, is clearly mapped out.

In contrast, no such clear set path to formal status conversion exists for nonimmigrant visa holders or undocumented immigrants. Currently, there are approximately two million nonimmigrant visa holders in the United States.<sup>143</sup> A temporary nonimmigrant visa may be issued in a variety of circumstances, most commonly to tourists and individuals taking business trips,<sup>144</sup> diplomats of other nations or employees of international organizations,<sup>145</sup> foreign media correspondents,<sup>146</sup> investors,<sup>147</sup> students,<sup>148</sup> temporary workers,<sup>149</sup> fiancées of United States citizens,<sup>150</sup> intracompany transferees within large multinational corporations,<sup>151</sup> aliens of “extraordinary ability in the sciences, arts, education, business, or athletics,”<sup>152</sup> religious workers,<sup>153</sup> individuals who can provide “essential” assistance to U.S. law enforcement in a criminal or terrorism-related investigation,<sup>154</sup> victims of human trafficking to the United States,<sup>155</sup> and victims of crime in the United States.<sup>156</sup> The majority of nonimmigrant visa holders have no route from their nonimmigrant status to LPR status, unless they have a close family relationship with a U.S. citizen that enables them to apply for adjustment of status on that basis while their nonimmigrant visa is still current.<sup>157</sup> For example, a student admitted on a nonimmigrant student visa may meet and marry a U.S. citizen during his course of studies

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143. See Zong & Batalova, *supra* note 126 (“[A]s of January 1, 2012, about 1.9 million foreign nationals on various temporary visas resided in the United States.” (footnote omitted)).

144. 8 U.S.C. § 1101(a)(15)(B).

145. *Id.* § 1101(a)(15)(A), (G).

146. *Id.* § 1101(a)(15)(I).

147. *Id.* § 1101(a)(15)(E).

148. *Id.* § 1101(a)(15)(F), (J), (M).

149. *Id.* § 1101(a)(15)(H).

150. *Id.* § 1101(a)(15)(K).

151. *Id.* § 1101(a)(15)(L).

152. *Id.* § 1101(a)(15)(O).

153. *Id.* § 1101(a)(15)(R).

154. *Id.* § 1101(a)(15)(S).

155. *Id.* § 1101(a)(15)(T).

156. *Id.* § 1101(a)(15)(U).

157. *Cf. id.* § 1255 (explaining the ways in which nonimmigrants may get their status changed).

and then apply to adjust status to become an LPR on the basis that he is now the immediate relative of a U.S. citizen.

Nonimmigrant visas are, by their very nature, temporary. For the duration of his nonimmigrant visa's validity, a nonimmigrant visa holder remains in the United States at the federal government's pleasure.<sup>158</sup> His visa may be revoked at any time if he breaks any of its conditions—for example, if he works without prior authorization from the federal government or if he commits almost any crime.<sup>159</sup> In some circumstances, a nonimmigrant visa may be revoked if the federal government decides to remove certain categories of nonimmigrants from the United States for some other reason. For example, during the Iranian hostage crisis in 1980, the U.S. government revoked the nonimmigrant visas of all Iranians present in the United States.<sup>160</sup> In short, nonimmigrant status is contingent and lacks long-term security, which is why conversion from nonimmigrant to LPR status is so attractive.

Undocumented immigrants are in an even more tenuous position than nonimmigrant visa holders. There are a variety of circumstances in which an immigrant may be present in the United States without formal authorization. For example, an immigrant may enter the United States on a nonimmigrant visa—such as a tourist visa or a temporary worker visa—and then not leave the country when the visa expires.<sup>161</sup> Or, she may enter the United States on a nonimmigrant visa and violate the terms of her visa, causing her to fall out of status and be ordered removed from the United States,<sup>162</sup> but she may nonetheless evade removal and remain without authorization. Or, she may enter the United States, apply unsuccessfully for asylum and be issued a removal order,<sup>163</sup> but nonetheless stay in the country. Or, she may enter the country illegally, by crossing the

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158. See 22 C.F.R. § 41.122(a) (2016) (stating the discretionary revocation of visas).

159. See 8 U.S.C. § 1227.

160. See PUB. AFFAIRS ALL. OF IRANIAN AMS., IRANIAN AMERICANS: IMMIGRATION AND ASSIMILATION 6 (2014), <http://www.paaia.org/CMS/Data/Sites/1/pdfs/iranian-americans---immigration-and-assimilation.pdf> [https://perma.cc/NKG9-GHGW].

161. See 8 U.S.C. § 1202(g).

162. See *id.* § 1227(a)(1)(c)(i) (“Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted ... is deportable.”).

163. See *id.* § 1225(b)(1)(B)(iii)(I).

border without inspection.<sup>164</sup> For immigrants in any of these circumstances, status conversion to become either a nonimmigrant or LPR is extremely hard to achieve.<sup>165</sup> There has been no clear path to status conversion for large groups of undocumented immigrants since the Immigration Reform and Control Act of 1986 (IRCA).<sup>166</sup> IRCA permitted approximately 2.7 million undocumented immigrants to adjust status to become LPRs and, ultimately, citizens.<sup>167</sup> This large-scale legalization was, however, of limited application and limited duration. It was available only to immigrants who had resided in the United States since 1982 and certain agricultural workers.<sup>168</sup> Since then, conversion from undocumented status has been available only to a very limited number of immigrants on humanitarian grounds.<sup>169</sup> Today, it is available only if the undocumented immigrant has resided in the United States for an extended period of time, has committed no disqualifying crimes, and has family ties to U.S. citizens who would suffer exceptional and extremely unusual hardship if the undocumented immigrant were to be deported,<sup>170</sup> or if the undocumented immigrant herself has been the victim of domestic abuse, trafficking, or some other crime in the United States.<sup>171</sup>

In recent years, there have been several failed attempts at introducing comprehensive immigration reform.<sup>172</sup> Each of these

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164. *See id.* § 1325.

165. *See, e.g., id.* § 1182 (explaining that “aliens” overstaying their visas are inadmissible).

166. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C. (2012)); *see also* DONALD M. KERWIN & LAUREN LAGLAGARON, MIGRATION POLICY INST., STRUCTURING AND IMPLEMENTING AN IMMIGRANT LEGALIZATION PROGRAM: REGISTRATION AS THE FIRST STEP 1 (2010), <http://www.migrationpolicy.org/pubs/legalization-registration.pdf> [<https://perma.cc/4SZZ-AEXU>] (noting that IRCA has been the only “general” legalization program).

167. KERWIN & LAGLAGARON, *supra* note 166, at 32.

168. *See* 8 U.S.C. §§ 1160, 1255a.

169. For example, in the 1990s, individuals from Nicaragua, Cuba, Guatemala, El Salvador, and former Soviet bloc countries became eligible to apply for “special rule” cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act (NACARA). *See generally* Eli Coffino, Note, *A Long Road to Residency: The Legal History of Salvadoran & Guatemalan Immigration to the United States with a Focus on NACARA*, 14 CARDOZO J. INT’L & COMP. L. 177 (2006).

170. *See* 8 U.S.C. § 1229b(b)(1).

171. *See id.* § 1229b(b)(2).

172. *See, e.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005,

failed bills would have broadened opportunities for access to status conversion at all levels—undocumented migrant to nonimmigrant or LPR, nonimmigrant to LPR, and LPR to citizen. In each instance, the failure to enact meaningful reform can be attributed to vehement opposition to the possibility of status conversion for undocumented immigrants.<sup>173</sup>

## 2. Partial Conversion Under State Law

*I am 19 years old, I was born in Reynosa[,] Mexico ... I have lived here in the United States since [I was] really little and when I was like 10 I got taken away from my mother in the state of Arkansas by the Foster care program. At age 16 I started to act up and I never got adopted so I kept running away until now I'm 19 still with no papers. I have twin boys born in the United States and [living] with my boyfriend. I want to get married and have him apply for me but I'm scared things are going to go wrong.*

*Gloria, undocumented immigrant, Texas*<sup>174</sup>

*He'll never have to go back to a country that will kill him.*

*Nick Marritz, Attorney for Guillermo, recipient of Special Immigrant Juvenile Status, Virginia*<sup>175</sup>

In June 2012, in its landmark ruling in *Arizona v. United States*, the Supreme Court of the United States affirmed that the federal government had “broad, undoubted power” over immigration regulation.<sup>176</sup> The Court emphasized that, with respect to immigration powers, the federal government was a “single sovereign” at the head of “a comprehensive and unified system.”<sup>177</sup> The federal government’s plenary power in the immigration arena thus leaves very

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H.R. 4437, 109th Cong. (2005).

173. See Jeffrey N. Poulin, Current Development, *The Piecemeal Approach Falls Short of Achieving the DREAM of Immigration Reform*, 22 GEO. IMMIGR. L.J. 353, 355-56 (2008).

174. *Older Stories*, MY IMMIGR. STORY, <https://myimmigrationstory.com/older-stories/> [<https://perma.cc/2QAD-27Z2>].

175. J. Weston Phippen, *Young, Illegal, and Alone*, ATLANTIC (Oct. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/10/unaccompanied-minors-immigrants/410404/> [<https://perma.cc/6BTF-63AD>].

176. 132 S. Ct. 2492, 2498 (2012).

177. *Id.* at 2502.



little room for other governmental actors to affect conversion of formal immigration status in any way. Indeed, local governments and their laws and regulations play no role whatsoever in formal immigration status conversion.<sup>178</sup> Similarly, as a general rule, state governments and state laws have no influence on immigration status conversion—to the chagrin of both immigrants’ advocates and their opponents.<sup>179</sup>

The only (limited) exception to this rule occurs when the validity of a predicate condition for conversion by operation of federal law is dependent upon a prior determination made under color of state law. In this respect, the process of status conversion begins with an action performed by, or with the acquiescence of, the state in which the action occurs. A straightforward example of such an action would be when a nonimmigrant or undocumented immigrant seeks to adjust status on the basis of marriage to a U.S. citizen or an LPR. That marriage must be one that is recognized under the law of the state in which the marriage occurs.<sup>180</sup> The marriage certificate issued by the state is then necessary, but not sufficient, for the process of status conversion by the federal government. A state’s certification of the valid adoption of a minor child functions in much the same way: that adoption forms the basis for subsequent conversion of the child’s formal immigration status.<sup>181</sup>

A more complex example of the state playing a partial role in immigration status conversion occurs when an immigrant under the age of twenty-one seeks Special Immigrant Juvenile Status (SIJS). Congress created the SIJS immigration classification in 1990 to protect abused, neglected, or abandoned immigrant children.<sup>182</sup> Any child present in the United States who is not a U.S. citizen or an

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178. *See id.* (explaining that when the federal government “occupies an entire field, as it has in the field of alien registration,” any state regulation in that area is impermissible).

179. *See id.* (noting that even complementary or parallel state regulation is impermissible).

180. *See* Lovo-Lara, 23 I. & N. Dec. 746, 751 (B.I.A. 2005) (holding that although “the ultimate issue of the validity of a marriage for immigration purposes is one of Federal law, that law has, from the inception of our nation, recognized that the regulation of marriage is almost exclusively a State matter”).

181. *See* Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 319 (1988) (noting that federal immigration officials must “be concerned with *state* standards, because a state court ultimately will decide whether [an] adoption should be granted under state law”).

182. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., R43703, SPECIAL IMMIGRANT JUVENILES: IN BRIEF 1 (2014).

LPR may be eligible to apply for SIJS if they are (1) under twenty-one years of age; (2) unmarried; (3) present in the United States; and (4) subject to a valid state court order with three specific findings.<sup>183</sup> First, the state court must find that reunification with one or more parent is not viable due to abuse, neglect, abandonment, or a similar reason under state law.<sup>184</sup> Second, the state court must find that the child or young person is a dependent of the court, a state agency, or another court-appointed individual.<sup>185</sup> Third and finally, the state court must find that it is not in the best interests of the child to return to the child's country of origin.<sup>186</sup> If all of the requisite criteria are met, including that the young person is subject to the valid state court order, a federal immigration official may authorize a grant of SIJS.<sup>187</sup> Once the government grants SIJS, the child (who may be a refugee, an asylee, a nonimmigrant, or undocumented) may apply to adjust his status to become an LPR.<sup>188</sup> The role of the state court judge in this process is crucial. Without the state court's determinations, status conversion is not possible. Here, too, the process of status conversion begins with the state actor, and once again, the state's actions are necessary, but not sufficient, for the immigrant to achieve status conversion. Thus, in this small way, state law plays a partial role in the process of immigration status conversion.<sup>189</sup>

### *B. Immigration Status Passing*

Immigration status "passing" is a widespread phenomenon. In addition to concealing their immigrant identity as a sociocultural

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183. 8 C.F.R. § 204.11(e) (2016).

184. *See* 8 U.S.C. § 1101(a)(27)(J)(i) (2012).

185. *See id.*

186. *See id.* § 1101(a)(27)(J)(ii).

187. 8 C.F.R. § 204.11(b), (e).

188. *See* WASEM, *supra* note 182, at 4. One-step processing is available for children who apply for SIJS when they are not already in immigration court proceedings. *See Concurrent Filing*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 29, 2015), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/concurrent-filing> [<https://perma.cc/G7GT-R56E>].

189. For more information about the importance of prior state court rulings on the federal government's immigration determinations, see generally ANGIE JUNCK ET AL., IMMIGRANT LEGAL RESEARCH CTR., IMMIGRATION BENCHBOOK FOR JUVENILE AND FAMILY COURT JUDGES (2010), [https://www.ilrc.org/sites/default/files/resources/2010\\_sijs\\_benchbook.pdf](https://www.ilrc.org/sites/default/files/resources/2010_sijs_benchbook.pdf) [<https://perma.cc/J82W-DVYB>].

act of passing, immigrants may pass with respect to their formal immigration status in a variety of different contexts, including in the workplace, at school, with government employees, and within their own social circle. Immigrants holding various immigration statuses may pass as U.S. citizens. Nonimmigrant visa holders and undocumented immigrants may pass as LPRs. Undocumented workers may pass as nonimmigrants in possession of valid work authorization. Immigration status passing may also have a variety of different guises. Passing may involve remaining silent about status, leading others to assume a more favorable status. It may involve actively lying to others. It may even involve providing false documentation to employers, schools, and police officers. Indeed, a thriving subeconomy exists, wherein, for the right price, counterfeit identity documents—such as social security cards, work permits, and driver’s licenses—can be obtained to enable individuals to pass as members of a more favored group.<sup>190</sup>

Unlike immigration status conversion, immigration law does not provide any mechanisms for immigrants to pass as holders of a different immigration status. To the contrary, such passing is strictly prohibited. It is an offense under federal law for a noncitizen to claim to be a U.S. citizen.<sup>191</sup> It is an offense under both federal and state laws to possess or to use false identity documents, whether wholly fabricated or in another person’s name.<sup>192</sup> It is an immigration infraction and visa violation to work without authorization.<sup>193</sup> Every day, nonetheless, despite the risks of immigration removal and criminal charges, immigrants living in the United States make the decision to pass as members of a status group to which they do

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190. See John Leland, *Some ID Theft Is Not for Profit, but to Get a Job*, N.Y. TIMES (Sept. 4, 2006), <http://www.nytimes.com/2006/09/04/us/04theft.html> [<https://perma.cc/UD7J-8J57>] (describing how illegal immigrants’ use of fraudulent social security numbers “provides the backbone of some low-wage businesses and a boon to the Social Security trust fund”).

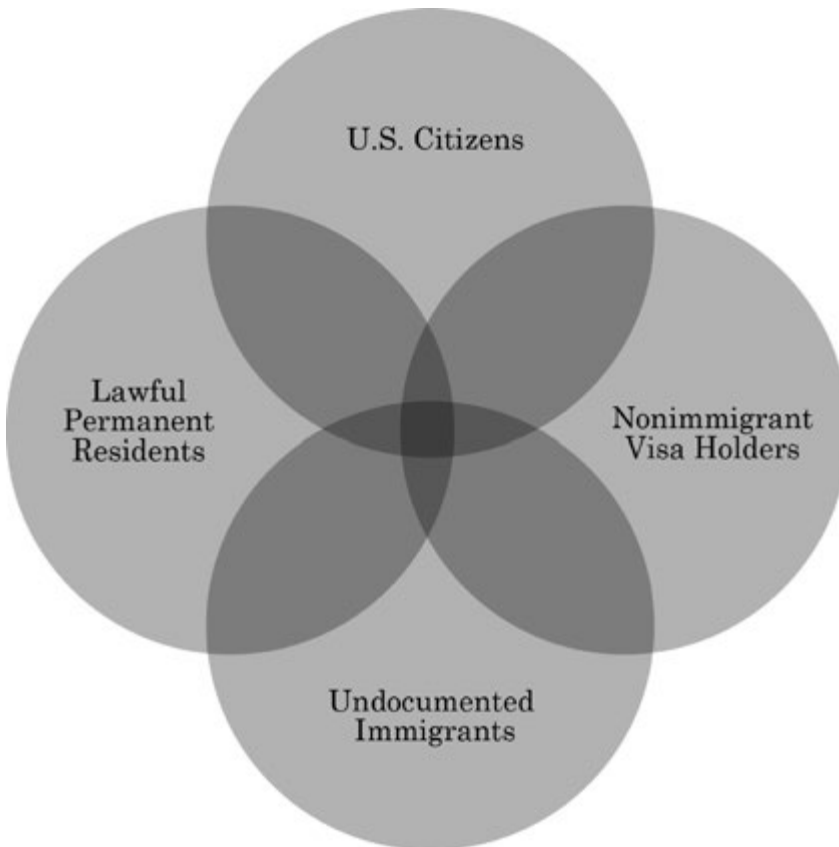
191. 8 U.S.C. § 1182(a)(6)(C)(ii)(I).

192. See, e.g., *id.* § 1324c(a) (penalizing the use of fraudulent documents to satisfy the IRCA’s verification requirements); 18 U.S.C. § 1546 (2012) (prohibiting the use of fraudulent documents for entry or for employment); 42 U.S.C. § 408(a)(7)(B) (2012) (prohibiting false use of social security number); FLA. STAT. § 322.212 (2016) (making it unlawful to knowingly possess a false or counterfeit driver’s license or identification card).

193. See Enid Trucios-Haynes, *Civil Rights, Latinos, and Immigration: Cybercascades and Other Distortions in the Immigration Reform Debate*, 44 BRANDEIS L.J. 637, 646-47, 653 (2006) (noting that an unauthorized stay in the United States is a bar to permanent residence or a temporary worker visa and is also a civil violation).

not actually belong. The diagram below, composed of overlapping circles, illustrates the intersection between immigrants' underlying identities and the identities that they may adopt in order to access the opportunities from which they would otherwise be barred.<sup>194</sup> As the diagram shows, no one particular immigration status is uniformly adopted by immigrants seeking to pass as members of a more assimilated group. For example, undocumented immigrants may present themselves as either U.S. citizens, LPRs, or nonimmigrant visa holders. Similarly, nonimmigrant visa holders may pass as either LPRs or U.S. citizens.

Figure 2.



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194. See KENNEDY, *supra* note 53, at 283.

This Section discusses the ways in which the current constellation of federal, state, and local laws affecting the lives of immigrants living in the United States creates conditions in which immigrant status passing is either encouraged, implicitly tolerated, or, in some circumstances, even required. At the federal level, this Section discusses immigrant removal and immigrant employment restrictions—with an emphasis on the practical divide between the stringent laws on the books and the patchwork pattern of actual enforcement. It demonstrates how, functionally, the limited way in which these laws are enforced implicitly tolerates immigration status passing. At the state level, this Section examines federal-state enforcement agreements, state “attrition through enforcement” initiatives, and independent state restrictions on immigrant employment. It shows how, in states with these policies, immigration status passing is essentially required of any immigrant lacking authorization who wishes to live and work in the state. At the local level, this Section discusses “anti-immigrant” measures—such as so-called Illegal Immigration Relief Acts that seek to exclude undocumented residents from municipalities—illustrating how these ordinances functionally force immigrants living there to pass as holders of different immigration statuses. This Section also considers some “pro-immigrant” programs that nonetheless encourage immigrant passing, such as “don’t ask, don’t tell” law enforcement protocols, which put immigrants on notice that if they do not reveal their immigration status when they come into contact with local police, they will not have to face immigration penalties, thereby encouraging immigration status passing.

### 1. *Passing Because of Federal Laws*

*My wife came home one day and said that she had my SSN that she had been working on for some time. I... utilized that SSN for the next 24 years while I worked, built a company, employed people, did [a] year of volunteer work, paid all of my personal and corporate taxes fully.... Then, when getting divorced I find out that it is NOT a good number. The person that really does have that SSN is alive and will receive the very handsome benefit of the taxes that I paid all those years.*

*Warren, Canada*<sup>195</sup>

*He began to work. Then they told him that there was a problem with e-verify. That his citizenship status was not registered. So he had to apply again. Or maybe there was an error in his social security number. He knew that it would just fail again, because he didn't have a work permit. So the company said, 'You are not a citizen.' And he said, 'No.' 'We can't keep you on.'*

*Alondra, noncitizen, California*<sup>196</sup>

Two areas of federal immigration law and policy influence the current prevalence of immigration status passing: (1) immigration enforcement and immigrant removal, and (2) immigrant employment. The INA is unambiguous and stringent in its regulation of both immigrants' presence in the United States and their access to employment. At the same time, for over twenty years, there has been a policy of selective underenforcement by the federal government with respect to both the removal of immigrants unlawfully present in the United States and the regulation of the employment of immigrants lacking work authorization.<sup>197</sup> This creates a rather contradictory situation in which the law on the books prohibits the presence and employment of certain immigrants, but the law as enforced allows both to proceed, provided any other implicated actors—such as employers—can plausibly deny knowledge of the immigrants' true immigration status.<sup>198</sup> The result is that

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195. MY IMMIGR. STORY, *supra* note 96.

196. ASHAR ET AL., *supra* note 15, at 16.

197. See Cox & Rodríguez, *supra* note 14, at 126-27.

198. For a more comprehensive analysis of this phenomenon in immigration law, see Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 31-33 (arguing that "immigration law is centrally the product of executive 'lawmaking' that

immigrants in various statuses—most notably undocumented migrants, but also nonimmigrant visa holders lacking work authorization and LPRs who have in some way violated the terms of their immigrant visas—routinely pass as holders of different immigration statuses.

For millions of undocumented immigrants who live in the United States, the threat of removal from the country via deportation is real and ever-present, even if the actual likelihood of such removal is statistically remote. Immigrants who enter the country without inspection at the border or who overstay their temporary nonimmigrant visas are subject to immigration controls and, absent other compelling circumstances, can be arrested, detained, put in immigration court proceedings, and ordered to be removed at any time.<sup>199</sup> Nonimmigrants or LPRs who violate the terms of their visas—whether by working without authorization, by committing one of an enumerated list of civil immigration infractions, or by being arrested for or convicted of certain federal or state crimes—may similarly find themselves in immigration proceedings and subject to removal.<sup>200</sup>

The immigration court system in which these removable immigrants may find themselves—the Executive Office of Immigration Review within the Department of Justice—is byzantine and opaque, so much so that the majority of immigrants who are arrested and charged with being present in the United States without authorization do not even contest that charge and agree to leave the country “voluntarily” without appearing before an immigration judge.<sup>201</sup> This is particularly shocking because these immigrants are entitled to participate in such a proceeding,<sup>202</sup> which would, at the very least, delay their removal and might even allow them to demonstrate their eligibility for some form of relief so that they could remain in the country. Those immigrants who do opt to appear in immigration

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bears little relation to immigration law on the books”).

199. See 8 U.S.C. §§ 1227, 1229a, 1325(a) (2012) (explaining penalties for entry of alien without inspection).

200. See Trucios-Haynes, *supra* note 193, at 653. See generally 8 U.S.C. § 1227 (outlining classes of deportable aliens).

201. ALISON SISKIN, CONG. RESEARCH SERV., R43892, ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS 11 (2015); see also 8 U.S.C. § 1229c(a)(1) (explaining voluntary departure).

202. See 8 C.F.R. § 1240.32 (2016).

court to contest their removal from the country frequently do so without the benefit of legal counsel.<sup>203</sup> As a consequence, almost all immigrants who are charged with being unlawfully present or with violating the terms of their visas are found by the immigration court to be removable from the country.<sup>204</sup> At that point, even though there may theoretically be options available, particularly for long-term U.S. residents,<sup>205</sup> it is extremely difficult for an immigrant to obtain any formal relief from removal in order to remain in the United States. For example, it is often complicated and prohibitively expensive to appeal an immigration court's decision to remove an immigrant from the country. Appeals of an immigration court's order of removal must be filed within thirty days with the Board of Immigration Appeals (BIA), the appellate-level administrative tribunal within the Department of Justice.<sup>206</sup> Any subsequent appeal of the BIA's decision must be filed thereafter with the federal court of appeal for the circuit in which the immigration court is located.<sup>207</sup> During the pendency of the federal court case, the immigrant can still be removed from the United States unless the circuit court specifically orders otherwise—there is no automatic stay of removal during such proceedings.<sup>208</sup> Moreover, even if an immigrant does manage to file an appeal, the federal courts are prohibited from reviewing the administrative agency's discretionary decisions, including any denial of relief from removal.<sup>209</sup>

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203. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7-8 (2015).

204. See *id.* at 76.

205. See, e.g., 8 U.S.C. § 1229b(b) (detailing cancellation of removal for certain nonpermanent residents).

206. See 8 C.F.R. §§ 1003.1(b), 1003.2(b)(2) (providing that orders of removal may be appealed to the BIA).

207. 8 U.S.C. § 1252(a)(5), (b)(2) (providing that the sole and exclusive means for judicial review of an order of removal is a petition filed with an appropriate court of appeals).

208. Only two U.S. circuit courts of appeal have procedures designed to stay removal during the pendency of proceedings. In the Ninth Circuit, the filing of a stay motion automatically confers a temporary stay by operation of law. See *De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997); 9TH CIR. GEN. ORDER 6.4(c)(1) (2016). The Second Circuit has an informal agreement with the Department of Homeland Security (DHS): upon notification by the court that a stay motion has been filed, DHS will not remove the noncitizen until the court adjudicates the stay motion. See *Fatma Marouf et al., Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337, 373-74 (2014).

209. See 8 U.S.C. § 1252(a)(2)(A)-(C); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1624 (2000)



The vast majority of immigrants who might find themselves in removal proceedings likely have little awareness of the complexities of the immigration court system. However, they do understand that if they are arrested by the federal immigration authorities it will likely lead to deportation.<sup>210</sup> They therefore live in constant fear of removal and the attendant separation from their family, friends, community, and property.<sup>211</sup> For many who have made their home in the United States for years (or in some cases for decades), deportation constitutes, as the U.S. Supreme Court has acknowledged, “the equivalent of banishment or exile.”<sup>212</sup> As a consequence, the “possibility or threat” of removal, even in the absence of any clear indication that such threat will be actualized against them in the near future, creates an inexorable pressure that many immigrants feel the need to conceal their true immigration status and pass as holders of a more privileged status.<sup>213</sup>

Somewhat ironically, the widespread scale upon which this immigration status passing and the attendant violation of various immigration laws occurs is a direct result of consecutive governments’ interpretations of those very laws. Currently, approximately 11.3 million undocumented immigrants reside in the United States, consisting of individuals who entered the country without inspection or overstayed their visas.<sup>214</sup> This is far from a new phenomenon. Historically, there have always been large numbers of unauthorized immigrants living, working, and raising their families in the United States.<sup>215</sup> In large part, this situation occurs because it is just not

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(explaining that the 1996 amendments eliminated federal courts’ jurisdiction to review removal orders “predicated upon criminal convictions,” based on “discretionary remedies in compassionate circumstances,” or entered pursuant to an “expedited removal’ process”).

210. See Villazor, *supra* note 27, at 42.

211. See *id.* at 31.

212. Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (quoting Delgado v. Carmichael, 332 U.S. 388, 390-91 (1947)).

213. See Villazor, *supra* note 27, at 31 (quoting Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1924-1965*, 21 LAW & HIST. REV. 69, 72 (2003)).

214. JEFFREY S. PASSEL ET AL., PEW RESEARCH CTR., AS GROWTH STALLS, UNAUTHORIZED IMMIGRANT POPULATION BECOMES MORE SETTLED 2, 4 (2014), [http://www.pewhispanic.org/files/2014/09/2014-09-03\\_Unauthorized-Final.pdf](http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf) [<https://perma.cc/68QG-2HGC>] (estimating that there were 11.3 million unauthorized immigrants living in the United States in March 2013).

215. See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 24-25 (2014) [hereinafter MOTOMURA, OUTSIDE THE LAW]; HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY

logistically feasible or economically viable to arrest, detain, imprison, and deport millions of people. For decades, successive Republican and Democratic administrations have chosen to under-enforce immigration laws, allowing undocumented immigrants and their families to remain in the country.<sup>216</sup> At the same time, alongside a nationwide policy of condoning, or at the very least permitting, the presence of millions of unauthorized migrants, there has been no guarantee that any individual undocumented immigrant will not be subject to immigration controls at any time.<sup>217</sup> The result has been a pattern of, at best, arbitrary and, at worst, discriminatory immigration enforcement.<sup>218</sup> This, in turn, has fostered deep uncertainty and fear among already vulnerable immigrant communities, adding to the pressure upon members of these communities to conceal their true immigration status by passing.<sup>219</sup>

The main arena in which immigrants pass as holders of a different status is the workplace. Again, this is a consequence of a disconnect between the federal immigration enforcement laws on the books and a widespread policy of selective underenforcement. Unauthorized immigrants lack permission to live in the United States and they lack access to any form of government assistance to support themselves and their families.<sup>220</sup> They, along with certain nonimmigrant visa holders, also lack authorization to work in the United States, and working without authorization is traditionally a civil immigration violation.<sup>221</sup> Yet, at the same time, their presence in the country is tacitly tolerated by the authorities that choose not

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OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 7 (2006).

216. See MOTOMURA, *OUTSIDE THE LAW*, *supra* note 215, at 172-74.

217. See *id.* at 22 (“Whether they are ultimately deported depends on countless decisions by government officials who exercise discretion, always aware of political and economic pressures, and often in ways that can be inconsistent, unpredictable, and sometimes discriminatory.”).

218. See *id.* at 142 (explaining that discretion in immigration law is so great that it can dismantle safeguards against arbitrary or discriminatory government decisions).

219. See Villazor, *supra* note 27, at 31.

220. Undocumented migrants are ineligible for food stamps, cash assistance, public housing, social security benefits such as Supplemental Security Income and Social Security Disability Insurance, and federally guaranteed student loans. See Personal Responsibility and Work Opportunity Reconciliation (Welfare Reform) Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2261-62, (codified as amended at 8 U.S.C. § 1611 (2012)).

221. See Trucios-Haynes, *supra* note 193, at 653; *cf.* 8 C.F.R. § 274a.12 (2016) (discussing classes of aliens authorized to accept payment).

to remove them. They are here and they must earn a living somehow.

This inherent contradiction is addressed, to some extent, in the laws governing the employment of immigrants lacking work authorization. Employers are prohibited from hiring such individuals.<sup>222</sup> The IRCA imposes sanctions, ranging from hefty fines to criminal penalties, on employers who knowingly hire individuals who lack work authorization.<sup>223</sup> All employers are required to complete I-9 Employment Verification Forms for each employee they hire to enable the federal government to check the immigration status of their employees.<sup>224</sup> Some employers, most notably federal government contractors, are required to participate in the online E-Verify system, which instantly compares the information on I-9 forms to U.S. Department of Homeland Security (DHS) records.<sup>225</sup> Workers lacking employment authorization can only overcome these checks and obtain employment if they successfully pass as U.S. citizens or immigrants authorized to work. Interestingly, Congress acknowledged the catch-22 in which unauthorized workers would find themselves when developing the IRCA rules. As described above, the IRCA imposes various sanctions on employers who hire undocumented workers, but it does not penalize the immigrant workers themselves.<sup>226</sup> As the Supreme Court has noted, this distinction in the federal Act was crucially important: “[t]he legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.”<sup>227</sup> Thus, a “careful balance [was] struck by Congress with respect to unauthorized employment of aliens.”<sup>228</sup> One of the inevitable consequences of this “careful balance” has been the widespread prevalence of immigration status passing.

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222. See 8 U.S.C. § 1324a(a) (2012).

223. See *id.* §§ 1324a-1324b.

224. See *id.* § 1324a(b).

225. See 48 C.F.R. § 52.222-54 (2015).

226. See *Arizona v. United States*, 132 S. Ct. 2492, 2504 (2012).

227. *Id.*

228. *Id.* at 2505.

## 2. *Passing Because of State Laws*

*For as long as I can remember, I knew that my parents were undocumented.... My parents would tell my siblings that we wouldn't be able to fly to see our cousins in Florida or even take a bus to another state because they didn't have a state-issued ID. I have always feared my parents getting stopped by the authorities and then getting deported. When I left for Scripps College ... my parents couldn't even accompany me into the airport. My mom was terrified of going into the terminal for fear that someone would ask her for documentation.*

*Henna, U.S. citizen, California*<sup>229</sup>

*I used to work for a company in Pennsylvania. This was a laundry company and we had a union that represented us. Unfortunately I was injured inside the company. I was following all the rules of the company and the union, so I reported everything that happened to me.... I never intend[ed] to sue the company because I really needed a job, but my boss was afraid I was going to do that, so he called immigration on me.*

*Dubi, deported undocumented immigrant, Guatemala*<sup>230</sup>

Just as some federal laws and policies simultaneously prohibit and yet also encourage immigration status passing, a number of state laws perform a similar function. In the last ten years there has been an explosion of rulemaking by state governments involving state regulation of immigrants' lives according to their immigration status.<sup>231</sup> In 2015, for example, according to the National Conference of State Legislatures, 216 separate state laws "dealing with immigration" were enacted by state legislatures.<sup>232</sup> These state laws and regulations include laws permitting or requiring state actors to perform immigration enforcement functions delegated by the federal government.<sup>233</sup> They also include "alienage laws" determining how

229. MY IMMIGR. STORY, *supra* note 96.

230. *Older Stories*, *supra* note 174.

231. See *State Laws Related to Immigration and Immigrants*, NAT'L CONF. ST. LEGISLATURES (Feb. 16, 2016), <http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx> [<https://perma.cc/899L-5N7Y>].

232. *Id.*

233. See, e.g., *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/factsheets/287g>

the states as independent sovereigns interact with the immigrants living within their jurisdiction.<sup>234</sup> State laws and policies that add to the existing pressures on immigrants to pass as holders of different statuses to avoid deportation or civil or criminal penalties, like their federal law counterparts, primarily involve immigration enforcement or restrictions on immigrant employment.

State law enforcement officers may be authorized to act on behalf of federal immigration authorities and inquire into an immigrant's legal status by Immigration and Customs Enforcement (ICE) under its so-called ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security) Program.<sup>235</sup> The program has two key components: (1) federal-state agreements under section 287(g) of the INA<sup>236</sup> and (2) the ICE Priority Enforcement Program (PEP).<sup>237</sup> Section 287(g) of the INA authorizes the Attorney General to enter into agreements with state law enforcement agencies, permitting designated officers to perform immigration law enforcement functions.<sup>238</sup> The delegated authority includes the power to arrest and detain noncitizens for immigration violations, to investigate immigration violations, and to collect evidence and prepare immigration cases that will be brought before a federal immigration judge.<sup>239</sup> As of this writing, ICE has thirty-two active 287(g) agreements in sixteen states and more than 1675 state and local law enforcement officers have been "trained and certified to enforce

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[<https://perma.cc/25JT-5NZA>] [hereinafter *Section 287(g)*].

234. For example, in a series of cases, the Court recognized the power of a state to restrict the devolution of real property to noncitizens based on a state's broad authority to regulate real property within its borders. *See* *Frick v. Webb*, 263 U.S. 326, 333-34 (1923); *Webb v. O'Brien*, 263 U.S. 313, 321-22 (1923); *Porterfield v. Webb*, 263 U.S. 225, 232-33 (1923); *Terrace v. Thompson*, 263 U.S. 197, 216-18 (1923).

235. *See ICE ACCESS Programs: 287(g), the Criminal Alien Program, and Secure Communities*, NAT'L IMMIGR. L. CTR. (Nov. 2009), <https://www.nilc.org/issues/immigration-enforcement/ice-access-2009-11-05/> [<https://perma.cc/N6CQ-N5RC>].

236. *See id.*

237. *See Priority Enforcement Program: How Is PEP Different from Secure Communities?*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/pep> [<https://perma.cc/9SC3-9UH6>].

238. *See* *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, § 133, 110 Stat. 3009-546, 3009-563 to -564 (codified as amended at 8 U.S.C. § 1357 (2012)) (adding section 287(g) to the INA).

239. 8 U.S.C. § 1357(g) (2012); *see also* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 198-99.

immigration law.”<sup>240</sup> PEP was launched in 2015 to replace the now-discontinued Secure Communities Program.<sup>241</sup> Under PEP, participating state law enforcement agencies use a secure web-based system to submit arrestees’ fingerprints to ICE so that cross-checks can be run in the agency’s databases.<sup>242</sup> If there is a match between the arrest record and a person who is a “priority” in the PEP database, ICE will either request notification of when that person is due to be released from state detention or will issue a request that the person be detained by the state authorities for transfer to ICE custody.<sup>243</sup> Unauthorized immigrants and immigrants violating the terms of their visas who live in states with active 287(g) agreements or widespread use of PEP are (understandably) wary of interactions with state officials. They are particularly afraid of scrutiny of their immigration status. This prompts immigration status passing in a variety of circumstances, ranging from social encounters with state employees to routine traffic stops by state troopers.

Since the U.S. Supreme Court’s ruling in *Arizona v. United States*, “independent” state initiatives, uncoupled from authority delegated by the federal government to police the immigration status of state residents, have been severely limited.<sup>244</sup> The only exception to this general rule is the continued vitality of “show me your papers” laws.<sup>245</sup> The most well known of these is section 2(B) of Arizona’s S.B. 1070,<sup>246</sup> but similar provisions are found in Georgia’s H.B. 87,<sup>247</sup> Alabama’s H.B. 56,<sup>248</sup> and South Carolina’s S.B. 20.<sup>249</sup> These laws require state police and sheriff’s officers, whenever

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240. See Section 287(g), *supra* note 233.

241. See *Priority Enforcement Program: Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/pep> [<https://perma.cc/9SC3-9UH6>].

242. *Id.*

243. *Id.*

244. See NAT’L IMMIGRATION LAW CTR., SB 1070 FOUR YEARS LATER: LESSONS LEARNED 2 (2014), <https://www.nilc.org/wp-content/uploads/2016/03/SB1070-lessonslearned-2014-04-23.pdf> [<https://perma.cc/9K48-MP5H>].

245. *Cf. id.*

246. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, 41).

247. Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, No. 252, 2011 Ga. Laws 794 (codified in scattered sections of GA. CODE ANN. tits. 13, 16, 17, 35, 36, 42, 45, 50).

248. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, No. 535, 2011 Ala. Laws 888 (codified as amended at ALA. CODE § 31-13-1 to -35).

249. S.B. 20, No. 69, 2011 S.C. Acts 325 (codified in scattered sections of S.C. CODE ANN.

they make an arrest for any suspected violation of any law and have “reasonable suspicion” to believe that the individual is an undocumented immigrant, to detain that individual until they can check his immigration status.<sup>250</sup> In *Arizona v. United States*, the Supreme Court saw this provision as an “alienage” rule, consistent with the State’s valid exercise of its police powers, rather than an impermissible encroachment on federal immigration lawmaking.<sup>251</sup> It therefore ruled that these kinds of laws were constitutionally permissible.<sup>252</sup> State law enforcement officers in jurisdictions with “show me your papers” laws therefore routinely inquire into the immigration status of any individual who they encounter and arrest, even if the arrest has nothing to do with immigration status and even if the arrest would not otherwise lead to detention or a criminal conviction.<sup>253</sup> In jurisdictions with “show me your papers” laws, the pressures upon immigrants encountering state police to pass as holders of a more assimilated immigration status is even greater than in jurisdictions where state law enforcement personnel have authority delegated by the federal government. In “show me your papers” states, any interaction with state police, no matter how benign initially, has the potential to escalate into a situation of arrest, detention, and ultimately deportation.<sup>254</sup> The response in those states’ immigrant communities has been widespread immigration status passing.<sup>255</sup>

Immigration status passing is also particularly prevalent in states that have independent state law restrictions on immigrant employment that go above and beyond the minimum floor set forth in the federal scheme. In a 2011 case, *Chamber of Commerce of the United States v. Whiting*, the U.S. Supreme Court held that the state of Arizona could mandate that all employers in the state use the federal E-Verify database, the use of which is ordinarily

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tits. 6, 8, 16, 17, 23, 41).

250. See NAT’L IMMIGRATION LAW CTR., *supra* note 244, at 1-2.

251. 132 S. Ct. 2492, 2508-09 (2012).

252. *Id.* at 2510.

253. See, e.g., Brief of Former Arizona Attorneys General Terry Goddard et al. as Amici Curiae in Support of Respondent at 37 n.39, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182).

254. *Cf. id.* at 12.

255. *Cf.* Anjana Mudambi, *The Construction of Brownness: Latino/a and South Asian Bloggers’ Responses to SB 1070*, 8 J. INT’L & INTERCULTURAL COMM. 44, 55 (2015).

voluntary, in order to determine whether potential workers were eligible for employment.<sup>256</sup> In the aftermath of the *Whiting* case, nineteen other states have enacted legislation requiring mandatory use of E-Verify.<sup>257</sup> Employers who fail to comply with these laws are subject to state penalties in addition to any sanctions to which they ordinarily would be subject under federal law.<sup>258</sup> The explicit goal of these laws is, predictably, to deter employers from hiring immigrants lacking the requisite authorization, with the intended consequence of reduced employment of such unauthorized migrants.<sup>259</sup> This underscores the dilemma faced by immigrants lacking employment authorization. The knowledge that employers in a state are required to check work eligibility may deter unauthorized immigrants from seeking employment in the first place. More frequently, however, given the economic necessities of life, those same immigrants may choose to pass as holders of a different immigration status.

### 3. *Passing Because of Local Laws*

*The mayor forced the people going out of Hazleton. That's the truth. It's really bad for everybody: for the city, for me, for my family.... Before the ordinance, we made a lot of money. We had a lot of customers, the Hispanic people.... Now, you see my store is empty. No people in here.*

*Maria Lopez Scott, U.S. citizen, Pennsylvania*<sup>260</sup>

*The last thing I want to be doing [as a landlord] is asking, 'Where's your papers?'... And how am I supposed to know if what they're giving me is real?*

*Angie Iraheta, U.S. citizen, Texas*<sup>261</sup>

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256. 563 U.S. 582, 608-11 (2011).

257. See U.S. CITIZENSHIP & IMMIGRATION SERVS., E-VERIFY OVERVIEW 7, [https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify\\_Native\\_Documents/e-verify-presentation.pdf](https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/e-verify-presentation.pdf) [<https://perma.cc/3J2Q-WALE>].

258. See *Whiting*, 563 U.S. at 608-11.

259. *Id.* at 603-04.

260. *Pennsylvania Town Passes Illegal Immigration Law*, PBS NEWSHOUR (Sept. 1, 2006, 6:20 PM), [http://www.pbs.org/newshour/bb/social\\_issues-july-dec06-immigration\\_09-01/](http://www.pbs.org/newshour/bb/social_issues-july-dec06-immigration_09-01/) [<https://perma.cc/G9K6-4J27>].

261. Thomas Korosec & Terri Langford, *Farmers Branch Illegal Immigrant Rule Blasted*, HOUS. CHRON. (Nov. 15, 2006, 6:30 AM), <http://www.chron.com/news/houston-texas/article/>



A slightly different constellation of immigration status passing occurs with respect to various immigration-related local laws. Local laws can affect immigration status passing in two distinct ways. First, there are some local laws that, like their state counterparts, are implicitly and avowedly anti-immigrant in that they essentially require immigrants in certain statuses to pass as holders of an alternative status in order to live their everyday lives. Second, there are some local laws that might be viewed as more immigrant friendly because they encourage immigrants to pass as holders of more favorable immigration statuses by providing that no adverse action will be taken against them on the basis of their immigration status, unless and until they disclose that status.

The most notorious of the anti-immigrant local laws in recent years are the so-called Illegal Immigration Relief Acts enacted by some municipal governments that limit immigrants' access to housing, employment, or basic government services, such as water, refuse removal, and other utilities.<sup>262</sup> In 2006, for example, the City of Hazleton, Pennsylvania, enacted two municipal ordinances: an Illegal Immigration Relief Act Ordinance (IIRAO)<sup>263</sup> and a Rental Registration Ordinance (RRO).<sup>264</sup> The IIRAO made it unlawful for any business located in whole or in part within the city limits to employ, continue to employ, or recruit any person who lacked federal immigration status.<sup>265</sup> It also prohibited any landlord within the city from leasing or renting their property to undocumented immigrants.<sup>266</sup> The RRO required all persons renting a dwelling in the city to obtain an occupancy permit.<sup>267</sup> In order to obtain such a permit, the applicant had to be over eighteen years of age and to show proof of "legal citizenship and/or residency" in the United

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Farmers-Branch-illegal-immigrant-rule-blasted-1910025.php [https://perma.cc/LK3K-28ZD].

262. See Lindsay Nash, *Expression By Ordinance: Preemption and Proxy in Local Legislation*, 25 GEO. IMMIGR. L.J. 243, 247-48, 250-52 (2011).

263. Hazleton, Pa., Ordinance 2006-18 (Sept. 12, 2006), <http://www.clearinghouse.net/chDocs/public/IM-PA-0001-0010.pdf> [https://perma.cc/8G73-DS2Z]; see Hazleton, Pa., Ordinance 2006-40 (Dec. 28, 2006), [https://www.aclu.org/sites/default/files/field\\_document/hazleton\\_thirdordinance.pdf](https://www.aclu.org/sites/default/files/field_document/hazleton_thirdordinance.pdf) [https://perma.cc/BR5L-792N].

264. See Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006), [https://www.aclu.org/files/pdfs/immigrants/hazleton\\_firstordinance.pdf](https://www.aclu.org/files/pdfs/immigrants/hazleton_firstordinance.pdf) [https://perma.cc/2Z9Q-XNVL].

265. See Hazleton, Pa., Ordinance 2006-18 § 4.

266. See *id.* § 5(A).

267. See Hazleton, Pa., Ordinance 2006-13 §§ 6(a), 7(b).

States.<sup>268</sup> Similarly restrictive local ordinances were enacted in Farmers Branch, Texas,<sup>269</sup> and Fremont, Nebraska.<sup>270</sup>

Legal challenges were launched by immigrants' advocates to contest these restrictive housing ordinances, but the federal courts of appeal have reached differing conclusions in their recent rulings. In *Lozano v. City of Hazleton*, the U.S. Court of Appeals for the Third Circuit held that the Hazleton ordinances were preempted by the federal government's plenary power to regulate immigration.<sup>271</sup> In *Villas at Parkside v. City of Farmers Branch*, the U.S. Court of Appeals for the Fifth Circuit similarly ruled that the Farmers Branch ordinance was impermissible because it created a new, impermissible immigration-related state crime.<sup>272</sup> In *Keller v. Fremont*, in contrast, the U.S. Court of Appeals for the Eighth Circuit held that Fremont's similarly restrictive ordinance was permissible because it was a law that applied to all Fremont residents, not only immigrants residing within the city limits.<sup>273</sup> Any unauthorized migrants renting in Fremont are therefore required to pass as holders of a different immigration status if they want to remain in their homes.<sup>274</sup> Any undocumented immigrants living in Hazleton or Farmers Branch are no longer subject to criminal or civil sanctions for doing so, but the prior existence of the ordinances demonstrates, at the very least, a heightened social pressure to conceal their underlying immigration status from their neighbors and to pass as members of a more assimilated, and therefore more favored, group.

In contrast, some municipalities have taken steps to allow immigrants to pass as holders of different immigration statuses precisely because they hope that such passing will build trust and social capital in their communities. An example of this phenomenon is the adoption of "don't ask, don't tell" protocols by local law enforcement agencies. Like the former U.S. military policy of the

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268. *See id.* §§ 1(m), 7(b)(1)(g).

269. *See Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 526 (5th Cir. 2013) (en banc).

270. *See Keller v. City of Fremont*, 719 F.3d 931, 937 (8th Cir. 2013).

271. *Lozano v. City of Hazleton*, 724 F.3d 297, 300 (3d Cir. 2013).

272. *Villas at Parkside*, 726 F.3d at 529.

273. *Keller*, 719 F.3d at 951.

274. *See id.* at 950-51.

same name,<sup>275</sup> these protocols effectively prohibit local police officers from taking action against undocumented immigrants who are passing as members of other immigrant groups. They do so by simultaneously banning police officers from making inquiries into an individual's formal immigration status—unless that status is relevant to an ongoing criminal investigation—and providing that any adverse action based on an immigrant's lack of formal immigration status can be taken only if he volunteers information about that status.<sup>276</sup> For example, the City of New Haven, Connecticut, has one such protocol, General Order 06-2, which precludes police officers from inquiring into an individual's immigration status.<sup>277</sup> Similar measures exist in cities throughout the United States.<sup>278</sup>

As Professor Bill Ong Hing has explained, “don't ask, don't tell” law enforcement protocols have two goals.<sup>279</sup> First, the protocols are designed to promote public safety by encouraging immigrant victims of crime to come forward without fear that they will be required to disclose information to the police that might lead to their removal from the country.<sup>280</sup> Second, the protocols are designed to preserve economic resources by limiting police expenditures to nonimmigration-related crimes and by ensuring that police personnel time is not expended on making immigration-related inquiries.<sup>281</sup> Both purposes were underscored at the time that New Haven General Order 06-2 was signed, but a particular emphasis was placed on community policing amongst vulnerable immigrant populations.<sup>282</sup> As the city announced, for example, “The formal policy is meant to

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275. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670-73 (1993), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; Dep't of Def. Directive 1304.26 (1993).

276. *See, e.g.*, Press Release, City of New Haven, New Haven Police Issue Executive Order - No Resident Should Be Afraid of Reporting Crime (Dec. 14, 2006), <http://www.cityofnewhaven.com/Mayor/ReadMore.asp?ID=%7B874974A9-AC89-465B-A649-57D122E9FAF9%7D> [<https://perma.cc/3RWG-87EF>] [hereinafter New Haven Press Release].

277. *See id.*

278. *See* NAT'L IMMIGRATION LAW CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATES: IMMIGRANTS' ACCESS TO DRIVER'S LICENSES, HIGHER EDUCATION, WORKERS' RIGHTS, AND COMMUNITY POLICING 13-15 (2013), <http://www.nilc.org/wp-content/uploads/2016/02/inclusive-policies-advance-in-states-2013-10-28.pdf> [<https://perma.cc/RLQ4-A7JZ>].

279. Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 310-11 (2012).

280. *Id.*

281. *Id.*

282. *Id.*

encourage all residents, regardless of immigration status, to feel comfortable reporting crime and talking with the police.”<sup>283</sup> As the example of General Order 06-2 shows, government encouragement of immigration status passing need not be motivated solely by animus. Here, the local government was attempting to encourage immigrant passing to facilitate immigrant integration and stability and to conserve its own resources—goals that are also readily apparent in the context of immigration status covering.

### *C. Immigration Status Covering*

Immigrant “covering” is both a long-standing sociocultural practice and a relatively recent legal phenomenon. As discussed in Part I.C of this Article, for over a century, immigrants have engaged in social status covering, by “toning down” aspects of their identity that mark them as outsiders in order to fit into the more homogeneous American mainstream. Whether by adopting more western dress or cultivating an American English accent and mannerisms, immigrants have taken steps that allow others to disattend to the fact that they are immigrants.<sup>284</sup> Formal immigration status covering by operation of federal, state, or local laws, regulations, and subregulatory policies is, however, a more recent phenomenon—or at least a more recent widespread phenomenon. Since the passage of the INA in 1952, immigration status conversion has been the gold standard of immigrant assimilation.<sup>285</sup> Since the 1980s, immigration status passing has been a ubiquitous collateral consequence of increasingly strict regulation of immigrant admission and immigrant employment, coupled with widespread underenforcement of immigration laws.<sup>286</sup> Only in the last decade or so, however, an extraordinary number of federal, state, and local laws and policies, which are most accurately characterized as facilitating immigration status covering, have been implemented.

Unlike conversion, these covering laws and policies do not transform the immigrant’s underlying (traditionally disadvantaged) immigration status. Unlike passing, the immigrant is neither

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283. See New Haven Press Release, *supra* note 276.

284. See *supra* text accompanying notes 79-82.

285. See *supra* Part II.A.1.

286. See *supra* Part II.B.1.

required nor encouraged to conceal her immigration status, and she does not need to claim to hold a more privileged immigration status. Instead, the covering laws allow immigrants who would otherwise, by virtue of their immigration status, be disqualified from access to certain rights, privileges, and government services to have access. These laws operate in practice to downplay the otherness of the immigrant outsider, allowing local, state, and federal authorities to disattend to that aspect of her identity. The diagrams below illustrate how these laws may operate in practice to temporarily elide certain immigrants' disfavored statuses, thereby providing them with partial access to goods and services previously available (partially or wholly) only to their more assimilated counterparts, such as naturalized U.S. citizens and LPRs.

Figure 3.

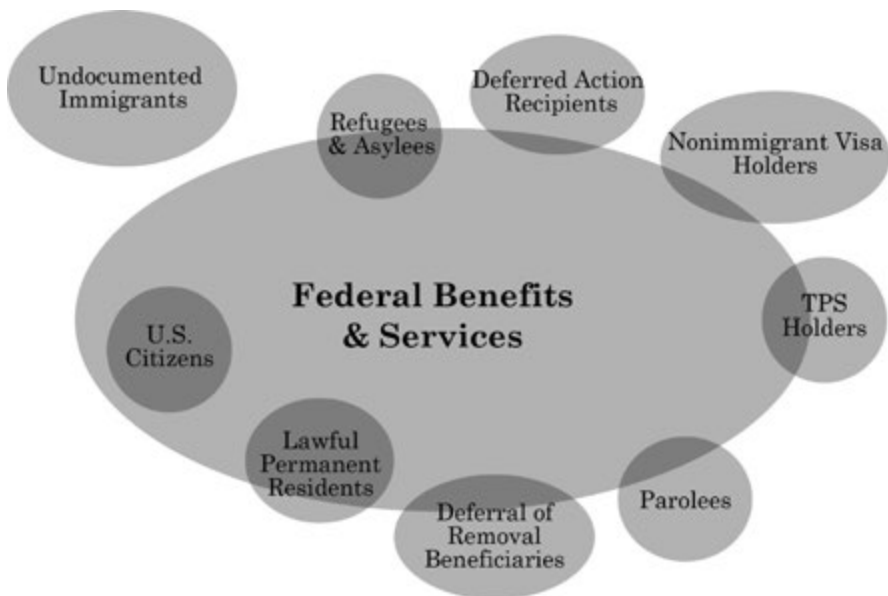


Figure 4.

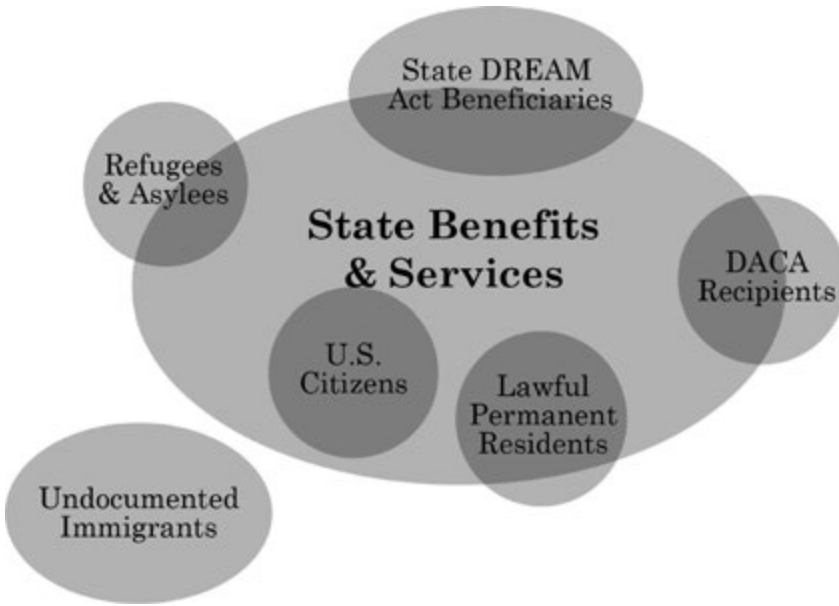
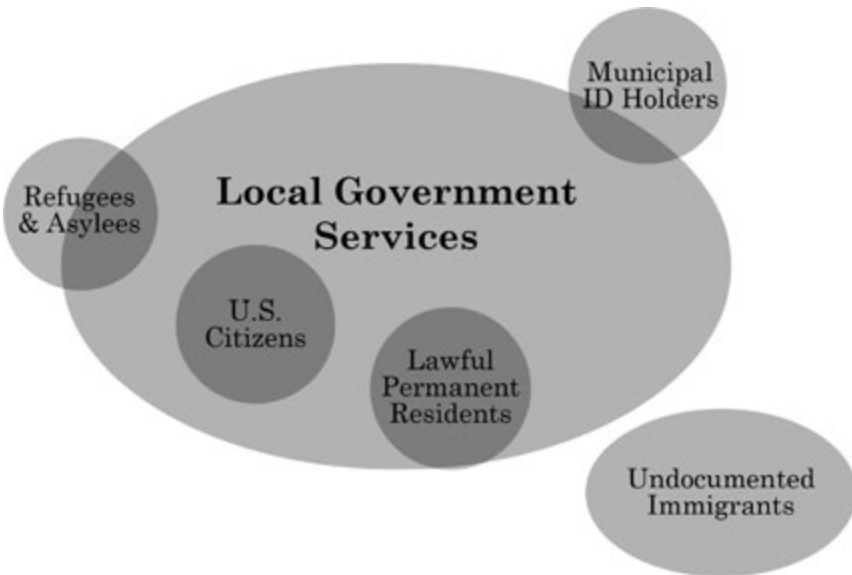


Figure 5.



This Section provides examples of immigration status covering laws and policies at the federal, state, and local levels. At the federal level, this Section discusses Deferred Action (including DACA and DAPA), as well as Temporary Protected Status, Parole, and Administrative Closure. At the state level, this Section examines in-state tuition initiatives and state issuance of driver's licenses. At the local level, this Section discusses the sanctuary city movement and municipal identification cards. In each instance, the covering provisions are tenuous and temporary—the protections that they offer are typically discretionary, their availability to each individual immigrant is largely unreviewable, and they are weakly described by positive law.<sup>287</sup> Yet, for many immigrants they constitute the only available avenue for some form of (albeit limited) integration into mainstream American society.

### *1. Covering by Operation of Federal Law*

*My parents had left me at the age of 2 back in Mexico with my grandparents while they came to the U.S. They sent for me at the age of 4 and that is when I crossed the border with my aunt.... I am now 18 years old and thankful that I was able to qualify for the DACA. With DACA I have been able to do so much. Thankfully I now have 2 jobs and I am in school. Although I am undocumented, I do not give up my hopes and dreams of a better life for my family.... As much as I would like to go visit my family in Mexico, I can't.*

*Wendy, DACA beneficiary, New York*<sup>288</sup>

*It would have been impossible for me to have a job with my company if I didn't have legal documents.... Thanks to TPS I was able to find my job and stay in my job.*

*Alex Sanchez, TPS recipient*<sup>289</sup>

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287. See Heeren, *supra* note 15, at 1120 (“These individuals occupy a paradoxical middle ground between legality and illegality, loosely tethered to this country by humanitarian concern or prosecutorial discretion.”).

288. MY IMMIGR. STORY, *supra* note 96.

289. Alexandra Starr, *For Some Immigrants, Temporary Life in U.S. Can Mean a Long Stay*, NPR (Jan. 13, 2015, 6:19 PM), <http://www.npr.org/2015/01/13/377003329/for-some-immigrants-temporary-life-in-u-s-can-mean-a-long-stay> [<https://perma.cc/T4UQ-64TD>].

Today, perhaps the most high-profile iterations of immigration status covering by operation of federal law are President Obama's two deferred action programs, Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).<sup>290</sup> The DACA program was launched in June 2012.<sup>291</sup> It is designed to help DREAMers, that is, young undocumented immigrants brought to the United States as minors and raised in this country.<sup>292</sup> In order to qualify for DACA, under the 2012 provisions, a young person is required to show that (1) he was under the age of thirty-one as of June 15, 2012; (2) he arrived in the United States before his sixteenth birthday; (3) he has maintained a current and continuous residence in the United States since June 15, 2007; (4) he was in the United States both on June 15, 2012, and when he submitted a DACA request; (5) he had no lawful immigration status on June 15, 2012; (6) he is currently in school or has graduated from high school, obtained a General Education Development (GED) certificate, or is an honorably discharged veteran of the U.S. Armed Forces; and (7) he has not been convicted of a felony, "significant misdemeanor," or three or more misdemeanors, and he does not pose a threat to national security or public safety.<sup>293</sup> Undocumented immigrants who are eligible for DACA apply for the program in much the same way that eligible immigrants apply for other immigration benefits—they submit a U.S. Citizenship and Immigration Services (USCIS) application form, which is available online, along with supporting evidentiary documents, and pay a filing fee.<sup>294</sup> As with other USCIS forms, there is a detailed instruction sheet designed to help pro se applicants file their DACA applications.<sup>295</sup>

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290. See *Executive Actions on Immigration*, *supra* note 11.

291. See Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html> [<https://perma.cc/N3AQ-L92B>].

292. For a description of the term DREAMer, see *supra* note 83 and accompanying text.

293. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/6KJ5-HCXE>] (last updated Dec. 22, 2016).

294. *Id.* See generally U.S. CITIZENSHIP & IMMIGRATION SERVS., OMB No. 1615-0124, FORM I-821D: CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2014) [hereinafter FORM I-821D], <https://www.uscis.gov/sites/default/files/files/form/i-821d.pdf> [<https://perma.cc/3ZJW-L2RS>].

295. See FORM I-821D, *supra* note 294.



Immigrants granted DACA often describe themselves as “DACAmended.”<sup>296</sup> This term captures the fact that their underlying immigration status has not changed—they are still formally undocumented—but they have been granted a temporary reprieve from deportation, and along with it, temporary access to certain benefits through the DACA program. In other words, once DACAmended, an undocumented immigrant has temporary authorization to be present in the United States, even though she continues to have no formal immigration status. Most important, a young person granted DACA is no longer considered to be “unlawfully present” in the United States, at least for its two-year duration.<sup>297</sup> “Unlawful presence,” a term of art in immigration law, refers to the time period for which an individual is present in the United States without authorization—either because of entry without inspection, a visa overstay, or violation of the terms of a visa.<sup>298</sup> A DACA recipient who is no longer unlawfully present is eligible, if she can show economic need, to apply for an employment authorization document that will enable her to work legally for the two years of her DACA grant.<sup>299</sup> She is able to apply for a driver’s license from her state Department of Motor Vehicles.<sup>300</sup> In many states, she is also eligible for in-state tuition at state colleges and universities.<sup>301</sup> This combination of benefits has the potential to radically change her day-to-day experiences and offers multiple pathways for greater social integration and feelings of belonging. Her underlying immigration status has not been changed in any way, but the federal authorities’

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296. See CAITLIN PATLER & JORGE A. CABRERA, INST. FOR RESEARCH ON LABOR & EMP’T, FROM UNDOCUMENTED TO DACAMENTED: IMPACTS OF THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) PROGRAM THREE YEARS FOLLOWING ITS ANNOUNCEMENT 3, 33 n.8 (2015), [http://www.chicano.ucla.edu/files/Patler\\_DACA\\_Report\\_061515.pdf](http://www.chicano.ucla.edu/files/Patler_DACA_Report_061515.pdf) [<https://perma.cc/CG8X-DMFG>].

297. See 8 U.S.C. § 1182(a)(9)(B) (2012) (defining the term “unlawful presence” and stating that those individuals are inadmissible).

298. *Id.*

299. 8 C.F.R. § 274a.12(c)(14) (2016) (allowing work permission for a person granted deferred action if she can show economic necessity).

300. See Esther Yu Hsi Lee, *Nebraska Becomes the Last State in the Country to Pass a Law Allowing DREAMers to Drive*, THINKPROGRESS (May 28, 2015), <http://thinkprogress.org/immigration/2015/05/28/3663456/nebraska-drivers-license/> [<https://perma.cc/DJM8-LTCL>].

301. See *Tuition Benefits for Immigrants*, NAT’L CONF. ST. LEGISLATURES (July 15, 2015), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx> [<https://perma.cc/NJF2-3QF9>].

decision to formally disattend to that status provides cover along a number of different dimensions with respect to a number of different actors—from state and local governments, to employers, to educational institutions. By June 2016, 844,931 young immigrants had been granted DACA.<sup>302</sup> This represents immigration status covering on a hitherto unprecedented scale.

On November 20, 2014, President Obama announced his plans to expand eligibility for the DACA program and to increase the duration of the program and its attendant grant of work authorization from two years to three years.<sup>303</sup> At the same time, he announced a new initiative, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).<sup>304</sup> The DAPA program was designed to work in much the same way as DACA. To apply for DAPA, eligible undocumented immigrants would need to prove (1) they were the parent of a U.S. citizen or LPR child who was born on or before November 20, 2014; (2) they had lived in the United States since January 1, 2010; (3) they had no lawful immigration status on November 20, 2014; (4) they had not been convicted of a felony, “significant misdemeanor,” or three or more misdemeanors; and (5) they did not pose a threat to national security or public safety.<sup>305</sup> As with DACA recipients, immigrants who qualify for DAPA would, under the terms of the program, no longer be considered unlawfully present and would be able to apply for work authorization from the federal government.<sup>306</sup> Up to 4 million of the estimated 11.2 million undocumented migrants present in the United States might be eligible to apply for DAPA.<sup>307</sup> With

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302. *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics, and Case Status: 2012-2016 (June 30)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 13, 2016), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2016\\_qtr3.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2016_qtr3.pdf) [<https://perma.cc/574G-FPUY>].

303. *See Executive Actions on Immigration*, *supra* note 11; *see also* President Barack Obama, Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/Q52F-AH5X>].

304. *See Executive Actions on Immigration*, *supra* note 11.

305. *You May Be Able to Request DAPA*, U.S. CITIZENSHIP & IMMIGR. SERVS. (2015), [https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier\\_DAPA.pdf](https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf) [<https://perma.cc/AL9U-SS4Q>].

306. *See Executive Actions on Immigration*, *supra* note 11.

307. *See PASSEL ET AL.*, *supra* note 214, at 7; *see also* Pamela Constable & Julie Zauzmer,

DAPA, as with DACA, the underlying undocumented status of the immigrant beneficiaries would not change, but the disattendance of the federal government to that status would open up numerous opportunities for assimilation into mainstream society hitherto denied to the “DAPAmended.”

The DAPA program provoked more controversy than DACA. The DREAMer beneficiaries of DACA were widely perceived as sympathetic and less culpable because they had been brought to the United States as children.<sup>308</sup> In contrast, the potential beneficiaries of DAPA were adults who had deliberately chosen to either enter the United States without inspection or overstay their visas, thereby violating U.S. immigration law.<sup>309</sup> In anticipation of objections to the DAPA program, the Department of Justice released a series of internal memoranda outlining their analysis of the legal authority upon which the expanded DACA and DAPA programs were based.<sup>310</sup> These memoranda explained that the President had prosecutorial discretion to defer the removal of some of the 11.2 million undocumented immigrants in the United States because he was responsible for managing and allocating limited resources.<sup>311</sup> In particular, the memoranda explained the priority federal immigration law places

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*Illegal Immigrants to Rally at White House, Thank Obama for Deportation Reprieve*, WASH. POST (Nov. 21, 2014), [https://www.washingtonpost.com/local/illegal-immigrants-to-rally-at-white-house-thank-obama-for-deportation-reprieve/2014/11/21/145ccea0-71a0-11e4-893f-86bd390a3340\\_story.html](https://www.washingtonpost.com/local/illegal-immigrants-to-rally-at-white-house-thank-obama-for-deportation-reprieve/2014/11/21/145ccea0-71a0-11e4-893f-86bd390a3340_story.html) [<https://perma.cc/8XZ4-4TXM>].

308. See David Grant, *Immigration Reform: From House Republicans, Some Sympathy for DREAMers*, CHRISTIAN SCI. MONITOR (July 23, 2013), <http://www.csmonitor.com/USA/Politics/2013/0723/Immigration-reform-From-House-Republicans-some-sympathy-for-DREAMers-video> [<https://perma.cc/7B2H-NBSV>] (“At a committee hearing, sympathy is expressed for young DREAMers, but not their parents.”).

309. See *id.*

310. See The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C., at 9 (Nov. 19, 2014) [hereinafter OLC Opinion], <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/JWS9-HB64>]; Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t; R. Gil Kerlikowski, Comm’r, U.S. Customs & Border Prot.; Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs.; & Alan D. Bersin, Acting Assistant Sec’y for Policy 1-5 (Nov. 20, 2014) [hereinafter Sec’y Johnson Memorandum], [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/X9BB-4PPP>].

311. See OLC Opinion, *supra* note 310, at 9; Sec’y Johnson Memorandum, *supra* note 310, at 1-5; see also SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 14-22 (2015).

upon family unity concerns, which allowed the President to exercise his prosecutorial discretion to defer the removal of the parents of U.S. citizens and LPRs.<sup>312</sup>

Immigrant communities and their advocates and allies greeted the launch of the expanded DACA and DAPA programs with great enthusiasm.<sup>313</sup> In contrast, many federal and state lawmakers—particularly members of the Republican party—were vehemently opposed.<sup>314</sup> The U.S. House of Representatives passed a largely symbolic resolution in opposition to expanded DACA and DAPA.<sup>315</sup> Then, twenty-six states,<sup>316</sup> led by the state of Texas, sued the Department of Homeland Security to enjoin DAPA and expanded DACA, arguing that the programs violated the notice-and-comment requirements of the Administrative Procedure Act and the President's constitutional duty to "take care" to enforce the immigration laws.<sup>317</sup> On February 16, 2015, Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas granted the states' motion for a preliminary injunction.<sup>318</sup> On November 9, 2015, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's ruling.<sup>319</sup> On January 19, 2016, the Supreme Court of the United States granted certiorari.<sup>320</sup> On June 23, 2016, the U.S. Supreme Court issued a one-line per curiam opinion, which stated that "[t]he judgment [of the Fifth Circuit] is affirmed by an equally divided Court."<sup>321</sup> Judge Hanen's preliminary injunction therefore remains in place, and the case moves to trial for a final determination as to whether DAPA and expanded DACA are permissible

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312. See OLC Opinion, *supra* note 310, at 9; Sec'y Johnson Memorandum, *supra* note 310, at 1-5.

313. See, e.g., Constable & Zauzmer, *supra* note 307.

314. See Grant, *supra* note 308.

315. See Jeremy W. Peters & Ashley Parker, *On War and Immigration, Obama Faces Tests of Authority from Congress*, N.Y. TIMES (Dec. 4, 2014), <http://www.nytimes.com/2014/12/05/us/paul-forces-senate-vote-on-limiting-fight-against-isis.html> [<https://perma.cc/3RPW-SRS9>].

316. For a list of the twenty-six plaintiff states see *Texas v. United States*, 86 F. Supp. 3d 591, 604 n.1 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

317. *Id.* at 607.

318. *Id.* at 677-78.

319. *Texas*, 809 F.3d at 188.

320. *United States v. Texas*, 136 S. Ct. 906, 906 (2016) (mem.) *granting cert. to* 809 F.3d 134 (5th Cir. 2015).

321. *Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

exercises of executive power. In the wake of the Supreme Court's ruling, scholarly commentators are divided in their assessment of the constitutionality of these programs, and whether they will endure remains an open question, particularly in light of the forthcoming change of administration.<sup>322</sup> However, the focus of this Article is not on whether such programs are legally permissible, but how they currently operate—in the case of DACA—and may operate in the future—in the case of DAPA—as a form of immigration status “covering.”

Despite the ongoing controversy surrounding DACA and DAPA, this form of immigrant covering is not a new invention. The DACA and DAPA programs use the formal mechanism of “deferred action,” a long-standing form of immigration prosecutorial discretion that was previously offered on a limited case-by-case basis, as the foundation for a widespread policy.<sup>323</sup> In the 1970s, John Lennon was granted “nonpriority status,” the precursor to modern deferred action, to enable him to remain in the United States after he overstayed his visa during a protracted custody battle over Yoko Ono's daughter, Kyoko, from her first marriage.<sup>324</sup> Lennon's attorney, Leon Wildes, filed a federal Freedom of Information Act suit to obtain information about how the Immigration and Naturalization Service (INS) of the time administered grants of nonpriority status.<sup>325</sup> He discovered that a grant of nonpriority status was a temporary deferral of deportation, entirely at the INS's discretion, and subject to periodic review and summary reversal.<sup>326</sup> It came

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322. Compare Gabriel J. Chin, *Symposium: From Here, Where to?*, SCOTUSBLOG (June 23, 2016, 6:25 PM), <http://www.scotusblog.com/2016/06/symposium-from-here-where-to/> [https://perma.cc/23WY-X74D], with Lyle Denniston, *Opinion Analysis: Obama Immigration Plan All but Doomed*, SCOTUSBLOG (June 23, 2016, 4:16 PM), <http://www.scotusblog.com/2016/06/opinion-analysis-obama-immigration-plan-all-but-doomed/> [https://perma.cc/49KU-UG3Z]. See generally Cox & Rodriguez, *supra* note 14, at 107-225 (describing various examples in practice of the Executive exercising inherent authority over immigration); Delahunty & Yoo, *supra* note 14, at 856 (contending that DACA constitutes a violation of the Take Care Clause); Price, *supra* note 14, at 674-75 (arguing that the President may decline to enforce civil and criminal prohibitions in particular cases but not with respect to entire categories of persons).

323. See WADHIA, *supra* note 311, at 14-16.

324. See Leon Wildes, *Not Just Any Immigration Case*, CARDOZO LIFE (1998), <http://www.cardozo.yu.edu/life/spring1998/john.lennon> [https://perma.cc/BA6M-2KCS].

325. See Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42, 44 (1976).

326. *Id.*

with no particular attendant rights, beyond nondeportation at the time of issuance.<sup>327</sup> It was subject to no statutory or regulatory provisions and was only possible because there was no congressional mandate in the INA forbidding its use.<sup>328</sup> In short, nonpriority status constituted an unreviewable exercise of the federal government's prosecutorial discretion that could be reversed at any time.

During the 1990s, "nonpriority status" was replaced by "deferred action," but its core attributes—in particular its temporariness and nonreviewability—remained the same. In 1996, Congress passed two pieces of legislation, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>329</sup> and the Antiterrorism and Effective Death Penalty Act of 1996.<sup>330</sup> These statutes eliminated many forms of judicial relief from removal<sup>331</sup> and made the exercise of prosecutorial discretion, including grants of deferred action, increasingly important. Most scholars have long assumed that following the 1996 reforms and before DACA, immigration prosecutors continued to exercise their discretion to grant deferred action to immigrant respondents on a case-by-case basis.<sup>332</sup> Geoffrey Heeren, however, has recently shown that since 1996 deferred action has been potentially available to "entire categories of unauthorized immigrants."<sup>333</sup> Indeed, since 2000, the availability of deferred action as a mechanism for prosecutorial discretion has been linked to wide category-based priorities for immigration enforcement.<sup>334</sup> In that year, INS Commissioner Doris Meissner issued a memorandum on prosecutorial discretion that reaffirmed the existence of deferred action tied to the INS's general authority to

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327. See Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 102-06 (1979).

328. *Id.*

329. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. (2012)).

330. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of tits. 8, 18, 22, 28, 42 U.S.C. (2012)).

331. See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 303(e), 8 U.S.C. § 1226 (2012).

332. See, e.g., Cox & Rodriguez, *supra* note 14, at 144; Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 119 (2014).

333. See Heeren, *supra* note 15, at 1152.

334. See Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv. to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents & Reg'l & Dist. Counsel 1 (Nov. 17, 2000).

prioritize deporting some noncitizens over others.<sup>335</sup> At the same time, case-by-case grants of deferred action have continued apace. Indeed, ICE continues to also grant deferred action on a case-by-case basis to many immigrants each year.<sup>336</sup>

For all recipients of deferred action today, whether the deferral is granted via a widespread program like DACA or through individual exercise of prosecutorial discretion by ICE trial attorneys, deferred action offers a form of immigration status covering. All recipients of deferred action lack formal immigration status.<sup>337</sup> They are not LPRs; they do not have a nonimmigrant visa; they are not refugees or asylees. Instead, their underlying status remains that of an undocumented immigrant. But, at the same time, they have been granted a temporary reprieve from removal; as long as the federal government does not change its mind about them—which, theoretically, it may do at any time—they may remain in the United States.<sup>338</sup> Moreover, because they are no longer considered to be “unlawfully present” in the United States, they can apply for an employment authorization document that will enable them to work legally.<sup>339</sup> They have thus not experienced conversion to lawful immigration status, nor are they passing as members of a more favored immigrant group, but they are nonetheless able to enjoy greater social integration into the mainstream.

Deferred action is not the only available avenue for immigration status covering. The federal government also employs a variety of other mechanisms that formally disattend to the undocumented status of certain immigrants, thereby enabling them to live and work in the United States on a temporary basis. One example is parole, which is used to allow a person to cross the United States border and enter the country without being considered formally

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335. *See id.* at 4-5 (explaining that investigations focused on identifying high priority aliens are preferable to investigations that identify a broader variety of removable aliens).

336. *See Heeren, supra* note 15, at 1120 n.14.

337. *See* Adjustment of Status; Certain Nationals of the People's Republic of China, 62 Fed. Reg. 63,249, 63,253 (Nov. 28, 1997) (“Deferred action does not confer any immigration status on an alien, nor is it in any way a reflection of an alien’s lawful immigration status.”).

338. *Id.* (“Deferred action ... confers no protection or benefit on an alien. Deferred action does not preclude the Service from commencing removal proceedings at any time against an alien.”).

339. 8 C.F.R. § 274a.12(c)(14) (2016).

admitted under the immigration laws of the United States.<sup>340</sup> This “entry fiction” means that parolees are treated permanently as though they have remained at the U.S. border, even if they have lived and worked in the country for years.<sup>341</sup> Historically, parole was used as a means to permit the mass admission of certain groups of refugees. In 1956, for example, following the Hungarian Revolution, approximately 30,000 Hungarian refugees were paroled into the United States.<sup>342</sup> Similarly, in 1980, during the Mariel boatlift, approximately 125,000 Cubans were paroled into the country.<sup>343</sup> During the 1996 immigration and welfare reforms, however, Congress amended the INA to allow parole “only on a case by case basis.”<sup>344</sup> As a consequence, today the federal government grants parole on a case-by-case basis to immigrants who present themselves at a port of entry with compelling humanitarian reasons to enter the United States, but who do not meet the legal requirements for entry.<sup>345</sup> Most recently, a number of Central American mothers and children fleeing gang violence in El Salvador, Guatemala, and Honduras have been paroled into the United States after arriving at the southwest border.<sup>346</sup> These immigrants have no permanent immigration status, and their stay in the United States is temporary and contingent on the federal government’s discretion.<sup>347</sup> Yet, at the same time, they may apply for work authorization and are not subject to immigration enforcement actions.<sup>348</sup> They therefore enjoy more stability and more social integration than their undocumented counterparts.

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340. See 8 U.S.C. § 1226(a)(2)(B) (2012); 8 C.F.R. § 212.5.

341. See, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) (“The parole of aliens seeking admission ... was never intended to affect an alien’s status.”); *Castellon*, 17 I. & N. Dec. 616, 620 (B.I.A. 1981) (holding that parolees as applicants for admission do not enjoy the same constitutional rights afforded to aliens who have entered the country).

342. See MOTOMURA, *OUTSIDE THE LAW*, *supra* note 215, at 25.

343. See Yvette M. Mastin, Comment, *Sentenced to Purgatory: The Indefinite Detention of Mariel Cubans*, 2 *SCHOLAR* 137, 142-43 (2000).

344. 8 U.S.C. § 1182(d)(5)(A).

345. *Humanitarian or Significant Public Benefit Parole for Individuals Outside of the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 23, 2016), <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-individuals-outside-united-states> [<https://perma.cc/6CBK-ZHJR>].

346. See Scott Rempell, *Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge*, 18 *CHAP. L. REV.* 337, 353-54 (2015).

347. 8 U.S.C. § 1182(d)(5)(A).

348. See *Executive Actions on Immigration*, *supra* note 11.



The same is true of immigrants granted Temporary Protected Status (TPS), another form of federally authorized immigration status covering TPS was created by the Immigration Act of 1990 to provide temporary relief from removal for immigrants who are unable to return to their countries of origin due to armed conflict, environmental disaster, or other extraordinary but temporary conditions.<sup>349</sup> The Department of Homeland Security (DHS) maintains a list of countries whose nationals may be eligible for TPS, which currently includes El Salvador, Guinea, Haiti, Honduras, Liberia, Nepal, Nicaragua, Sierra Leone, Somalia, South Sudan, Sudan, Syria, and Yemen.<sup>350</sup> An applicant for TPS must demonstrate that he (1) is a national of a duly designated country; (2) has been continuously, physically present in the United States since nationals of that country were designated as eligible for TPS; (3) has resided in the United States since the date designated for nationals of his particular country; (4) has filed his application in a timely manner; (5) has not committed a disqualifying crime; (6) is not subject to any of the mandatory bars to a grant of asylum; and (7) does not pose a threat to national security.<sup>351</sup> TPS, like parole and deferred action, is an inherently temporary form of relief and confers no formal immigration status.<sup>352</sup> As with deferred action beneficiaries and parolees, persons granted TPS are never granted formal admission to the United States for the purposes of the immigration laws.<sup>353</sup> Moreover, the period of TPS protection, and therefore lawful presence in the United States and attendant work authorization, ranges from six to eighteen months and the DHS may, at any time, decide to revoke a grant of TPS or fail to renew that grant.<sup>354</sup> Despite this fact, some immigrants have held TPS for over a decade.<sup>355</sup> Indeed, current estimates suggest that over

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349. See Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 4978, 5030 (codified as amended at 8 U.S.C. § 1254a (2012)).

350. See *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/P93Q-RH6H>].

351. See 8 U.S.C. §§ 1158(b)(2), 1254a(c)(1)-(2).

352. See *id.* § 1254a(a)(1).

353. See *Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260, 1265-66 (11th Cir. 2011) (per curiam) (deferring to DHS's position that TPS is not an admission). But, the U.S. Court of Appeals for the Sixth Circuit recently rejected DHS's position. See *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548, 554 (6th Cir. 2013).

354. 8 U.S.C. § 1254a(b)(2)-(3)

355. See, e.g., CARLA N. ARGUETA & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RS20844,

300,000 immigrants with TPS currently live and work in the United States.<sup>356</sup> The principal benefit of TPS, like parole and deferred action, is the fact that it prevents an immigrant from being “unlawfully present” and therefore enables her to obtain work authorization and, in some states, a driver’s license.<sup>357</sup> These two benefits, as discussed above, allow immigration status covering by TPS beneficiaries that permits them a certain degree of assimilation into mainstream American society.

In addition to specific statutory, regulatory, and subregulatory forms of immigration relief characterized by deferred action, parole, and TPS, some immigrants are granted a minimal amount of immigration status covering when their pending immigration cases are administratively closed by the federal government. In 2011, the Obama Administration announced a prosecutorial discretion initiative designed to halt removal cases against noncitizens with close family, educational, or other ties in the United States and to focus resources on purportedly dangerous “criminal immigrants.”<sup>358</sup> From that date to December 2013, over 30,000 pending removal cases have been administratively closed by ICE trial attorneys.<sup>359</sup> Immigrants who benefit from administrative closure are no longer in proceedings and no longer subject to instant deportation.<sup>360</sup> In many cases, immigrants in proceedings are eager to accept an offer of administrative closure, even if it means that they lose forever the opportunity to make out a case that they qualify for some form of permanent, formal immigration status.<sup>361</sup> This consigns them to a path of immigration status covering, rather than immigration status conversion. Like deferred action beneficiaries, parolees, and

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TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 8 (2016) (describing how many Liberians have lived in the United States under this status since the 1990s).

356. *Id.* at 3. As of February 2016, the most populous group was Salvadorans, with 204,000 TPS grants. *Id.* at 4 tbl.1.

357. 8 U.S.C. § 1254a(a)(1), (f).

358. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft, to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel 1, 4-5 (June 17, 2011).

359. See *Once Intended to Reduce Immigration Court Backlog, Prosecutorial Discretion Closures Continue Unabated*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Jan. 15, 2014), <http://trac.syr.edu/immigration/reports/339/> [<https://perma.cc/P793-Q8BP>].

360. See Heeren, *supra* note 15, at 1118.

361. See *id.* at 1118-19.

TPS holders, they may apply for work authorization.<sup>362</sup> Depending on the state in which they live, they may obtain a driver's license.<sup>363</sup> But, their underlying immigration status has not changed and will not change. They have no discernable path to lawful permanent residency or citizenship.<sup>364</sup> They will pay taxes but are unable to qualify for benefits like Social Security.<sup>365</sup> They will not be able to travel freely outside the United States.<sup>366</sup> They will not be able to vote or serve on a jury.<sup>367</sup> They are covered but stuck on the margins; they will never be converted.

## 2. *Covering by Operation of State Law*

*The immigrants have benefitted a lot from [California's AB 60] because before, an immigrant who was driving and was stopped due to a broken headlight, the police could stop them and impound the car. The police got a lot of money from the cars of immigrants. They know they can take them away.*

*Alondra, undocumented immigrant, California*<sup>368</sup>

*All of this stuff can just disappear.... The world that we live in, at this point in time, seems really uncertain.*

*J, state DREAM Act beneficiary, California*<sup>369</sup>

Immigration status covering is not the sole preserve of the federal government. Several states have also introduced measures designed to allow a variety of different actors to disattend to immigrants' underlying immigration statuses in order to enable those immigrants to better integrate into mainstream American society. According to the National Conference of State Legislatures, two areas in which state governments have been particularly active in

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362. *See id.* at 1158-59.

363. *See id.* at 1169-70.

364. *See id.* at 1119.

365. *See id.* at 1167.

366. *See id.* at 1159.

367. *See id.* at 1119.

368. Jennifer Chacón, *Citizenship Matters: Immigrant Vulnerabilities and Immigration Reform 18* (Mar. 10, 2016) (unpublished manuscript) (on file with author).

369. Jennifer Adaeze Okwerekwu, *First Wave of Undocumented Immigrants in Medical Schools Face Uncertain Future*, *STAT* (Mar. 18, 2016), <https://www.statnews.com/2016/03/18/medical-school-daca/> [<https://perma.cc/HZS9-RA6T>].

fostering this form of immigrant covering are access to higher education and the issuance of driver's licenses irrespective of immigration status.<sup>370</sup> States pursuing education-access initiatives or issuing driver's licenses are aware that some immigrant recipients lack the formal status that would ordinarily entitle them to receive these benefits. Yet, they have nonetheless passed laws to allow those immigrants access to the benefits, and through that access they facilitate greater immigrant integration and participation. In other words, the state laws themselves operate to foster immigration status covering.

States play a pivotal role in facilitating access to higher education by holders of all forms of immigration status. The federal government has a long-standing pattern and practice of stringently regulating and closely monitoring access to higher education by noncitizens.<sup>371</sup> Under current immigration and welfare laws, noncitizens' access to a variety of government educational benefits, including loans for undergraduate and graduate studies, is expressly restricted.<sup>372</sup> Nevertheless, individual states "may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible ... through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility."<sup>373</sup> In accordance with this provision, a number of states have enacted legislation designed to facilitate immigrant assimilation through access to education.

Since 2001, many states have passed laws or promulgated policies designed to facilitate access to higher education for all residents of the state, regardless of their immigration status.<sup>374</sup> For example,

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370. See NAT'L CONFERENCE OF STATE LEGISLATURES, REPORT ON 2015 STATE IMMIGRATION LAWS 1 (2016), [http://www.ncsl.org/documents/statefed/ImmigrationReport2015Final\\_Feb2016.pdf](http://www.ncsl.org/documents/statefed/ImmigrationReport2015Final_Feb2016.pdf) [<https://perma.cc/BV8T-WV8M>].

371. See, e.g., 8 U.S.C. § 1101(a)(15)(F) (2012) (providing criteria for admission of nonimmigrants on student visas); *id.* § 1184(m) (explaining limitations on foreign students attending publicly funded institutions, including primary and secondary schooling). However, the children of undocumented immigrants are granted free access to public primary and secondary schooling. See *Plyler v. Doe*, 457 U.S. 202, 224 (1982).

372. See 8 U.S.C. §§ 1623(a), 1611, 1641 (pertaining to undocumented immigrants); 34 C.F.R. §§ 668.130-.139 (2016) (pertaining to lawfully present migrants).

373. 8 U.S.C. § 1621(d) ("State authority to provide for eligibility of illegal aliens for State and local public benefits.").

374. *Undocumented Student Tuition: State Action*, NAT'L CONF. ST. LEGISLATURES (June

some states have allowed state high school graduates to qualify for in-state tuition at public universities.<sup>375</sup> Other states have even created in-state scholarship funds available to all residents, regardless of immigration status.<sup>376</sup>

Today, the immigrant beneficiaries of these state education access initiatives are graduating from college and attending graduate school. As a consequence, a next generation of education-related state law immigrant covering is emerging in the arena of professional licensure, particularly in law and medicine.<sup>377</sup> California, for example, has passed legislation that allows bar admission for all persons, regardless of immigration status.<sup>378</sup> Florida allows DACA recipients to sit for its state bar exam.<sup>379</sup> In 2014, a New York appellate court ruled that an undocumented law school graduate's immigration status did not prevent him from passing the state bar's character and fitness requirements.<sup>380</sup> In 2016 the Colorado Bar admitted its first DREAMer.<sup>381</sup> In the medical arena, 61 out of 145

12, 2014), <http://www.ncsl.org/research/education/undocumented-student-tuition-state-action.aspx> [<https://perma.cc/V8S9-2RX3>]; see also Margie McHugh, *Mapping the Patchwork of State 'DREAM Acts' and Postsecondary Education Policies for Unauthorized Immigrant Youth*, MIGRATION POL'Y INST. (Oct. 2015), <http://www.migrationpolicy.org/news/mapping-patchwork-state-dream-acts-and-postsecondary-education-policies-unauthorized> [<https://perma.cc/JE9J-RMQR>].

375. See, e.g., CAL. EDUC. CODE § 68130.5 (West 2016); FLA. STAT. § 1009.26 (2016); 110 ILL. COMP. STAT. 305/7e-5(a)(5), 520/8d-5(a)(5) (2016); KAN. STAT. ANN. § 76-731a(b)(2)(C) (2016); NEB. REV. STAT. § 85-502 (2016); N.M. STAT. ANN. § 21-1-4.6(B) (2016); N.Y. EDUC. LAW §§ 355(2)(h)(8), 6206(7)(a) (McKinney 2016); TEX. EDUC. CODE ANN. §§ 54.052-.053 (West 2016); UTAH CODE ANN. § 53B-8-106 (West 2016); WASH. REV. CODE § 28B.15.012(2)(e) (2016).

376. CAL. EDUC. CODE § 66021.7 (West 2016); 110 ILL. COMP. STAT. 947/67 (2016).

377. See Alan Gomez, *Qualified Illegal Immigrants Seek Rights to Practice Law*, USA TODAY (updated July 2, 2012, 1:48 AM), <http://usatoday30.usatoday.com/news/nation/story/2012-07-01/illegal-immigrants-want-to-practice-law/55943734/1> [<https://perma.cc/67J6-JHF9>]; Bryan Llenas, *Undocumented Youth with Work Permits Seek Professional Licenses*, FOX NEWS LATINO (Jan. 22, 2013), <http://latino.foxnews.com/latino/politics/2013/01/22/undocumented-youth-with-work-permits-seek-professional-licenses/> [<https://perma.cc/KG7T-9PDX>].

378. See Jennifer Medina, *Allowed to Join the Bar, but Not to Take a Job*, N.Y. TIMES (Jan. 2, 2014), <http://www.nytimes.com/2014/01/03/us/immigrant-in-us-illegally-may-practice-law-california-court-rules.html> [<https://perma.cc/J4TW-ZUNF>].

379. Jan Pudlow, *Governor Signs Undocumented Attorney Bill*, FLA. B. NEWS (June 1, 2014), [https://www.floridabar.org/\\_85256aa9005b9f25.nsf/0/52b54e465c469ee785257cdd0044afd4](https://www.floridabar.org/_85256aa9005b9f25.nsf/0/52b54e465c469ee785257cdd0044afd4) [<https://perma.cc/HFX2-UNWC>].

380. See Cristian Farias, *César Vargas Just Became New York's First Undocumented Lawyer*, N.Y. MAG. (June 5, 2015, 1:15 PM), <http://nymag.com/daily/intelligencer/2015/06/new-york-just-got-its-first-undocumented-lawyer.html> [<https://perma.cc/25UJ-MSMC>].

381. Posting of Ediberto Román, Professor of Law, Fla. Int'l Univ., [romane@fiu.edu](mailto:romane@fiu.edu), to

accredited medical schools in the United States accept applications from DACA recipients—all of which are located in states with state DREAM Act provisions.<sup>382</sup> Public university hospitals in those states have agreed to allow DACAmented students to train in their clinics and hospitals during their residencies.<sup>383</sup> In each of these states, once again, state law operates to allow an immigrant's potential employers, clients, and professional colleagues to disattend to his underlying immigration status and to treat him as an assimilated member of the mainstream.

The issuance of driver's licenses to immigrants of all statuses has proven to be more controversial than the various education access statutes and regulations. This may be because possession of a driver's license facilitates immigration status covering to a much greater extent and in a much wider variety of arenas than possession of a college degree. It may also be due, in part, to the fact that the young DREAMer recipients of in-state tuition or other educational benefits are widely regarded as both socially and culturally assimilated, as well as less culpable of immigration violations, because they entered the United States as children. Thus, the students' success at sociocultural covering also contributes to their success at immigration status covering. In contrast, those seeking driver's licenses may be of any age and any immigration status, ranging from LPRs to nonimmigrant visa holders to TPS recipients to undocumented migrant workers, many of whom lack any of the markers of assimilation evinced by the DREAMers. But, this very lack of sociocultural covering is what makes access to immigration status covering, in the form of a driver's license, so important to the immigrant recipients.<sup>384</sup>

The federal REAL ID Act of 2005 introduced strict guidelines for the issuance of state driver's and nonoperator's licenses.<sup>385</sup> Amongst other provisions, the Act places almost insurmountable barriers to the provision of regular driver's licenses to undocumented immigrants and places restrictions on the issuance of driver's licenses to

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immprof-bounces@lists.ucla.edu (Mar. 8, 2016) (on file with author).

382. See Okwerekwu, *supra* note 369.

383. See *id.*

384. See Manning & Stumpf, *supra* note 15, at 34.

385. REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2), 119 Stat. 302, 312-13 (codified as amended at 49 U.S.C. § 30301 (2012)).

nonimmigrant visa holders.<sup>386</sup> Despite specific mention in the Act of deferred action and TPS recipients as eligible for driver's licenses, several states previously refused to issue them to deferred action beneficiaries.<sup>387</sup> Today, there is consensus among all fifty states that deferred action recipients, particularly the DACAmented, may obtain driver's licenses.<sup>388</sup> However, there is widespread disagreement about the extent to which this form of immigration status covering should be extended to other immigrant groups, most notably undocumented migrants not subject to any form of federal immigration status covering.

Ten states and the District of Columbia currently permit all residents, irrespective of immigration status, to obtain driver's licenses.<sup>389</sup> Almost all of the states in question—California, Colorado, Connecticut, Illinois, Maryland, Nevada, New Mexico, Utah, Vermont, and Washington—have well-established immigrant communities, including large undocumented populations.<sup>390</sup> However, these states have adopted different approaches to the degree of immigration status covering that they will allow through driver's licensing, based upon the nature of the licenses issued. Two states, Washington and New Mexico, issue the same standard license to all applicants, regardless of their immigration status.<sup>391</sup> Two others, Colorado and Illinois, issue “temporary” licenses to a variety of immigrants, including conditional LPRs, nonimmigrant visa holders, and undocumented migrants.<sup>392</sup> The Illinois license states on its face, in bold, capital letters, that it is a temporary license and

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386. *Id.*

387. *See, e.g.,* *Ariz. Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1053, 1074-75 (D. Ariz. 2013) (finding that Arizona's efforts to deny driver's licenses to persons with DACA violated equal protection), *rev'd on other grounds*, 757 F.3d 1053 (9th Cir. 2014); *Saldana v. Lahm*, No. 4:13CV3108, 2013 WL 5658233, at \*1, \*7 (D. Neb. Oct. 11, 2013) (granting in part the motion to dismiss a challenge to Nebraska's refusal to grant a driver's license to a DACA grantee).

388. Nebraska was the last state to allow the DACAmented to obtain licenses. *See Lee, supra* note 300.

389. *See* PEW CHARITABLE TRS., *DECIDING WHO DRIVES: STATE CHOICES SURROUNDING UNAUTHORIZED IMMIGRANTS AND DRIVER'S LICENSES 1* (2015), <http://www.pewtrusts.org/~media/assets/2015/08/deciding-who-drives.pdf> [<https://perma.cc/YQU3-CY7H>].

390. *See id.* (estimating that approximately 37 percent of undocumented immigrants live in one of these states).

391. *See id.* at 7.

392. *See id.*

cannot be accepted as a form of government-issued identification.<sup>393</sup> Six states—California, Connecticut, Maryland, Nevada, Utah, and Vermont—and the District of Columbia issue alternative driver’s licenses to unauthorized migrants.<sup>394</sup> For example, the statutes in force in the District of Columbia and Maryland require that their licenses must clearly state that they are not acceptable by federal agencies for official purposes.<sup>395</sup> Utah’s “driving privilege card” is a different color from the state’s regular licenses and specifies on its face that it is “[n]ot valid for identification.”<sup>396</sup> Colorado’s “temporary license” features a black banner stripe and a statement that it may not be used for “federal identification, voting, or public benefit purposes.”<sup>397</sup>

AB 60, the California law permitting the issuance of alternative driver’s licenses to unauthorized immigrants, specifically requires that the alternative license should appear similar to the standard California license—demonstrating California legislators’ understanding of the potential stigma attached to a distinctive “second class” license.<sup>398</sup> After a series of disagreements with DHS about whether such a license would be sufficiently distinctive to comply with the requirements of the REAL ID Act,<sup>399</sup> a license featuring language on its face stating that “Federal Limits Apply” was deemed a satisfactory solution.<sup>400</sup> AB 60 is perhaps the most high-profile, and therefore most analyzed, of the immigrant covering state driver’s licensing laws. The bill, which was passed in 2013, went into effect on January 1, 2015.<sup>401</sup> Nearly 500,000 undocumented immigrants applied for driver’s licenses in California in its first

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393. See PEW CHARITABLE TRS., *supra* note 389, at 7; see also 625 ILL. COMP. STAT. 5/6-105.1 (2016).

394. See PEW CHARITABLE TRS., *supra* note 389, at 7.

395. D.C. CODE § 50-1401.01 (2016); MD. CODE ANN., TRANSP. § 16-122 (West 2016).

396. See PEW CHARITABLE TRS., *supra* note 389, at 7.

397. *Id.*

398. See CAL. VEH. CODE § 12801(d)(1) (West 2016).

399. See Ian Lovett, *Federal Officials Reject Design of California Driver’s Licenses for Illegal Immigrants*, N.Y. TIMES (May 6, 2014), <http://www.nytimes.com/2014/05/07/us/federal-officials-reject-design-of-california-drivers-licenses-for-illegal-immigrants.html> [<https://perma.cc/KU4V-Y58M>].

400. See Jeremy B. White, *Feds Give Green Light to California Immigrant Licenses*, SACRAMENTO BEE (Sept. 19, 2014, 3:47 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article2610422.html> [<https://perma.cc/4732-6T59>].

401. See *id.*



three months.<sup>402</sup> Initial reports suggest that AB 60 has had a transformative effect on the lives of its undocumented immigrant beneficiaries, enabling them to drive without fear of being stopped by state or local police, arrested, detained, or fined, and thereby facilitating their daily access to work, friends, and family.<sup>403</sup> AB 60 and the other state laws like it demonstrate the great impact that immigrant covering by operation of state law may have, even when there is no change to the immigrant beneficiaries' underlying immigration status.

### 3. Covering by Operation of Local Law

*The San Antonio Police Department's position is that we do not want to isolate the community from the police department, so we don't ask people about their immigration status. The relationship we've built with the community over the years is a fragile one. If the community got the idea that police were going to ask them for their papers, it would frighten them away from calling the police or communicating with the police in any way. We don't want to see that happen.*

*William McManus, San Antonio Police Chief, Texas*<sup>404</sup>

*Everywhere you go, everybody's asking, 'Can I have your ID? Can I have your ID?' This [city-issued ID] is good for the people who don't have the identity.*

*Wa Sutardji, immigration status unknown, New York*<sup>405</sup>

Local governments, like their state counterparts, are also increasingly engaging in rulemaking that facilitates immigration status

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402. See Press Release, Cal. Dep't of Motor Vehicles, Nearly 500,000 Apply for Licenses Under AB 60 (Apr. 3, 2015), [http://www.dmv.ca.gov/portal/dmv/detail/pubs/newsrel/newsrel15/2015\\_27](http://www.dmv.ca.gov/portal/dmv/detail/pubs/newsrel/newsrel15/2015_27) [<https://perma.cc/WNU2-PM8Y>].

403. See ASHAR ET AL., *supra* note 15, at 34.

404. POLICE EXEC. RESEARCH FORUM, VOICES FROM ACROSS THE COUNTRY: LOCAL LAW ENFORCEMENT OFFICIALS DISCUSS THE CHALLENGES OF IMMIGRATION ENFORCEMENT 7 (Craig Fischer ed., 2012), [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Immigration/voices%20from%20across%20the%20country%20-%20local%20law%20enforcement%20officials%20discuss%20the%20challenges%20of%20immigration%20enforcement%202012.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Immigration/voices%20from%20across%20the%20country%20-%20local%20law%20enforcement%20officials%20discuss%20the%20challenges%20of%20immigration%20enforcement%202012.pdf) [<https://perma.cc/59MR-SENE>].

405. Hansi Lo Wang, *New York City ID Could Open Up Doors—and Privacy Concerns*, NPR (Jan. 12, 2015, 4:18 PM), <http://www.npr.org/2015/01/12/376788822/new-york-city-id-could-open-up-doors-and-privacy-concerns> [<https://perma.cc/CQ37-FW6P>].

covering by the immigrant communities that live within their borders.<sup>406</sup> Municipal governments may have no formal role to play in the promulgation of immigration laws, but they nonetheless play an important role in the regulation of the daily lives and experiences of immigrants within their communities.<sup>407</sup> As discussed in Part II.B, in localities pursuing immigrant-exclusionary policies, local laws can create an environment that effectively mandates immigration status passing. In localities seeking to foster social integration by immigrants, municipal laws and policies can have a very different effect, facilitating immigration status covering. This form of immigrant covering is evident in a variety of local government initiatives, including sanctuary city ordinances and municipal identification card initiatives.

So-called sanctuary laws are currently in force in cities throughout the United States—ranging from major urban centers such as New York City and Los Angeles,<sup>408</sup> to smaller towns such as Durango, Colorado,<sup>409</sup> and Ashland, Oregon.<sup>410</sup> Sanctuary laws—whether statutes, resolutions, ordinances, or executive orders—were initially introduced in the 1970s and 1980s to prevent state and local police from engaging in the enforcement of federal immigration laws or handing immigrants in local custody over to federal immigration authorities.<sup>411</sup> Today, these laws and policies have evolved

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406. See, e.g., Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1374-75 (2006) (providing several examples of such rulemaking).

407. I have written elsewhere about the increasingly important role of immigrant-inclusionary initiatives at the state and local level. See Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 734-36, 744-47 (2013).

408. See Aaron Morrison, *Immigrant Identification Card: New York City Issues Over 730K Free IDs, One Year After Program Launches*, INT'L BUS. TIMES (Jan. 13, 2016, 11:00 AM), <http://www.ibitimes.com/immigrant-identification-card-new-york-city-issues-over-730k-free-ids-one-year-after-2263399> [<https://perma.cc/L2NB-WD5L>].

409. See Laura Sullivan, Comment, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 576-77 (2009).

410. See NAT'L IMMIGRATION LAW CTR., LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES 16 (2008), <http://www.ailadownloads.org/advo/NILC-LocalLawsResolutionsAndPoliciesLimitingImmEnforcement.pdf> [<https://perma.cc/B6BU-7VKM>].

411. See Pham, *supra* note 406, at 1382-83; see also Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1683-85 (2009) (discussing San Francisco's sanctuary law).

to encompass the provision of a wide variety of services to immigrant residents.<sup>412</sup> But for many immigrants—particularly undocumented migrants who live in constant fear of removal from the country—the law enforcement noncooperation provisions remain of paramount importance. In 2008, approximately seventy local jurisdictions had prevented their law enforcement officials from inquiring into an individual’s immigration status or discriminating against persons on the basis of that status.<sup>413</sup> Noncooperation with federal immigration authorities is, or at some point in the recent past has been, a routine part of local law enforcement policies and practices in California, Maine, Illinois, Massachusetts, New Mexico, New York, and Oregon.<sup>414</sup>

The immigration status covering embodied in these sanctuary ordinances is particularly striking because provisions in the IIRIRA explicitly bar local governments from preventing their employees from “[e]xchanging such information with any other Federal, State, or local government entity.”<sup>415</sup> Legal challenges to local sanctuary laws based on the relevant clauses of those federal laws have, however, thus far been unsuccessful. One such failed attempt was a 2009 lawsuit seeking to enjoin Los Angeles’s Special Order 40, which precludes Los Angeles Police Department (LAPD) officers from inquiring into individuals’ immigration statuses or arresting individuals on the suspicion of having committed immigration-related crimes.<sup>416</sup> In that case, *Sturgeon v. Bratton*, the California Court of Appeals held that nothing in the federal laws prohibited states and localities from instructing their officers to refrain from

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412. See Pham, *supra* note 406, at 1389-91; see also, e.g., Jennifer Medina, *New Haven Approves Program to Issue Illegal Immigrants IDs*, N.Y. TIMES (June 5, 2007), <http://www.nytimes.com/2007/06/05/nyregion/05haven.html> [<https://perma.cc/UJ32-6DFK>] (detailing the benefits the New Haven sanctuary laws afford immigrant residents).

413. See NAT’L IMMIGRATION LAW CTR., *supra* note 410, at 1-20.

414. See *id.* at 1-2, 6-8, 14-16. State measures limiting state enforcement of federal immigration restrictions have included, for example, OR. REV. STAT. § 181A.820(1) (2016); Me. Exec. Order No. 13 FY 04/05 (Apr. 9, 2004), *rescinded by* Me. Exec. Order No. 08 FY 11/12 (Jan. 6 2011); N.M. Exec. Order No. 2005-019 (Apr. 7, 2005), *rescinded by* N.M. Exec. Order 2011-009 (Jan. 31, 2011).

415. 8 U.S.C. § 1373(b)(3) (2012); see also *id.* § 1644 (“[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).

416. *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 722-23 (Ct. App. 2009).

obtaining information about immigrants' statuses, and thus federal law did not preempt the LAPD order.<sup>417</sup> Local governments therefore enjoy the discretion, in exercise of their police powers, to determine how best to allocate their resources, including deploying those resources in such a way as to disattend to their immigrant residents' formal immigration statuses.

One recent example of immigration status covering through the operation of local law is the issuance of municipal identification cards to all residents, irrespective of immigration status. A number of cities, including New Haven, Connecticut, Oakland, California, San Francisco, California, and Richmond, California, have implemented these municipal ID programs.<sup>418</sup> Similar county-wide "community IDs" have been issued by Johnson County, Iowa,<sup>419</sup> and Mercer County, New Jersey.<sup>420</sup> These photographic IDs, issued by city or county officials to all persons who can demonstrate residence in the locality, are designed primarily to help local residents access city services and obtain the assistance of police.<sup>421</sup> In some localities, the cards fulfill these functions directly, by operating as a library card or parking card.<sup>422</sup> In other locations, they are accepted as a government-issued ID that enables the holder to join a city library or access a city park facility, such as a beach or swimming pool.<sup>423</sup> The cards may also be used to open bank accounts or collect prescription medications from pharmacies.<sup>424</sup> Apparently, the cards have proven to be particularly helpful for immigrants unable to obtain any other form of U.S. government-issued ID, such as a state driver's license.<sup>425</sup> Once again, possession of a municipal ID card

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417. *Id.* at 731-33.

418. See CTR. FOR POPULAR DEMOCRACY, WHO WE ARE: MUNICIPAL ID CARDS AS A LOCAL STRATEGY TO PROMOTE BELONGING AND SHARED COMMUNITY IDENTITY 11, 14, 16 (2013) [hereinafter WHO WE ARE], <https://populardemocracy.org/sites/default/files/municipal%20id%20report.pdf> [<https://perma.cc/K6B3-J7P4>].

419. See THE CTR. FOR POPULAR DEMOCRACY, BUILDING IDENTITY: A TOOLKIT FOR DESIGNING AND IMPLEMENTING A SUCCESSFUL MUNICIPAL ID PROGRAM 1 (2015) [hereinafter BUILDING IDENTITY], <http://populardemocracy.org/sites/default/files/Municipal-ID-Report-web.pdf> [<https://perma.cc/G5SV-MB9E>].

420. See WHO WE ARE, *supra* note 418, at 21.

421. See *id.* at 7-8.

422. *Id.* at 12, 14, 18-19, 21-22 (providing detailed accounts of such localities).

423. See *id.* at 12.

424. See *id.* at 14, 17, 19, 21.

425. See BUILDING IDENTITY, *supra* note 419, at 1-2.

does not affect an immigrant's underlying immigration status in any way. But it allows her to access certain goods and services that require a photo identification without needing to use fraudulent documents to pass as a holder of a different immigrant status. Her underlying status is not converted, but she is given a means to ensure that actors who would ordinarily attend to that status, and discriminate against her accordingly, disattend to her disfavored characteristic and treat her like her more assimilated peers.

### III. THE CONSEQUENCES OF IMMIGRANT COVERING

In the continued absence of comprehensive immigration reform, which could allow widespread immigration status conversion,<sup>426</sup> and in the face of myriad pressures on immigrants to actively conceal their immigration status and pass as holders of a more privileged status,<sup>427</sup> the rise of immigration status covering seems inevitable. For those who are in favor of greater integration of all immigrant groups, irrespective of formal legal status, it also appears, at first glance, to be normatively desirable. Federal laws and regulations, state statutes, and local ordinances that facilitate immigration status covering actively contribute to the inclusion of disfavored immigrant communities, allowing hitherto marginalized groups and individuals to better integrate into American society. For this reason, many immigrants and their allies and advocates have offered unalloyed praise for federal law covering programs such as DACA, state law covering initiatives such as alternative driver's licenses, and local law covering schemes such as municipal ID cards. The scholarly literature on covering in other, nonimmigration contexts, however, suggests that such a view may oversimplify the consequences of a complex phenomenon. This Part therefore builds upon the insights gleaned from the scholarly literature critiquing covering in other contexts to discuss the potential advantages and pitfalls of our growing national reliance on immigrant covering.

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426. See Blake, *supra* note 10.

427. See *supra* Part II.B.

A. *The Potential Advantages of Immigrant Covering*

*Throughout my life I never thought it would be such a big deal being illegal until I got to high school and starting [sic] applying for my licenses or college scholarships. Obviously I was denied for not having a social security number. Later on Mr. President Obama gave us an opportunity named deferred action and it has opened to [sic] many doors for me! I'm truly blessed. I was able to obtain my driver licenses [sic] and continue school. Honestly my life has completely changed.*

*Allison, DACA beneficiary, North Carolina*<sup>428</sup>

*[W]e need the right to work. We deal with it every day. You are working under low salaries, exploitation, bad working conditions. You have to deal with it every day.*

*Anonymous, undocumented immigrant, California*<sup>429</sup>

Immigration status covering provided by governmental actors at the federal, state, and local levels has the potential to transform the lives of immigrant communities. The scholarly literature on covering because of race, gender, and sexual identity suggests that covering may allow individuals access to otherwise foreclosed opportunities.<sup>430</sup> That is undoubtedly true in the immigration context. On a practical level, immigration status covering can open up a variety of opportunities for immigrants whose options for education, employment, and access to goods and services were previously limited. Less tangible, but equally significant, immigration status covering can provide some psychological benefits for individuals who were previously crippled by chronic fears of deportation and other experiences of societal alienation.<sup>431</sup> This is particularly true for unauthorized immigrants, whose struggles have been extensively documented by social science researchers.<sup>432</sup>

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428. MY IMMIGR. STORY, *supra* note 96.

429. Chacón, *supra* note 368, at 20.

430. See discussion *supra* Part I.C.

431. See, e.g., Carola Suárez-Orozco et al., *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438, 443-44, 451-56, 459 (2011) (detailing the trauma associated with unauthorized status).

432. See, e.g., DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 118-26 (2002) (detailing the negative effect of undocumented status on wages).

But refugees and asylees, nonimmigrant visa holders, and even certain LPRs may benefit from being treated on par with U.S. citizens, although they do not hold that formal legal status.

The practical advantages of immigration status covering can be seen through the impact of federal programs, such as deferred action, parole, TPS, and administrative closure, when they are accompanied by the issuance of an employment authorization document to a previously undocumented immigrant beneficiary. As discussed in detail in Part II.B, federal immigration laws tightly regulate the employment of immigrants on the theory that “[e]mployment in the United States is not an inherent right,” but instead “a matter of administrative discretion.”<sup>433</sup> The IRCA provides for harsh penalties for employers hiring undocumented workers<sup>434</sup> and underscores the immigration removal consequences for any immigrants working without authorization—whether because they are undocumented or not authorized to work in the United States under the terms of their nonimmigrant visas.<sup>435</sup> As a consequence, as discussed in Part II.B, immigrants who lack employment authorization but work to support themselves and their families frequently pass as authorized workers. In so doing, they may violate a range of federal and state immigration and criminal laws and regulations—particularly if they work under an assumed name using fabricated identity documents—putting them at risk of civil sanctions and criminal penalties.<sup>436</sup> Because of unauthorized workers’ fears of the risks of discovery, their employment is often underpaid and underregulated, with widespread wage theft, wage and hour violations, and health and safety infractions by unscrupulous employers.<sup>437</sup> Undocumented immigrants with postsecondary education also often find themselves underemployed, working in subminimum wage jobs, despite their college degrees and other

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433. Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079, 25,080-81 (May 5, 1981) (codified at 8 C.F.R. pt. 109).

434. See Immigration Reform and Control Act of 1986 § 101, 8 U.S.C. § 1324a(e)-(f) (2012).

435. 8 U.S.C. § 1227.

436. See, e.g., 18 U.S.C. § 1546 (2012).

437. See Wishnie, *supra* note 239, at 214. Median household income of unauthorized immigrants was \$36,000 in 2007, compared to \$50,000 for their U.S.-born counterparts. See JEFFREY S. PASSEL & D’VERA COHN, PEW RESEARCH CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 16 (2009), <http://www.pewhispanic.org/files/reports/107.pdf> [<https://perma.cc/37BS-QWTH>].

advanced qualifications.<sup>438</sup> Obtaining work authorization has an immediate effect on the employment prospects of an undocumented worker.<sup>439</sup> For example, some deferred action recipients describe wage increases, access to company benefit programs, and eligibility for graduate trainee programs among the short-term employment consequences of receiving employment authorization documents.<sup>440</sup>

The provision of driver's licenses by state governments appears to have a similarly immediate and fundamental effect on the lives of previously ineligible immigrants. Many undocumented immigrants, refugees, asylees, and nonimmigrant visa holders live in areas without comprehensive public transit systems.<sup>441</sup> As a result, in order to work, take children to school, attend church, or seek medical care, immigrants in these areas drive without a license.<sup>442</sup> As with working without authorization, driving without a valid license can lead to a variety of serious outcomes, including fines, the impounding of the vehicle, the arrest and detention of the immigrant driver, and even potentially the immigrant being placed in removal proceedings and deported from the country.<sup>443</sup> Tellingly, in a recent study of undocumented immigrants in Southern California undertaken by Professors Sameer Ashar, Jennifer Chacón, Susan Bibler Coutin, and Stephen Lee, many interviewees frequently and spontaneously discussed how their lives had been transformed positively by the passage of California's AB 60, which allows certain qualified undocumented immigrants to obtain driver's licenses.<sup>444</sup>

State education access initiatives are another form of immigration status covering that appear to offer many practical advantages

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438. See ASHAR ET AL., *supra* note 15, at 16.

439. See, e.g., ROBERTO G. GONZALES & VERONICA TERRIQUEZ, IMMIGRATION POLICY CTR., HOW DACA IS IMPACTING THE LIVES OF THOSE WHO ARE NOW DACAMENTED: PRELIMINARY FINDINGS FROM THE NATIONAL UNDACAMENTED RESEARCH PROJECT (2013), [https://www.americanimmigrationcouncil.org/sites/default/files/research/daca\\_final\\_ipc\\_csii\\_1.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/daca_final_ipc_csii_1.pdf) [<https://perma.cc/PPV3-9MVV>]; see also PATLER & CABRERA, *supra* note 296, at 20.

440. See PATLER & CABRERA, *supra* note 296, at 21. But there is no guarantee that this will be the case. See Jason Dzubow, *Immigration Rant*, GREEN CARD (Immigration Law Section, Fed. Bar Ass'n, Arlington, Va.), Winter 2016, at 3-4, <http://www.fedbar.org/Image-Library/Sections-and-Divisions/Immigration/Winter-2016--Green-Card.aspx> [<https://perma.cc/ULU7-BHTZ>].

441. See, e.g., ASHAR ET AL., *supra* note 15, at 18.

442. See *id.*

443. See *id.*

444. See *id.* at 34.



to their immigrant recipients. As the U.S. Supreme Court recognized in 1982 in *Plyler v. Doe*, education is the foundation of basic integration, without which immigrant newcomers would be denied “the ability to live within the structure of our civic institutions, and foreclose[d] [from] any realistic possibility ... [to] contribute in even the smallest way to the progress of our Nation.”<sup>445</sup> Any form of postsecondary education, but particularly college attendance, has been shown to be a highly effective route for the inclusion of immigrant youth into American society.<sup>446</sup> Education access initiatives, most notably those involving tuition assistance, have significantly improved both the economic well-being and the sociocultural integration of young immigrants.<sup>447</sup>

At the local level, immigration status covering instruments, such as municipal ID cards, appear to play a similarly important practical role. For example, the opportunity to use such cards to open bank accounts has purportedly led to increased community safety.<sup>448</sup> In communities where undocumented immigrants are unable to produce the requisite identification documents to open bank accounts, immigrants routinely carry large sums of cash on their persons or store large sums of cash in their homes, making them easy targets for criminals.<sup>449</sup> These same immigrants are wary of any contact with police officers, because of their lack of formal immigration status.<sup>450</sup> As a consequence, when they are the victims of crime—whether muggings or burglaries—they are unlikely to report the crime to the authorities, leading to unchecked criminal activity and widespread threats to public safety.<sup>451</sup> Anecdotal accounts from localities that have introduced their own local identification documents suggest that those municipal or community ID cards have considerably ameliorated this problem.<sup>452</sup>

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445. 457 U.S. 202, 223 (1982) (striking down state denial of public primary and secondary education to undocumented children).

446. See Sandy Baum & Stella M. Flores, *Higher Education and Children in Immigrant Families*, FUTURE CHILDREN, Spring 2011, at 171, 183-84.

447. See *id.* at 184.

448. See WHO WE ARE, *supra* note 418, at 11, 17-18.

449. See *id.* at 11.

450. See *id.*

451. See *id.*

452. See *id.* at 11, 16-18, 20.

In addition to these practical benefits, there are also clear psychological advantages for the subjects of federal, state, and local immigrant covering initiatives when compared to their peers who engage in immigration status passing. Immigrants passing in their daily lives as holders of a different immigration status, and violating criminal and civil laws to do so, live in constant fear of discovery and its consequences. First and foremost, these covering laws go some way to reducing the immigrant beneficiaries' fears of the imminent risk of arrest leading to deportation.<sup>453</sup> As discussed in Part II.C, all of the federal immigration status covering provisions—deferred action, parole, TPS, and administrative closure—are of limited temporal duration and may, theoretically, be revoked at any time at the federal government's pleasure. Nonetheless, the recipients of these benefits have a more formalized relationship with the federal immigration authorities than undocumented immigrants who have had no such contact. Immigrants subject to deferred action, parole, TPS, and administrative closure have been assessed as a lower removal priority than their undocumented peers and thus have more confidence that an encounter with government authorities, such as a routine traffic stop, will not inexorably lead to deportation.<sup>454</sup> This greater confidence could even extend to individuals theoretically eligible for certain forms of federal immigration status covering who chose not to apply for it. Thus, even DACA-eligible youth who have chosen not to apply for the program may believe that their presumptive eligibility offers them some degree of protection from apprehension and removal because others in their situation have been deemed to be a low enforcement priority.<sup>455</sup>

Another notable psychological benefit of immigration status covering initiatives is that they go some way toward enabling immigrants to be their authentic selves in their everyday lives. The access to employment authorization or to a driver's license in an immigrant's own name is not valuable just because it obviates the

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453. See PATLER & CABRERA, *supra* note 296, at 25-26.

454. See ASHAR ET AL., *supra* note 15, at 14.

455. But individuals who are not priorities for removal are hardly immune from deportation. See Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR 437, 439-40, 472-73, 491-93, 498-99 (2013) (discussing the deportation of purportedly low-priority noncitizens with attention to one particular case).

need to pass by using false documents and the attendant risk of arrest, detention, and deportation.<sup>456</sup> It is also valuable because it permits a degree of openness about an immigrant's fundamental identity in the workplace, in social settings, and in encounters with the police and other government officials. Alongside this greater openness and authenticity come increased feelings of acceptance by the broader American community and more opportunities for participation and belonging in mainstream society. In short, immigration status covering, whether by operation of federal, state, or local laws, has several clear advantages for many immigrant individuals and their communities.

### *B. The Potential Pitfalls of Immigrant Covering*

*[P]rograms like DACA ... they're Band-Aids, they are not the solution. I fear and think a lot of people fear that these Band-Aids will just keep popping off ... it's not permanent. It's like stuck in this limbo.*

*Undocumented immigrant community organizer, California*<sup>457</sup>

*I would be satisfied even with being a resident.... If I were a resident I could go back to my country, and I could visit my family. If there's an emergency, I could get on a flight and go. I could get a better job. I could—there are more advantages for those that have papers than for those that don't. So I don't ask for much, I just ask to be a resident.*

*Oralia, undocumented immigrant, California*<sup>458</sup>

Like many other forms of covering, immigration status covering is not without significant disadvantages—some of which are readily apparent and some of which are less so. Scholars critiquing covering in other legal contexts underscore the ways in which individual authenticity, and acknowledgment of the individual's experiences and struggles, are either minimized or sacrificed to facilitate majoritarian comfort.<sup>459</sup> This is also the case in the context of

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456. Cf. ASHAR ET AL., *supra* note 15, at 10 n.7.

457. Chacón, *supra* note 368, at 27 n.85.

458. *Id.* at 23.

459. See, e.g., Onwuachi-Willig, *supra* note 59, at 884-86; Brandon Paradise, *Militant Covering*, 33 WASH. U. J.L. & POL'Y 161, 176 (2010); Russell K. Robinson, *Uncovering Cover-*

immigrant covering. Immigration status covering laws, regulations, and ordinances at the federal, state, and local levels may enable immigrants to downplay their disfavored characteristics, most often undocumented status.<sup>460</sup> As a consequence, the majority society in which the immigrants live may disattend to the harsh realities that are the hallmark of life for those with limited or no formal immigration status, and the immigrants themselves may benefit from greater (superficial) social acceptance and sociocultural integration. But immigrants subject to immigration status covering measures are burdened by the temporariness and contingency of the benefits that they enjoy through those measures, all of which are wholly dependent on the grace of the majority group, rather than the rights and human dignity of the immigrants. Moreover, in order to attain the benefits of the covering laws, immigrants are required to come forward and report their true underlying status to government authorities,<sup>461</sup> and those authorities could change their policies at any time and use that information against the immigrants in question.<sup>462</sup> Indeed, following the recent election of President Donald J. Trump, immigrant advocacy organizations fear such a change may occur.<sup>463</sup> The enduring fragility and vulnerability of the immigrant's underlying status is not addressed in any way—if anything, the very same laws that provide a vehicle for majority group disattention work to calcify the stigma of being undocumented. By eliding the differences between those lacking immigration status and those with status, the struggles of various immigrant communities become decreasingly visible. Further, covering immigrants themselves may become complicit in this process, accepting immigration status covering laws as “good enough,” thereby decreasing advocacy for comprehensive immigration reform and the availability of widespread immigration status conversion. Taken together, these are the potential harms of immigration status

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ing, 101 NW. U. L. REV. 1809, 1810, 1838 (2007) (reviewing YOSHINO, *supra* note 16).

460. *Cf.* Yoshino, *supra* note 16, at 772, 864 (discussing how covering downplays characteristics and the connection between legal regulation and covering).

461. *See, e.g.*, FORM I-821D, *supra* note 294.

462. *See* ASHAR ET AL., *supra* note 15, at 3-4, 20-21.

463. *See* Max J. Rosenthal, *Immigration Lawyers Are Advising Their Undocumented Clients to Stay in the Shadows*, MOTHER JONES (Nov. 23, 2016, 6:03 AM), <http://www.motherjones.com/politics/2016/11/what-immigration-lawyers-are-telling-clients-trump-administration> [<https://perma.cc/L4MC-RVVT>].

covering laws—while superficially appealing, they risk cementing stigmatized undocumented identity at the unobserved core of political discourse about immigration.

Impermanence, vulnerability, and absolute reliance on the continued good grace of the majority define immigration status covering laws. As discussed in detail in Part II.C, each of the immigration status covering mechanisms involve some degree of temporariness and contingency, rather than permanent status transformation and protection. An integral part of the temporal limitations of the various federal immigrant covering programs are additional burdens placed on the immigrant beneficiaries, which they must meet in a timely fashion or risk being placed in removal proceedings. For example, DACA and TPS, along with their attendant work authorization grants, must be renewed regularly, which involves submitting documentary evidence to show that all of the prerequisite qualifications are still met as well as requiring the payment of filing fees costing hundreds of dollars, and attendance at a biometrics interview to be photographed and fingerprinted.<sup>464</sup> Moreover, all beneficiaries of federal immigrant programs—whether DACA, TPS, parole, or administrative closure—must also notify the federal immigration authorities of their new contact information within ten days if they move homes.<sup>465</sup> In other words, while attempting to downplay their disfavored characteristics and blend into the mainstream in their daily lives, vulnerable immigrants are also subject to constant government surveillance and heightened scrutiny by the authorities as they attempt to comply with covering laws.

In addition to the heightened monetary burden for the beneficiaries of federal immigration status covering initiatives, there is also a potential burden of increased vulnerability to adverse discretionary decision-making by governmental actors. Although they enjoy temporary protection from being a removal priority in contrast with

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464. The current application fee for DACA, including employment authorization and biometric services is \$495. *I-821D, Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-821d> [<https://perma.cc/TZL8-9PQ9>] (last updated Dec. 22, 2016). The fee for TPS is currently \$50, plus an additional \$410 for employment authorization, and \$85 for biometrics. See *Temporary Protected Status*, *supra* note 350.

465. See 8 U.S.C. § 1305(a) (2012); U.S. CITIZENSHIP & IMMIGRATION SERVS., OMB No. 1615-0007, FORM AR-11: ALIEN'S CHANGE OF ADDRESS CARD (2015), <https://www.uscis.gov/sites/default/files/files/form/ar-11.pdf> [<https://perma.cc/B6C9-739Z>].

other undocumented migrants, their information is also stored in federal databases and therefore also available to state and local law enforcement officers.<sup>466</sup> This makes them particularly vulnerable to overenforcement initiatives by police officers—such as “broken windows” policing in high-immigration areas.<sup>467</sup> Moreover, should they be arrested or detained for minor offenses, they can be immediately placed in removal proceedings.<sup>468</sup> Indeed, immigrant vulnerability and reliance on discretionary decision-making, what Professor Jennifer Chacón calls “administrative grace,”<sup>469</sup> are in many respects the hallmark of immigration status covering initiatives. Although these initiatives are the product of statutory and administrative rulemaking at the federal, state, and local levels, there is nonetheless a tremendous degree of discretion accorded to the federal, state, and local administrators charged with administering the various programs.<sup>470</sup> As discussed in Part II.C, with respect to federal immigration status covering, it is impossible to appeal outside the administrative agency for denial of certain statuses, as in DACA.<sup>471</sup> Moreover, the eligibility for that program is defined entirely in internal memoranda, rather than by statute or regulation.<sup>472</sup>

Administrative closure is even more of a “black hole.”<sup>473</sup> While some ICE Chief Counsel offices routinely exercise their prosecutorial discretion to administratively close cases others do so much less often, and there is no real process to challenge this discrepancy.<sup>474</sup>

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466. See Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 105-111 (2014) (describing the interoperability of DHS and FBI databases and increasing data sharing at the federal, state, and local level).

467. See Rachel E. Rosenbloom, Essay, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149, 179-84, 191 (2016) (describing how “over-policing has become the norm”).

468. See *id.*

469. Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 711 (2015).

470. See Heeren, *supra* note 15, at 1126, 1150-51.

471. See 8 U.S.C. § 1252(a)(2)(A)-(C) (2012); Legomsky, *supra* note 209, at 1624.

472. See *Texas v. United States*, 86 F. Supp. 3d 591, 607-13 (S.D. Tex. 2015).

473. See Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141, 2186-88 (2016) (explaining administrative law’s “black hole” concept).

474. See Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 45, 47 (2013).

Covering laws thus serve to decrease both the social visibility of the disfavored immigrant *and* to curtail any potential scrutiny of the treatment that she receives at the hands of governmental actors.

However, the greatest fear shared by many immigrant beneficiaries of immigration status covering programs is that because of their liminal nature, grounded merely in the exercise of prosecutorial discretion, the programs could be abolished at any time.<sup>475</sup> When he announced the DAPA program, President Obama exhorted undocumented immigrants to “come out of the shadows and get right with the law.”<sup>476</sup> But taking the step to abandon immigration status passing, and to rely instead on covering provisions, could leave the immigrant beneficiaries socially and politically exposed and vulnerable to criminal and civil penalties, including deportation, if the covering programs were to be cancelled.<sup>477</sup> A new administration with different immigration priorities could abolish the DACA and DAPA programs, institute blanket policies canceling grants of deferred action, or remove countries from the list of those eligible for TPS.<sup>478</sup> Indeed, organizations advising President Trump have already proposed that he do just that when he assumes office.<sup>479</sup> The very same lack of statutory language, notice-and-comment rulemaking, and judicial oversight that has made federal immigration status covering possible makes it vulnerable to abolition at any time. The same is true, albeit to a lesser extent, of state and local initiatives designed to assist immigrant communities. State legislatures with different compositions or agendas could abolish previous laws pertaining to immigrant access to education or driver’s licenses. Localities could revoke sanctuary city ordinances or cease to issue municipal IDs. This is far from just a theoretical fear; over the years, the federal government has promulgated and then abandoned a number of different immigration enforcement priorities,<sup>480</sup> and

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475. See ASHAR ET AL., *supra* note 15, at 20.

476. Obama, *supra* note 303.

477. See ASHAR ET AL., *supra* note 15, at 20.

478. See CTR. FOR IMMIGRATION STUDIES, A PEN AND A PHONE: 79 IMMIGRATION ACTIONS THE NEXT PRESIDENT CAN TAKE 5, 8-9 (2016), [http://cis.org/sites/cis.org/files/79-actions\\_1.pdf](http://cis.org/sites/cis.org/files/79-actions_1.pdf) [<https://perma.cc/7W52-M2WJ>].

479. See Brian Bennett, *Yes, Trump Can Boost Deportations and Gut the Dreamer Program for Young Immigrants*, L.A. TIMES (Nov. 10, 2016, 7:15 PM), <http://www.latimes.com/nation/la-na-trump-immigration-20161109-story.html> [<https://perma.cc/J88N-Z4D2>].

480. See Cox & Rodríguez, *supra* note 14, at 128-30.

a number of states have passed and then repealed education access laws designed to aid immigrant youth.<sup>481</sup> This leaves the immigrants who have outed themselves by providing information to federal, state, and local government authorities about their biographic information, including their formal immigration status, uniquely vulnerable to both social stigma and law enforcement actions, including those that may ultimately lead to their deportation.

There is also an additional risk in increasing reliance on immigration status covering provisions, rather than legislative and regulatory rulemaking. Namely that these programs become, by default, a permanent alternative to immigration lawmaking. The congressional gridlock over comprehensive immigration reform over the last twenty years<sup>482</sup> and the inflammatory rhetoric around immigration during the 2016 presidential race<sup>483</sup> suggest that it is highly unlikely that the INA will be reformed in the near future. In the meantime, 11.3 million undocumented immigrants will continue to reside in the United States, as will over 2 million nonimmigrant visa holders, hundreds of thousands of refugees, and millions of LPRs who are unable or unwilling to naturalize as U.S. citizens.<sup>484</sup> Immigration status covering measures may allow these immigrants to better integrate into mainstream society in the short- and medium-term, but they do nothing to promote the long-term integration of all immigrants in the American polity. To the contrary, these measures functionally reinforce the stigma of being either undocumented or the holder of a less privileged status, such as nonimmigrant, by doing nothing to obviate the true underlying hardships at the core of that status and simultaneously diverting the majority's attention away from those hardships.

It is telling that during the 2013 congressional debates about comprehensive immigration reform, the most contentious issue

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481. In 2003, Oklahoma passed an in-state tuition bill for DREAMers but then swiftly ended DREAMer eligibility in 2008 in passing new OKLA. STAT. tit. 70, § 3242 (2016) and amending § 3242(C). In 2009, Wisconsin passed a similar bill, but then repealed it in 2011. See WIS. STAT. ANN. § 36.27(2)(cr) (West 2010) (repealed 2011).

482. See, e.g., Jaime Fuller, *Americans Are Ready for Immigration Reform. They Are Just Not Ready Enough.*, WASH. POST (July 14, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/07/14/americans-are-ready-for-immigration-reform-they-are-just-not-ready-enough/> [<https://perma.cc/JY5A-ENAK>].

483. See Burns, *supra* note 8; Martin & Healy, *supra* note 8.

484. See PASSEL ET AL., *supra* note 214, at 5; Zong & Batalova, *supra* note 126.



debated was whether to provide an eventual pathway to citizenship for currently undocumented migrants.<sup>485</sup> During the 2016 Republican presidential candidate debates, there was almost universal condemnation by all the candidates of the idea of a pathway to citizenship for the undocumented<sup>486</sup> and vehement critique by some candidates of the presence of any undocumented immigrants in the United States.<sup>487</sup> This underscores the continued valence of the stigma of undocumented status. Covering laws do nothing to challenge or change that stigma. Instead, federal, state, and local governmental actors have taken steps to reduce the visible hallmarks of being undocumented—such as an inability to work, drive, attend school, or get a professional license.<sup>488</sup> As with covering in other contexts, immigrant covering functions in such a way as to reduce the discomfort of the majority. It reduces majoritarian discomfort by obscuring obvious differences between less privileged immigrants and their mainstream neighbors. But in so doing, it in no way undermines majority condemnation of unauthorized migration; rather, it preserves space for the majority to disapprove of the undocumented in theory, without confronting their reality in practice.<sup>489</sup>

If this situation continues—and there is no reason to believe that it will not—the covered immigrant communities risk becoming a permanent, yet invisible, underclass. They will be taxpayers who are ineligible for government benefits, such as healthcare and social security retirement. They will be more vulnerable to discrimination by government entities and employers and less likely to avail themselves of the protections of the courts. They will be at risk of chronic overpolicing by the local, state, and federal authorities that hold their information. They will be disproportionately financially burdened by regular reregistration requirements. Through all of

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485. See Fuller, *supra* note 482; Sean Sullivan, *Rand Paul and Why the 'Pathway to Citizenship' Question Is So Delicate for the GOP*, WASH. POST (Mar. 19, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/03/19/rand-paul-and-why-the-pathway-to-citizenship-question-is-so-delicate-for-the-gop/> [https://perma.cc/YKT3-42CA].

486. See, e.g., *Transcript of the Republican Presidential Debate in Florida*, N.Y. TIMES (Mar. 11, 2016), <http://www.nytimes.com/2016/03/11/us/politics/transcript-of-the-republican-presidential-debate-in-florida.html> [https://perma.cc/5P32-23ZF] (outlining each candidate's views on immigration reform).

487. See Burns, *supra* note 8; Martin & Healy, *supra* note 8.

488. See ASHAR ET AL., *supra* note 15, at 6, 9, 14.

489. Cf. YOSHINO, *supra* note 16, at ix-xi.

this, they will have no options to enjoy the rights and privileges of their citizen and LPR peers; they will not be able to travel freely or sponsor family members to join them in the United States. But precisely because the covering measures have enabled them to enjoy some degree of integration into the mainstream, for many immigrants and their potential U.S. citizen allies, immigration status covering may be seen as good enough.<sup>490</sup> Fear of jeopardizing what little foothold they have gained in mainstream society through work authorization, driver's licenses, or sanctuary ordinances may even dissuade the immigrant beneficiaries of status covering initiatives from pushing for meaningful reform that could lead to full status conversion.<sup>491</sup>

Moreover, even the most widespread, or potentially far-reaching immigration status covering programs, such as DACA or DAPA, cannot reach all of the undocumented immigrants currently living in the shadows.<sup>492</sup> So, in addition to potentially creating a permanent underclass composed of beneficiaries of federal immigration status covering, reliance on such programs rather than more thoroughgoing reform also risks the creation of a permanent under-underclass of the "super undocumented" who are ineligible for any covering programs.<sup>493</sup> These individuals, whether because of criminal records, immigration and removal history, or other family or associational constraints would be permanently excluded.<sup>494</sup> Further, they would be permanently excluded in a sociopolitical climate within which being undocumented would be perhaps even more vilified than it is today—precisely because of the success of the covering laws in fostering majoritarian disattention to the realities of life for unauthorized immigrants. In short, immigration status covering may, for many immigrants and their allies, be the only

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490. See ASHAR ET AL., *supra* note 15, at 4.

491. Cf. YOSHINO, *supra* note 16, at ix-xi (discussing the ways in which covering, by decreasing minority group visibility, potentially decreases majority understanding of the minority group's struggles).

492. Estimates suggest that approximately 4 million of the 11.3 million undocumented persons in the United States would qualify for DAPA. See Audrey Singer, *Who Are the DAPA-Eligible Population?*, BROOKINGS INST. (Dec. 29, 2014), <https://www.brookings.edu/blog/the-avenue/2014/12/29/who-are-the-dapa-eligible-population/> [<https://perma.cc/9F9K-JR3D>].

493. See Elizabeth Keyes, Essay, *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOW. L.J. 899, 902 (2014).

494. See *id.* at 915-19.

option available right now, but whether it is the best option in the long-term remains to be seen.

### CONCLUSION

The covering paradigm provides a rich theoretical lens through which to explore recent developments in immigration law and policy. Individual immigrants' experiences of sociocultural assimilation into mainstream U.S. society may involve conversion, passing, or covering. Immigration laws and policies themselves may also embody status conversion, status passing, or status covering. For over thirty years, there has been a lack of meaningful opportunity for widespread immigration status conversion. For over twenty years, there has been a proliferation of legislative and regulatory provisions that effectively mandate immigration status passing by millions of immigrants. One consequence, in the last ten years, has been the widespread adoption of immigration status covering instruments at the federal, state, and local levels. This is not to say that one approach to immigrant inclusion has neatly replaced another, in an inevitable progression toward greater immigrant integration. Immigration status conversion, passing, and covering have long coexisted and continue to exist side by side. Now, more than ever, immigrants living in the United States are offered a multiplicity of choices as to how they wish to attempt to integrate into the American mainstream; either by pursuing assimilation through formal status conversion, by passing as holders of a different status, or by availing themselves of the covering options available under federal, state, or local laws. Nevertheless, the apparent current ascendancy of immigration status covering does perhaps represent a certain form of "qualified progress" narrative, albeit one whose long-term prospects are far from clear.

Immigration status covering may hold great promise for the integration of immigrants in the short- and medium-term, but it may simultaneously harm their long-term ability to fully assimilate into American society. Federal, state, and local immigration status covering initiatives may facilitate hitherto excluded immigrant access to education, employment, goods, and services. They may improve relations with law enforcement personnel and increase immigrant communities' social capital. They may even foster more

robust psychological well-being in immigrant communities. Yet, at the same time, by their very nature, immigration status covering laws are temporary, contingent, and dependent on the grace of the majority, not the rights and dignities of immigrants. Moreover, widespread acceptance of federal, state, and local covering laws as good enough may reduce the likelihood of comprehensive immigration reform and thereby decrease the long-term ability of immigrants to vindicate their rights as fully integrated members of American society. Above all, immigration status covering laws provide a vehicle that allows the majority to disattend to the realities of the everyday struggles of unauthorized immigrants, while simultaneously perpetuating and reinforcing the underlying stigma of being undocumented. Immigrant covering is thus a phenomenon to be cautiously celebrated, skeptically interrogated, and, above all, further explored.