

NOTE: ILLEGAL IMMIGRATION OVERSTAYS ITS WELCOME: HOW THE CRIMINALIZATION OF UNLAWFUL PRESENCE IN AMERICA WOULD HELP RELIEVE INADEQUACIES IN FEDERAL IMMIGRATION LAW

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Author: Nicole A. Blair+

+ Juris Doctor, Ave Maria School of Law, 2012. The author gratefully acknowledges the support of her family and friends and the editorial assistance of Professor Monique McLaughlin, Paul B. Hunker III, and the staff of the Ave Maria Law Review.

Text

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Introduction

Illegal immigration is a large problem in the United States today and is only expected to get worse. The estimated total number of illegal immigrants ¹ present in the United States in 2010 was 10.8 million. ² The Census Bureau predicts that the nation's population will rise to more than 400 million people by the year 2050, ³ with seventy percent of this growth being attributable to immigration generally, including both legal and illegal immigrants. ⁴

Not only will the racial demographics of the United States continue to shift, but the country can also expect that the total number of illegal immigrants present in the United States will steadily increase. An estimated 300,000 to 500,000 undocumented immigrants arrive each **[*204]** year and reside in the United States. ⁵ These figures are

¹ According to the Office of Immigration Statistics, the term "immigrant" generally refers to those who are legally admitted to the United States as permanent residents. A Description of the Immigration Population, Cong. Budget Office (2004), <http://www.cbo.gov/doc.cfm?index=6019&type=0>. The terms "unauthorized immigrant," "illegal immigrant," and "undocumented immigrant" are used interchangeably, and all refer to foreign citizens that are illegally residing in the United States, including those who entered without inspection and those who violated the terms of temporary admission without gaining lawful permanent resident status or temporary protection from removal. *Id.* The term "alien" may also be used to refer to foreign nationals illegally residing in the United States.

² Michael Hoefler et al., Dep't of Homeland Sec. Office of Immigration Statistics, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010, at 2 (2010).

³ Nicole W. Green, Immigration, CQ's Vital Issues Series 8 (Ann Chih Lin ed., 2002).

⁴ *Id.* (quoting Tom Mckenna, president of Population-Environment Balance).

⁵ Frequently Asked Questions About Comprehensive Immigration Reform, U.S. Conf. of Cath. Bishops, <http://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/frequently-asked-questions-comprehensive-immigration-reform.cfm> (last visited Feb. 12, 2012) [hereinafter Frequently Asked Questions].

hardly insignificant, leading many people to acknowledge that illegal immigration is a national issue that is not going away. With such a vast wave of people coming to the country from various places all over the world, often in violation of the law, American citizens can no longer deny the economic and social implications of illegal immigration.

One main reason for such a dramatic increase in the number of illegal immigrants coming to the United States is due to the inadequacy of federal immigration policy.⁶ Historically, the federal government possessed the exclusive authority to regulate immigration. However, states across the nation have taken matters into their own hands by proposing legislation similar to Arizona's Support Our Law Enforcement and Safe Neighborhoods Act ("S. 1070").⁷ This law, enacted in April 2010, would allow the State of Arizona to regulate illegal immigration within its own borders.⁸ Legislation such as this has rekindled the debate on immigration, causing many to question the sufficiency of federal law, as well as whether federal law is being effectively enforced.

In remedying this situation, the government must identify and revise the parts of federal immigration policy that are problematic. Currently, the federal Immigration and Nationality Act ("INA"),⁹ **[*205]** as amended in 1965, does not make it a federal crime for illegal immigrants to be "unlawfully present" in the United States.¹⁰ Federal law imposes criminal penalties on those who enter or re-enter the country without admission but not those who have lawfully entered and have violated their immigration status or who have remained longer than permitted.¹¹

What may at first seem to be a minor legislative oversight has, in hindsight, developed into a major problem with serious consequences. By refusing to amend federal immigration law, the government has created a permissive environment that makes it more likely that illegal immigrants, such as the terrorists responsible for the attacks on September 11, 2001, will remain in the country illegally and undetected.¹² This permissive environment is a result of inadequate resources, misplaced federal enforcement priorities, and a lack of effective deterrents aimed at discouraging immigrants from violating immigration laws. If unlawful presence had been a federal crime prior to the

⁶ See Udall Ctr. for Studies in Pub. Policy, *Illegal Immigration to the United States: Causes and Policy Solutions* 1 (Feb. 2007). Other reasons that contribute to such a broken system are global poverty, for example, which groups such as the United States Conference of Catholic Bishops aspire to remedy. See Catholic Church's Position on Immigration Reform, U.S. Conf. of Cath. Bishops (Jan. 2011), <http://uscceb.org/issues-and-action/human-life-and-dignity/immigration/churchteachingonimmigrationreform.cfm>. Many immigrants, both legal and illegal, flee their home countries seeking work and a better lifestyle, even if they must do so illegally. See *id.* Economic and social factors such as this, combined with the inadequacy of current federal law, have created the illegal immigration crisis that the United States is experiencing today. See *id.*

⁷ Support Our Law Enforcement and Safe Neighborhoods Act, S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

⁸ *United States v. Arizona*, 703 F. Supp. 2d 980, 985-86, 988-90 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011) (enjoining the bill on federal preemption basis).

⁹ Immigration and Nationality Act, *Pub. L. No. 82-414*, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.). Immigration regulation falls under the purview of Congress and the federal government, and such applicable laws are codified in the INA. See *United States v. Arizona*, 703 F. Supp. 2d at 991 (ruling that the federal government has "broad and exclusive authority to regulate immigration, supported by both enumerated and implied constitutional powers"). This Act empowers federal agencies, such as the Department of Justice ("DOJ") and the Department of Homeland Security ("DHS"), as well as the Department of the State ("DOS"), to enforce these laws. *Id.* at 987-88.

¹⁰ Compare 8 U.S.C. §§1325, 1326 (2010) (describing unlawful presence as an element of the crime of unlawful entry or re-entry after deportation), with 8 U.S.C. § 1101 (2010) (establishing the general provisions of the INA without even a mention of unlawful or illegal presence).

¹¹ See 8 U.S.C. § 1325.

¹² See *infra* Part IV.

time of these attacks, more vigilant enforcement efforts may have yielded the discovery and detention of these terrorists before they even had the chance to step onboard a plane. The federal government is sending the message that deliberate defiance of federal immigration laws will generally only result in removal in most cases, not prosecution. Instituting federal criminal penalties for all illegal immigrants who remain in the United States unlawfully is one possible way to deter them from continually violating U.S. immigration law. Criminalizing unlawful presence is one method of strengthening the authority of federal immigration law and extending the authority of immigration officials who are charged with enforcing those laws.

Standing alone, unlawful presence on U.S. soil is not a direct violation of the law,¹³ but it is highly detrimental to society, both [*206] ideologically and socially. The purpose of this Note is to examine the scope of the problem of unlawful presence and to provide a model for change that seeks to achieve balance between immigration enforcement and preservation of human dignity through support for legal immigration.¹⁴ It sets forth a possible solution that, if incorporated into the body of federal law, would restore confidence in federal policy as the ultimate authority in effective and fair regulation of immigration.

Part I of this Note explores the current state of affairs with regard to illegal immigration and discusses some of the problems caused by the unlawful presence of illegal immigrants in the United States. Part II explains the position taken by the U.S. government on the federal criminalization of unlawful presence and details the relevant provisions and objectives of the INA that relate to the discovery and removal of illegal immigrants. Part II also provides examples of proposed legislation from the past that has sought to criminalize unlawful presence at the federal level. Part III analyzes the effects of the provisions of Arizona's law that seek to regulate immigration by criminalizing unlawful presence. Part IV discusses policy considerations in favor of criminalizing unlawful presence and argues that the federal government should consider amending federal law by integrating appropriate provisions into the INA that criminalize unlawful presence in order to address the concerns of the states.

Amending federal immigration law to address the concerns of the states will promote consistency in U.S. immigration policy. It will unite all states and the federal government under a set of common objectives and will lend desperately needed support to the states that carry the burden of discovering and reporting a large number of illegal immigrants within their borders. By criminalizing unlawful presence, the government will bolster the mechanisms that are already in place which serve to apprehend and remove those in violation of national immigration law. Such an amendment will strengthen existing laws by reinforcing and expanding current federal policy to more effectively combat the growing problem of illegal immigration.

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I. Illegal Immigration in the 21st Century: A Growing Problem Within U.S. Borders

A. From the "Revolving-Door Era" to the "Storm-Door Era": A Brief History of Immigration in the United States from 1965 to Present

Over the last few decades, in what has been referred to as a move from the "Revolving-Door Era" to the "Storm-Door Era,"¹⁵ the number of people immigrating to the United States illegally has increased dramatically, moving the issue to the forefront of the nation's political agenda.¹⁶ After the amendments to the INA by President John F.

¹³ See supra note 10. Although it may make the illegal immigrant removable, unlawful presence is not a federal crime. *United States v. Arizona*, 703 F. Supp. 2d at 988 & n.3 (referencing 8 U.S.C. § 1326) ("Unlawful presence is an element of the federal crime of reentry after deportation ...").

¹⁴ See infra note 155 and accompanying text.

¹⁵ Michael C. LeMay, *Illegal Immigration: A Reference* 124-33 (2007) (using the terms "revolving-door era" and "storm-door era" to chronologically describe the historical time periods during which illegal immigration policy had changed and how it affected the number of illegal immigrants entering the country). LeMay refers to the congressional Select Commission on Immigration and Refugee Policy ("SCIRP") report made in 1981 where it stated, "Most U.S. citizens believe that the half-open door of undocumented/illegal immigration should be closed." *Id.* at 12.

Kennedy in 1965, the United States entered what is termed the "Revolving-Door Era."¹⁷ The policy considerations behind the enactment of the INA in 1952 began when President Harry Truman created a presidential commission to study immigration policy. The report produced by this commission in 1953 stated that "the major disruptive influence in our immigration law is the racial and national discrimination caused by the national origins system,"¹⁸ the restrictive quota system in place prior to 1952.

Following this report, the federal government changed its policy from a restrictive quota system to a more open preference system.¹⁹ [*208] The government had used the quota system throughout the 1920s to heavily limit those entering the country during the first great immigration wave prior to World War II.²⁰ The enactment of the INA reflected a change in attitude regarding immigration in the United States as one that moved away from the inherent racism of the quota system and toward a greater openness to immigration through the preference system.²¹

This change marked the beginning of a new wave of immigration. Immigrants, both legal and illegal, began coming onto U.S. soil on a massive scale. Whereas prior to 1965, the first wave of immigrants came mostly from Europe, the immigrants in this second wave or "Revolving-Door Era," came mainly from the developing world. An immigration climate as ripe as this set the stage for refugees like Elian Gonzalez and his mother to travel great distances and face death to make it to America, even years after the policy was first implemented.²²

During the "Storm-Door Era" from 2001 to the present, the United States has experienced the largest wave of illegal immigration yet. In 2005, in response to the 9/11 terrorist attacks, the House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act ("REAL ID Act"),²³ which modified [*209] federal law

¹⁶ Id. at 1.

¹⁷ See id. at 124.

¹⁸ Helene Hayes, U.S. Immigration Policy and the Undocumented: Ambivalent Laws, Furtive Lives 15 (2001).

¹⁹ Id. This system allocated immigrant visas within each foreign state, limiting the visas issued to each nation per year to 20,000 based on a first-come, first-served basis. LeMay, supra note 15, at 8. The United States began to give preference to those immigrants with close relatives living in America and those who possessed special skills needed by American industries. Green, supra note 3, at 17. Preference was given to immigrants as follows: First Preference was for the adult, unmarried sons and daughters of U.S. citizens; Second Preference was for spouses and unmarried children of lawful permanent resident immigrants; Third Preference was for members of the professions such as scientists and artists of exceptional talent; Fourth Preference was for married sons and daughters of U.S. citizens; Fifth Preference was for the siblings of U.S. citizens; Sixth Preference was for skilled and unskilled workers in occupations for which labor is in short supply; and Seventh Preference was for refugees to whom conditional entry or adjustment may be given. Hayes, supra note 18, at 17 tbl.2.1; LeMay, supra note 15, at 8. The final category was termed "nonpreference" and applied to any applicant who qualified to enter for other reasons (e.g., a \$ 40,000 investment in an American business). See Hayes, supra note 18, at 17 tbl.2.1.

²⁰ Green, supra note 3, at 17.

²¹ LeMay, supra note 15, at 7.

²² Cuban Immigration to the United States, U.S. Immigration Support, <http://www.usimmigrationsupport.org/cubaimmigration.html> (last visited Feb. 15, 2012). In 1999, Elian's mother died at sea aboard a small aluminum boat bound for America, leaving the boy adrift, but alive in a small inner tube accompanied by two other immigrants, all of whom were later rescued. Id. This resulted in a seven-month custody battle over the fate of this six-year-old boy, who was required to return to Cuba to live with his father. Id.

²³ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). The REAL ID Act, as H.R. 4437, passed in the U.S. House of Representatives, but died in the Senate. However, much of the language of H.R. 4437 was included in a rider to H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, which was passed by Congress. However, the rider's effect as law, which was extended to 2011, has been postponed again until 2013 in order to gain more support. See [6 C.F.R. § 37.51\(a\) \(2011\)](#) (removing the date "May 11, 2011," and adding in its place the date "January 15, 2013"); see also REAL ID Final Rule, Dep't of Homeland Sec.,

with the intent to crack down on terrorism threats posed by illegal immigrants.²⁴ Despite laws such as this, the number of illegal immigrants in the U.S. continued to rise.²⁵ The estimated total number of illegal immigrants in the United States increased from 10.5 million in 2005 to 10.8 million in the years 2009 and 2010, with the peak total reaching 11.8 million in 2007.²⁶ America also continued to see an increasing number of illegal immigrants coming from Mexico and South America.

In 2010, it is estimated that 6.6 million illegal immigrants living in the United States were born in Mexico, making this the largest ethnic group of illegal immigrants in the country.²⁷ The second largest group of illegal immigrants living in the United States came from Central and South America.²⁸ The remaining illegal immigrants came from Asia and India.²⁹ These people immigrated to the United States for various reasons such as escaping poverty in their home countries and finding work, reuniting with family already residing in the United States, and finding freedom from political or religious persecution in their native countries. Changing economic policies and political climate in the United States have also contributed to the problem because legislation designed to attract legal foreign-born workers to supplement the U.S. labor market also proved to attract illegal immigrants.³⁰

Regardless of the individual's reason for immigrating, such an extreme influx of illegal immigrants into the United States imposes heavy burdens upon the entire nation, as well as individual states, which have begun proactively combating illegal immigration within their own borders.

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B. The Burden of Illegal Immigration

The first major problem caused by illegal immigration is simple - if the law is not enforced, the law itself loses authority. It seems that there are endless exceptions to the rule that illegal immigration is prohibited, including various amnesty initiatives for illegal immigrants already present in the country. These exceptions compromise the fundamental integrity of federal immigration law and frustrate its purpose in preventing and deterring illegal immigration.

The rise in the number of illegal immigrants entering the United States has also caused major social and economic problems. Two main difficulties with illegal immigration are increased crime rates and the large cost to the American economy. It is estimated that in 2003, there were approximately 46,000 criminal aliens in federal prisons, at a cost

http://www.dhs.gov/files/laws/gc_1172765386179.shtm (last visited Feb. 15, 2012); News Report, REAL ID Act Postponed by Department of Homeland Security, Gov't Tech. (Dec. 18, 2009), <http://www.govtech.com/security/Real-ID-Act-Postponed.html?topic=117671>. The rider provision of H.R. 1268 is still popularly referred to as the REAL ID Act. See Division B - REAL ID Act of 2005, The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, *Pub. L. 109-13, 119 Stat. 231*, 301 (codified at [49 U.S.C. 30301](#) note).

²⁴ See LeMay, *supra* note 15, at 34. This law would bar states from issuing driver's licenses to illegal immigrants. *Id.* It requires applicants to prove their citizenship or legal resident status and requires licenses for immigrants to expire on the same day that their visa expires and displayed on their card for easy identification by officials. *Id.* at 66-67. This measure was initiated in response to the 9/11 terrorist attacks because these terrorists gained access to the hijacked airplanes by using driver's licenses. *Id.* at 34. For a similar discussion, see News Report, *supra* note 23.

²⁵ Hayes, *supra* note 18, at 18-19.

²⁶ Hoefler et al., *supra* note 2, at 2 fig.1.

²⁷ *Id.* at 4.

²⁸ *Id.* at 4 tbl.3 (reporting 620,000 born in El Salvador and 520,000 born in Guatemala).

²⁹ *Id.* (reporting 280,000 illegal immigrants from the Philippines, 200,000 from India, and the remaining 130,000 from China).

³⁰ See *infra* notes 65-66 and accompanying text.

of \$ 1.3 billion. ³¹ That same year, approximately 74,000 illegal aliens resided in state prisons at a cost of \$ 880 million, with approximately 147,000 individuals in local jails. ³²

The Government Accountability Office ("GAO") investigated 55,332 illegal aliens and found that recidivism was high, with each immigrant having been arrested on average about eight times. ³³ Approximately fifteen percent of these crimes were "property-related offenses," including "burglary, larceny-theft, motor vehicle theft, and property damage." ³⁴ Twelve percent of these crimes were "violent offenses such as murder, robbery, assault, and sex-related crimes." ³⁵ Since many illegal aliens who are convicted criminals are supposed to be removed, the high recidivism rate is somewhat surprising. Generally, most illegal immigrants come into the custody of Immigration and Customs Enforcement ("ICE") after they are turned over by state and local governments following an arrest. After the illegal immigrants bond out of state custody or complete their sentence, they are then put in ICE custody and arrangements are made for their removal from the United States. Some individuals have maintained that one of the reasons that these criminal aliens may not be removed is because [*211] of the existence of state "sanctuary" policies forbidding police officers from arresting criminals based on their immigration status. ³⁶

There is no doubt that the presence of illegal immigrants in the United States carries a high price tag. Illegal immigrants cost more than they contribute. While many claim that the presence of illegal immigrants benefits the economy because they are simply performing those jobs that American citizens are not willing to take, the facts paint a somewhat different picture. The two groups that benefit most from employing illegal immigrants are the immigrants themselves and the employers who hire them at a lower wage.

Foreign-born workers earn less than native workers, which reduces overall earnings growth for the United States workforce as a whole. ³⁷ It is estimated that four to six million jobs in the United States have moved to the underground economy, where workers are paid "under the table" in cash in order to avoid paying income taxes. ³⁸ Approximately \$ 35 billion a year in income taxes are not recovered due to jobs that are "off the books." ³⁹ Many of these jobs are in labor-intensive fields such as landscaping and construction.

United States citizens bear the cost, and the national economy is poorer when it comes to supporting the needs of illegal immigrants. Brian Gatton, a professor of history at Arizona State University, said that unskilled immigrants use "more in public services than they pay in taxes." ⁴⁰ For example, many are concerned that the American people are bearing the cost of education and health care for illegal immigrants and their children. The total cost of

³¹ J.D. Hayworth & Joseph J. Eule, *Whatever it Takes: Illegal Immigration, Border Security, and the War on Terror* 31 (2006). This figure represents a total of all criminal aliens, both legal and illegal; however, a large proportion of these criminal aliens were presumably illegal. See *id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 33. Therefore, these "sanctuary" policies essentially prevent state law enforcement from cooperating with federal immigration authorities. Proponents of such policies argue that they reduce crime, not encourage crime. *Id.* at 36 (stating that without sanctuary, illegal immigrants will become prey for criminals who believe their victims will not report such crimes to the police for fear of deportation).

³⁷ See Cong. Budget Office, *The Role of Immigrants in the U.S. Labor Market* 16 tbl.10, 17 tbl.11, 19-21 (2005), available at <http://www.cbo.gov/ftpdocs/68xx/doc6853/11-10-Immigration.pdf>.

³⁸ LeMay, *supra* note 15, at 19.

³⁹ *Id.* at 19-20.

⁴⁰ Hayworth & Eule, *supra* note 31, at 18.

educating the children of illegal immigrants is estimated to be about \$ 29 billion a year.⁴¹ It costs taxpayers \$ 12 billion a year for illegal immigrant children and \$ 17 billion a year for the U.S.-born children of illegal immigrants already residing here.⁴² After the U.S. Supreme Court [*212] decided *Plyler v. Doe*⁴³ in 1982, it became impermissible for states to deny public education to illegal immigrant students.⁴⁴ In that case, the Court struck down a Texas law which discriminated against kids on the basis of a "legal characteristic of which children can have little control."⁴⁵

Such an extreme interpretation of the Constitution is not without a high cost, both financially and socially. Some are worried that schools are focused on boosting enrollment to get the maximum funding possible even if it means enrolling illegal immigrants, rather than ensuring that U.S.-citizen students get the best education possible.⁴⁶ This is a legitimate concern that, when coupled with the rising costs in education, will need to be considered by the federal government in refining immigration policy.

Similarly, under the Emergency Medical Treatment and Active Labor Act, illegal immigrants cannot be deprived of emergency medical treatment.⁴⁷ This has opened the door for many who are unlawfully present to seek "emergency" treatment for many common ailments, using the emergency room as a clinic,⁴⁸ thus burdening the resources of hospitals and other medical facilities nationwide. Border counties alone estimated that at least \$ 190 million dollars of uncompensated care went to illegal immigrants in 2000.⁴⁹ Several million illegal immigrants are reported to have been taking advantage of this benefit in 2003, representing approximately twenty-five percent of welfare recipients.⁵⁰ Children who are U.S. citizens, but whose parents are unlawfully present in the United States, are also entitled to welfare benefits, including Medicaid and Supplemental Security Income ("SSI") disability payments, which are costing taxpayers a very large amount of money.⁵¹

[*213] The federal government can no longer ignore the facts when it comes to the long-term economic and social effects of illegal immigration. While some groups urge policy-makers and the American people to remain sensitive to the needs of illegal immigrants while they remain in the United States,⁵² some state legislators are speaking out

⁴¹ Id. at 19-20.

⁴² Id.

⁴³ [457 U.S. 202 \(1982\)](#).

⁴⁴ [Id. at 224-25](#); see also Hayworth & Eule, *supra* note 31, at 19.

⁴⁵ [Plyler, 457 U.S. at 220](#).

⁴⁶ Hayworth & Eule, *supra* note 31, at 21.

⁴⁷ Id. at 22.

⁴⁸ Id. at 22-23.

⁴⁹ Cong. Budget Office, *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments* 8 (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>.

⁵⁰ Hayworth & Eule, *supra* note 31, at 23.

⁵¹ Id. The authors provide examples of California, Texas, and Arizona, three states with some of the largest numbers of illegal immigrants. Id. According to the Federation for American Immigration Reform, the costs of unreimbursed medical care to children of illegal immigrants in those states totaled \$ 1.4 billion in California, \$ 850 million in Texas, and \$ 400 million in Arizona. Id.

⁵² See *id.* at 17. Congressman J.D. Hayworth asserts that groups such as "liberals and elites are willing to look the other way on illegal immigration" based on economic motivations because they are essential to a "privileged lifestyle" in America. Id. However, Bill Searle, a community activist and columnist for the Arizona Republic, said that while illegals are marked as "unwelcome in our midst," they "willingly perform chores shunned by most of us, yet are essential to the privileged lifestyle to which we have been

against these policies, believing they are inherently discriminatory against U.S. citizens.⁵³ These cries are becoming louder as states such as Arizona seek to execute laws within their own borders that address the problems they are experiencing as a result of illegal immigration.⁵⁴ The federal government has been forced to confront the constitutionality of such policies in cases such as *United States v. Arizona*,⁵⁵ but has failed to initiate any major reforms to federal immigration policy to address such concerns. With a growing number of states responding to Arizona's law, the federal government will not be able to shirk the issue of illegal immigration for much longer.

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II. Band-Aid for a Bullet Wound: The Absence of Unlawful Presence in the INA and the Goals of Federal Immigration Law

Perhaps the most obvious and problematic aspect of illegal immigration is that such immigrants enter the United States and remain here for extended periods of time without complying with federal law. An illegal immigrant is deemed to be unlawfully present in the United States "after the expiration of the period of stay authorized by the Attorney General or [when they are] present in the United States without being admitted or paroled."⁵⁶ Unlawful presence is not currently a federal crime, but may make an alien removable.⁵⁷

The INA currently criminalizes unlawful entry, re-entry, or attempt to enter into the United States.⁵⁸ Unlawful entry applies to aliens who, at the time they enter into the United States, do so without inspection or who enter or attempt to enter by means of fraud.⁵⁹ Unlawful re-entry of removed aliens imposes both civil and criminal penalties.⁶⁰

accustomed." *Id.* at 17. Other organizations such as the United States Conference of Catholic Bishops ("USCCB") and the Catholic Church are against illegal immigration and advocate for a better way to preserve the dignity of the human person as well as encouraging immigrants to obey immigration laws. See *Frequently Asked Questions*, *supra* note 5. They encourage lawmakers to create balanced legislation that seeks to protect immigrants from exploitation and abuse while also protecting U.S. citizens from the harmful effects of illegal immigration. See *supra* note 6.

⁵³ For a discussion citing examples of other lawmakers who challenge a system allowing educational and health-care benefits to illegal immigrants because of their discriminatory effect on American citizens, who ultimately pay the tax bill for such programs but who do not benefit from them and are often excluded completely, see Hayworth & Eule, *supra* note 31, at 18-26. Since illegal immigrants are guaranteed a free education, Hayworth says that the goal is to ensure schools get the maximum funding possible, not to ensure that American children get the best education possible. *Id.* at 21. In providing illegal immigrants with free "emergency" health care, this also deprives American citizens who are underprivileged from receiving quality health care because tax dollars are being used to pay for patients from across the border. *Id.* at 22-25. In an attempt to remedy this situation, Congresswoman Dana Rohrabacher of California offered an amendment to the health-care law that would require hospitals to collect from all patients information such as proof of citizenship, immigration status, address, current or former employer, and a photograph or fingerprint which would be provided to the Department of Homeland Security. *Id.* at 24.

⁵⁴ See *infra* notes 109-110 and accompanying text.

⁵⁵ [703 F. Supp. 2d 980 \(D. Ariz. 2010\)](#).

⁵⁶ [8 U.S.C. § 1182\(a\)\(9\)\(B\)\(iii\)](#) (2010).

⁵⁷ [8 U.S.C. § 1227\(a\)\(1\)\(C\)](#); see also [United States v. Arizona, 703 F. Supp. 2d at 988](#).

⁵⁸ [8 U.S.C. § 1325-1326](#).

⁵⁹ [8 U.S.C. § 1325](#) (imposing civil and criminal penalties for any alien who arrives or attempts to arrive in the United States by means of improper time or place or avoidance of examination or inspection and through misrepresentation or concealment of facts concerning their identity). Unlawful entry is a term of art and includes those who illegally enter the United States by whatever means including by plane, boat, foot, etc. Unlawful entry differs from the offense of unlawful presence in that the latter pertains to those who, regardless of their status upon entry, have violated the law by remaining in the country for any length of time after their visa has expired.

Unlawful presence is an element of the crime of unlawful re-entry after deportation, but requires that the person have been deported at least once.⁶¹

The term unlawful presence refers specifically to those who are physically present in the United States illegally, regardless of their status upon entry. For example, a person who was admitted lawfully into the United States would be considered unlawfully present if their non-immigrant status had expired. The changing goals of federal immigration policy after 1965 created an environment that allowed the number of illegal immigrants and those unlawfully present in the United States to steadily increase.

The 1965 INA amendments worked very well in opening the doors wider for immigration. They essentially purged racial and [*215] ethnic requirements for immigration and replaced them with a quota system intended to reunify families.⁶² The goal of federal immigration law had radically changed at that time; instead of creating entry requirements based on labor market considerations, the federal government formed a neutral system purported to tear down the "institutional racism of previous U.S. immigration legislation."⁶³ As a result, the total number of lawful immigrants entering the United States increased significantly. In the decade following the 1965 legislation, the total volume of immigrants in the United States rose to sixty percent.⁶⁴

However, the goal of this legislation to foster legal immigration would be further undermined in the years to come. Along with legal immigrants came a steady influx of illegal immigrants.⁶⁵ One main reason for this was the termination of the Bracero program, which increased the number of undocumented Mexican immigrant workers.⁶⁶ There was no way to meet the demand for labor, which caused more immigrant workers to enter illegally.

The large number of illegal immigrants present in the United States led Congress to pass the Immigration Reform and Control Act of 1986 ("IRCA").⁶⁷ IRCA was intended to fix some of the shortcomings of the INA by providing amnesty to illegal immigrants [*216] in the United States, but also to deter future illegal immigration.⁶⁸ According to Jeffrey S. Passel, IRCA applied a "carrot-and-stick" approach to illegal immigration.⁶⁹ Increased border control

⁶⁰ [8 U.S.C. § 1326\(a\)](#).

⁶¹ *Id.*

⁶² Hayes, *supra* note 18, at 15.

⁶³ *Id.* at 17. The National Origins Act of 1924, which established a quota for each nationality of immigrants who would be admitted to the United States, has been regarded as promoting "institutional racism." See *id.* at 13-15. This system was based on labor market considerations, whereas the passage of the INA defeated the "national origins principle" by eliminating race and ethnicity from the criteria for admission and replacing these with criteria aimed at reuniting families. See *id.* at 15.

⁶⁴ *Id.* at 19.

⁶⁵ *Id.* at 18.

⁶⁶ *Id.* This guest-worker program, which ran from 1942 to 1964, allowed Mexican workers to come into the United States to work on a temporary basis and was developed in response to the extreme labor shortage that occurred in the United States during World War II when much of the workforce had been withdrawn to the armed services. LeMay, *supra* note 15, at 4. The term "bracero" literally means "one who works with his arms." Hayes, *supra* note 18, at 18. The program increased the cost for imported labor for employers and they began hiring more illegal workers "under the table" for lower wages. See LeMay, *supra* note 15, at 4-5. Such an increase in illegal immigration and exploitation of workers eroded support for and led to the eventual termination of the Bracero program. *Id.* at 4. Hayes states that the increase in illegal immigration was a "logical continuation of the pattern of seasonal migration" that was started by the program. Hayes, *supra* note 18, at 18.

⁶⁷ Immigration Reform and Control Act of 1986, [Pub. L. No. 99-603](#), [100 Stat. 3359](#) (codified as amended in scattered sections of 8 U.S.C.).

⁶⁸ See Hayworth & Eule, *supra* note 31, at 100; Jeffrey S. Passel, Undocumented Immigration to the United States: Numbers, Trends, and Characteristics, in *Illegal Immigration in America: A Reference Handbook* 33 (David W. Haines & Karen E. Rosenblum eds., 1999).

and employer sanctions, which imposed penalties on American employers who hired illegal immigrants, were the "stick" under this Act. ⁷⁰ The "carrot" constituted two legalization programs, one that permitted illegal aliens residing in the United States for five years or longer to acquire legal status and the other that legalized agricultural workers who worked ninety days a year for three years in order to alleviate shortages in that field of labor. ⁷¹

The policy behind this program was the idea that the incentive for illegal immigration would disappear because employers would not hire illegal immigrants, thus eliminating the job opportunities that draw them. ⁷² While the number of illegal immigrants in the United States dropped substantially after the passage of IRCA, ⁷³ this proved to be only a band-aid for a bullet wound. The number of illegal immigrants in the country continued to increase rapidly in the few years following IRCA and continues to this day. ⁷⁴ Bills such as this were labeled as shortsighted and misguided, in part, because illegal immigrants used fake documents to satisfy the requirement that they show their employer they are authorized to legally work in the United States. ⁷⁵

IRCA attempted to legalize those in the United States that were law abiding, but sought to deter illegal immigration in the future. ⁷⁶ It failed to fulfill its promise of deterring future illegal immigration in the United States because, by granting amnesty to those who had entered illegally, it only temporarily slowed the rate at which illegal immigrants were coming into the country. ⁷⁷ The federal government allowed these illegal immigrants to "cut in line" in front of the [*217] estimated 1.9 million people worldwide who had been waiting years to enter lawfully. ⁷⁸

In recent years, there has been other immigration legislation proposed in the House and Senate designed to regain control of illegal immigration. Two bills in particular were introduced in the 109th Congress session and, if enacted, would have made unlawful presence by illegal immigrants in the United States a criminal offense: ⁷⁹ House of Representatives Bill 4437 ("H.R. 4437"), the Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005, ⁸⁰ and the 2006 Senate Bill 2454 ("S. 2454"), the Securing America's Borders Act. ⁸¹

H.R. 4437 would have amended the INA to make unlawful presence a felony, punishable with a year-and-a-day imprisonment. ⁸² The Securing America's Borders Act would have made the first-time offense a misdemeanor

⁶⁹ Passel, *supra* note 68, at 33.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Hayworth & Eule, *supra* note 31, at 101.

⁷³ Passel, *supra* note 68, at 35.

⁷⁴ Hayworth & Eule, *supra* note 31, at 104.

⁷⁵ See *id.* at 104-05.

⁷⁶ See Passel, *supra* note 68, at 33.

⁷⁷ *Id.* at 104.

⁷⁸ *Id.* at 101.

⁷⁹ Michael John Garcia, Cong. Research Serv., RS 22413, *Criminalizing Unlawful Presence: Selected Issues 1* (2006).

⁸⁰ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). Though H.R. 4437 did not get signed into law, other provisions of the Bill, not discussed here, were passed as a rider to H.R. 1268. See *supra* note 23.

⁸¹ Securing America's Borders Act, S. 2454, 109th Cong. (2005).

⁸² H.R. 4437 § 203; see also Garcia, *supra* note 79, at 2. This provision was not incorporated in the rider to H.R. 1268. See Division B - REAL ID Act of 2005, The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, **Pub. L. 109-13, 119 Stat. 231**, 301 (codified at [49 U.S.C. 30301](#) note).

subject to six months' imprisonment.⁸³ Both would also have created future immigration penalties for anyone convicted of being unlawfully present in the United States.⁸⁴

Unlawful presence would have been classified as an "aggravated felony" as per the INA, and as such, would have made the illegal immigrant permanently inadmissible upon removal if convicted.⁸⁵ This consequence is slightly different, however, from our current law, which criminalizes unlawful entry and re-entry. Both of these offenses may make illegal aliens removable, but do not make them permanently inadmissible.⁸⁶ Some of the reasons that these bills failed to be passed into law include concerns that criminalizing unlawful presence would consume scarce law enforcement resources, place state and local officers **[*218]** in difficult enforcement roles, contribute to prison overcrowding, be unnecessary to the enforcement of immigration law, and marginalize immigrants and Hispanic residents.⁸⁷

As discussed in Part IV *infra*, these concerns are misguided as they have been superseded by the new priorities of a changing culture, and some are based on skewed facts. These proposals to criminalize unlawful presence, while historically unsuccessful, are important, as they serve as a springboard for a renewed discussion on the problems of federal immigration policy and the criminalization of unlawful presence as a possible remedy.

III. States Demand Immigration Reform: Arizona Law Seeks to Criminalize Unlawful Presence

The Support Our Law Enforcement and Safe Neighborhoods Act of 2010, also known as Arizona Senate Bill 1070 ("S. 1070"),⁸⁸ is a set of statutes and amendments that were signed into law by Governor Janice Brewer on April 23, 2010.⁸⁹ The goal of S. 1070, as envisioned by state policy-makers, is to "discourage and deter" unlawful entry and presence of illegal immigrants within the state.⁹⁰ Arizona finds the "cooperative enforcement of federal immigration laws" a compelling state interest.⁹¹

Certain provisions of this bill sparked controversy among other states and the federal government. In *United States v. Arizona*,⁹² the United States government challenged the provisions of the bill, claiming they were preempted by federal law.⁹³ By passing these laws, Arizona hoped to systematically identify those violating federal immigration law, leading to their removal from the United States.⁹⁴

⁸³ S. 2454 § 206; see also Garcia, *supra* note 79, at 2.

⁸⁴ Garcia, *supra* note 79, at 3. Also, under both H.R. 4437 and S. 2454, subsequent offenses would be subject to heightened sentences, with the latter categorizing subsequent offenses as felonies subject to two years' imprisonment. *Id.* at 3.

⁸⁵ *Id.* at 3.

⁸⁶ *Id.* at 2.

⁸⁷ See Archdiocese of Portland in Oregon, Policy Critique of Arizona's Immigration Enforcement Law: S.B. 1070, as Amended by H.B. 2162 (2010), available at http://www.archdpx.org/jprespect/JP_Respect/Policy%20Cr%20of%20Arizona%20Law.pdf; Garcia, *supra* note 79, at 5-6.

⁸⁸ Support Our Law Enforcement and Safe Neighborhoods Act, S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

⁸⁹ S. 1070; H.R. 2162 (referring in both S. 1070 and H.R. 2162 to the April 23, 2010 enactment as modified by April 30, 2010 amendments).

⁹⁰ [*United States v. Arizona*, 703 F. Supp. 2d 980, 988 \(D. Ariz. 2010\)](#).

⁹¹ [*Id.* at 988-89](#).

⁹² [*703 F. Supp. 2d 980*](#).

⁹³ [*Id.* at 986](#) (addressing a few parts of the law that concern the unlawful status of illegal immigrants).

[*219] Section 3 of the bill would make it a criminal misdemeanor to willfully fail to apply for or carry alien registration papers in violation of federal law,⁹⁵ thereby effectively criminalizing unlawful presence.⁹⁶ This law would punish those who are in Arizona unlawfully, since such persons are not eligible for alien registration papers and are not likely to apply for anything due to their illegal status. In *United States v. Arizona*,⁹⁷ Judge Bolton of the United States District Court for the District of Arizona struck down this provision because it is preempted by the INA.⁹⁸ In essence, the court reasoned that the federal registration scheme in place for immigrants is complete and should not be interfered with by the states.⁹⁹ The court agreed with the United States that such a provision is unconstitutional because it seeks to criminalize unlawful presence and will result in the "harassment of aliens."¹⁰⁰

Senate Bill 1070 details in two other provisions how the status of unlawful presence should be determined by police officers. Section 2 requires officers to make a reasonable attempt to determine the immigration status of a person stopped, detained, or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States.¹⁰¹ In section 6, the bill authorizes the warrantless arrest of a person where there is probable cause to believe the person has committed a "public offense that makes the person removable from the United States."¹⁰² The court struck down both of these provisions as unconstitutional because such requirements are preempted by federal law and will likely create a burden for legally present aliens.¹⁰³ Moreover, the court concluded that section 2 would impermissibly **[*220]** burden federal resources and divert federal agencies away from the priorities they had established.¹⁰⁴

The court granted an injunction against the provisions mentioned above in the Arizona law, refusing to allow the State to criminalize unlawful presence.¹⁰⁵ The United States district court's decision is supported by various policy considerations in favor of maintaining the current state of federal immigration law. The court struck down these provisions, concluding that provisions seeking to determine the status of every person stopped by police would result in the harassment of lawfully present aliens and would impede federal enforcement and policy priorities.¹⁰⁶

⁹⁴ See S. 1070 § 1; [United States v. Arizona, 703 F. Supp. 2d at 985, 988.](#)

⁹⁵ Compare S. 1070 § 3, and [8 U.S.C. §§1304\(e\), 1306\(a\)](#) (2010) (providing that failure to carry registration papers constitutes a federal misdemeanor).

⁹⁶ See S. 1070 § 3; [United States v. Arizona, 703 F. Supp. 2d at 989.](#)

⁹⁷ [703 F. Supp. 2d 980.](#)

⁹⁸ [Id. at 999.](#)

⁹⁹ *Id.*

¹⁰⁰ [Id. at 998.](#)

¹⁰¹ S. 1070 § 2; see also [United States v. Arizona, 703 F. Supp. 2d at 989, 993.](#)

¹⁰² S. 1070 § 6; see also [United States v. Arizona, 703 F. Supp. 2d at 990, 1004.](#) Incorporating the meaning of "public offense" under Arizona law, both parties suggested that this revision can be interpreted as "providing for the warrantless arrest of a person where there is probable cause to believe the person committed a crime in another state that would be considered a crime if it had been committed in Arizona and that would subject the person to removal from the United States." [United States v. Arizona, 703 F. Supp. 2d at 1005.](#)

¹⁰³ [United States v. Arizona, 703 F. Supp. 2d at 998, 1006.](#)

¹⁰⁴ [Id. at 998.](#)

¹⁰⁵ [Id. at 1008.](#)

One of the primary policy considerations of the court was that federal immigration law is currently focused on arresting and deporting dangerous criminals or those who have committed felonies.¹⁰⁷ Arizona's law would allow arrests not just for those illegal immigrants committing felonies, but also for those who are committing misdemeanors or even those minor, non-criminal violations such as "jaywalking, failing to have a dog on a leash, or riding a bicycle on the sidewalk."¹⁰⁸

However, this is not the end of the matter. With nearly half of the country considering similar legislation, the United States government must eventually address the apparent inadequacies of the federal laws. Twenty-two states, both border and non-border, are now in the process of trying to pass legislation similar to Arizona's law.¹⁰⁹ States such as Arkansas, Florida, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Utah all have similar proposals in the works.¹¹⁰

The United States Court of Appeals for the Ninth Circuit upheld the Arizona district court in a decision dated April 11, 2011.¹¹¹ Judge Paez, for the court, determined that Judge Bolton did not abuse her discretion in granting a preliminary injunction after finding that federal [*221] law preempted provisions in Arizona's law.¹¹² Judge Bea, dissenting in part, fundamentally disagreed with the majority, finding that section 2 ("Cooperation and assistance in enforcement of immigration laws; indemnification") and section 6 ("Arrest by officer without a warrant") of S. 1070 were not preempted by federal law.¹¹³

Judge Bea found the majority's reasoning erroneous and without support in relevant statutes and case law.¹¹⁴ The dissent stated that "Congress envisioned, intended, and encouraged inter-governmental cooperation between state and federal agencies, at least as to information regarding a person's immigration status,"¹¹⁵ and the majority "mischaracterizes the limited scope" of the provisions.¹¹⁶

Judge Bea writes that ICE's "priorities and strategies" are nothing but "important-sounding abstractions" and that "simply informing federal authorities of the presence of an illegal alien" will not interfere with federal priorities at all "unless such priorities and strategies are to avoid learning of the presence of illegal aliens."¹¹⁷ The dissent also argues that the majority "misrepresents Arizona's attempt to assist the federal government as "unilaterally

¹⁰⁶ [Id. at 997-98, 1005-07.](#)

¹⁰⁷ See generally [id. at 980.](#)

¹⁰⁸ [Id. at 997.](#)

¹⁰⁹ Fred Lucas, Nearly Half of United States Considering Arizona-Style Immigration Legislation, [cnsnews.com](http://cnsnews.com/node/71294) (Aug. 18, 2010), <http://cnsnews.com/node/71294> (discussing the legislation being considered by various states).

¹¹⁰ *Id.*

¹¹¹ [United States v. Arizona, 641 F.3d 339 \(9th Cir. 2011\).](#)

¹¹² [Id. at 344, 366.](#)

¹¹³ [Id. at 371-72, 390](#) (Bea, J., dissenting).

¹¹⁴ [Id. at 371](#) (Bea, J., dissenting).

¹¹⁵ [Id. at 382](#) (Bea, J., dissenting).

¹¹⁶ [Id. at 372](#) (Bea, J., dissenting).

¹¹⁷ [Id. at 379](#) (Bea, J., dissenting).

transforming state and local law enforcement officers into a state-controlled DHS force" when instead they are cooperating in the enforcement of federal law "as invited to do by Congress." ¹¹⁸ Governor Janice Brewer has asked the United States Supreme Court to grant certiorari and to reverse the finding that these provisions are unconstitutional. ¹¹⁹

By following the Arizona model and amending the INA to reflect a new provision that criminalizes unlawful presence, Congress would be taking steps toward deterring and controlling illegal immigration in the United States, thereby reducing the need for state laws to remedy federal inadequacies.

[*222]

IV. Learning a Lesson from Arizona: What the Federal Government Can Do to Fortify Federal Immigration Law

The fact that unlawful presence is not a federal criminal offense is inherently problematic. Criminal penalties are imposed on those illegal immigrants discovered at the time of entry or re-entry, but it is not always only those that enter illegally who pose a significant threat to society. ¹²⁰ It would be helpful to have the tools to prosecute persons who enter lawfully but who are now unlawfully present in the United States.

If inadequacies such as this persist in federal law, the United States government will continue to send a message to immigrants that unlawful presence is not a serious matter, unwittingly encouraging such behavior. The ideological and practical consequences of current federal policy are immeasurable, given the social realities in the United States, and, if not amended, will jeopardize the goals that such laws were intended to enforce.

A. Why Criminalize Unlawful Presence at the Federal Level?

Nine out of the twenty-five terrorists involved in the planning and execution of the September 11th terrorist attacks on America were, at the time of the attacks, unlawfully present in the country. ¹²¹ Some of them had student visas while in the United States. ¹²² Among those nine men, four of them had remained in the United States longer than permitted. ¹²³ Two of those men were on the American Airlines flight that struck and destroyed the World Trade Center North Tower and one of them was on the United Airlines flight that struck the South Tower. ¹²⁴ One of the terrorist pilots on the American Airlines flight that crashed into the Pentagon had been in the United States illegally for nine months prior to the attack. ¹²⁵ Of the other **[*223]** conspirators involved, five had been denied visas, with one of the men having been denied four times. ¹²⁶

¹¹⁸ [Id. at 383-84](#) (Bea, J., dissenting) (alteration in original).

¹¹⁹ [Petition for a Writ of Certiorari, United States v. Arizona, 641 F.3d 339 \(9th Cir. 2011\)](#) (No. 11-182). The United States Supreme Court has granted certiorari and will hear the case. Greg Stohr, Arizona Illegal-Immigration Legislation Given U.S. Supreme Court Review, Bloomberg.com (December 12, 2011), <http://www.bloomberg.com/news/2011-12-12/supreme-court-to-hear-arizona-s-appeal-of-ruling-against-immigration-law.html> (discussing S. 1070 and the relevant issues in the case of United States v. Arizona prior to review by the United States Supreme Court).

¹²⁰ Consider, for example, the 9/11 terrorists, discussed *infra* notes 121-128 and accompanying text.

¹²¹ Identity and Immigration Status of 9/11 Terrorists, FAIR, http://www.fairus.org/site/PageNavigator/issues/identity_immigration_status_of_911_terrorists.html (last updated Nov. 2011) [hereinafter Identity].

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

Assuming that unlawful presence would become a crime, persons such as the 9/11 terrorists who enter the United States lawfully but who are now present unlawfully could be prosecuted. While they certainly could be prosecuted for terrorist activity, the government may not have sufficient evidence to charge them with such an offense. Allowing criminal prosecution for unlawful presence provides law enforcement with another tool to deal with potential terrorists. Many of them traveled through security at U.S. airports shortly before the attacks, and it is hard to believe that they were permitted to enter without valid visas. It is equally hard to believe that it was not until after the horrific events of September 11th that they were discovered to be illegal aliens. An increase in law enforcement resources and heightened vigilance would have made such instances of bureaucratic incompetency less likely.

Despite the crimes of terrorism that these men had committed, the fact that they had also acted in violation of U.S. immigration laws was not enough to convince the federal government that something should be done to permanently remove them. The terrorist who crashed the plane into the North Tower of the World Trade Center, Mohammed Atta, was approved for a visa to remain in the United States.¹²⁷ Although he was one of America's most sought-after criminals who posed a serious security risk to the entire country, Atta was erroneously granted a visa extension by the Immigration and Naturalization Service ("INS").¹²⁸

Along with being the deadliest attacks in American history, the September 11th terrorist attacks are also one of the most compelling examples of why unlawful presence should be a federal crime. It is not always those immigrants who enter illegally that are the biggest threat to society. If nine of the worst criminals in American history were able to enter the United States legally, it is possible that many others will be able to do the same. Not only will a federal statute [*224] criminalizing unlawful presence give force to federal immigration law, but it will also require increased enforcement resources to support that law. It will aid federal officials in being more vigilant in their efforts to discover dangerous criminal aliens who hide behind expired visas and provide them with an additional screening tool to facilitate the prosecution and removal of such individuals.

Criminalizing unlawful presence at the federal level is a viable option for change. By incorporating such a provision into the INA, the federal government would provide effective assistance to states like Arizona that are struggling in their attempt to control the influx of illegal immigrants within their borders. Such a provision would promote an accord between federal and state governments by creating more uniformity between state and federal immigration policy.

A statute such as this is more likely to receive support now, compared with the first attempts of 2005 and 2006, chiefly because times have changed. In the years since the first bill failed, the federal government has been forced to recognize the need for such a provision as more and more people protest the ever-increasing numbers of illegal immigrants residing in the country. Evidence of this appears in the form of state legislation on the issue, first by Arizona, then spreading to other states, showing no signs of ceasing. Furthermore, the social concerns mentioned in Part II used to support the rejection of previous proposals to criminalize unlawful presence are, in fact, reasons which support such a policy. These practical considerations will be discussed in detail in the next section, as they are some of the most frequently debated issues cited by those opposing the federal criminalization of unlawful presence.

B. Practical Considerations for Change

As mentioned in Part II of this Note, the reasons for opposing a bill criminalizing unlawful presence are that such a law would: consume scarce law enforcement resources, place state and local officers in difficult enforcement roles, contribute to prison overcrowding, be unnecessary to the ultimate enforcement of immigration law, and lead to racial profiling, particularly among Hispanic residents.

¹²⁷ Id.; see also Mark Potter & Rich Phillips, Six Months After Sept. 11, Hijackers' Visa Approval Letters Received, CNN.com (Mar. 12, 2002), http://articles.cnn.com/2002-03-12/us/inv.flight.school.visas_1_huffman-aviation-ins-student-processing-center-tourist-visas?_s=PM:US (reporting that the flight school in Venice, Florida, where the two men trained, was notified that Atta had been approved for an extension of his student visa six months after Atta died after crashing a plane into one of the towers).

¹²⁸ Potter & Phillips, *supra* note 127.

The first concern is a valid one. The federal government desperately needs to bolster the resources provided to the Department of Homeland Security ("DHS") in order to offer much needed support to federal enforcement agencies such as ICE and U.S. Customs and Border Patrol ("CBP"). Particularly, an enormous increase in the [*225] workforce size of ICE and CBP is needed in order to adequately apprehend and prosecute those suspected of being unlawfully present in the United States. It is clear that DHS is currently suffering from a severe lack of resources to control and prevent illegal aliens from being present in the United States. ICE has the resources to remove only 400,000 aliens per year, which is less than four percent of the estimated illegal population in the United States.¹²⁹ Budgetary reductions over the last few years have forced ICE and CBP to focus their efforts on finding and removing only criminal aliens as the federal government has designated this group to be of top enforcement priority,¹³⁰ essentially "giving a free pass to any illegal immigrant [that] is not dangerous enough."¹³¹

However, simply removing criminal aliens is insufficient. It is not just the criminal aliens that pose a significant threat to society, but all forms of illegal immigration that threaten the authority of law. Without consistent application and enforcement of the law against illegal immigrants, the rule of law itself is undermined and is no longer a safeguard against arbitrary governance.¹³² If the rule of law is no longer enforced, those subject to the laws of the United States will no longer have settled expectations as to their rights and duties. By increasing resources, the federal government would be better able to effectuate broader enforcement goals seeking to protect the United States against all forms of illegal immigration including unlawful presence.

A criminalization provision for unlawful presence will not divert law enforcement resources from core responsibilities, but will instead realign both federal and state responsibilities to more effectively support the federal prerogative of immigration enforcement. A new [*226] provision in federal law will not detract from, but rather strengthen the link between federal policy and state enforcement of that policy.

While the degree to which state law enforcement officials would assist the federal government is dependent on many factors, the likelihood of providing assistance turns on the federal government's willingness to prosecute unlawful presence.¹³³ Statistics suggest the federal government possesses the requisite willingness. Federal criminal prosecutions for violations of immigration laws have increased significantly from 2003 to 2009.¹³⁴ Immigration prosecutions were up nearly sixteen percent and made up more than half of all cases brought by the federal government.¹³⁵ Federal prosecutors actually choose to prosecute ninety-seven percent of illegal immigration cases that are presented to them.¹³⁶ Moreover, these proceedings are quick and require less

¹²⁹ Jerry Seper, Lack of Resources Curtails ICE Tracking of Illegals: Agents Told to 'Prioritize', Wash. Times (Aug. 8, 2010), <http://www.washingtontimes.com/news/2010/aug/8/lack-of-resources-curtaills-ice-tracking-illegals/>.

¹³⁰ Id.

¹³¹ Id. (citing Representative Lamar Smith of Texas, a member of the House Committee on Homeland Security, in reference to Assistant Secretary John Morton's comment in his June 29, 2010 memo to ICE employees that the agency should only focus on top-priority illegal immigrants, which are those who pose a risk to national security or public safety, those convicted of violent crimes (both felons and repeat offenders), those older than sixteen who participate in gangs, and those with outstanding criminal warrants).

¹³² Cf. Rule of Law, LexisNexis, <http://www.lexisnexis.com/about-us/rule-of-law/> (last visited Feb. 15, 2012). The rule of law is the principle that stands for the idea that no one is above the law. Id.

¹³³ Garcia, supra note 79, at 5.

¹³⁴ Am. Civil Liberties Union, Issue Brief: Criminalizing Undocumented Immigrants 3 (2010) (indicating that federal prosecutions have increased from 20,000 in 2003 to 91,899 in 2009).

¹³⁵ John Schwartz, Immigration Enforcement Fuels Rise in U.S. Cases, N.Y. Times (Dec. 21, 2009), http://www.nytimes.com/2009/12/22/us/22crime.html?_r=1 (noting that the research center at Syracuse University analyzed the Department of Justice data and issued a new TRAC report that revealed a significant increase in federal prosecutions involving immigration violations).

manpower than other types of cases already pursued fervently by the U.S. government. Illegal immigration crimes tend to be disposed of within two days as opposed to 460 days for white-collar criminal offenses and 333 days for narcotics cases. ¹³⁷

In its complaint in *United States v. Arizona*, ¹³⁸ the U.S. government stated that Arizona's law criminalizing unlawful presence would "impose significant and counterproductive burdens on ... federal agencies" and would divert "resources and attention from the dangerous aliens who the federal government targets as its top enforcement priority." ¹³⁹ This would not be the case if the federal government allocated sufficient resources to make apprehension of all illegal aliens an enforcement priority. The fact that an immigrant has entered and remained in the United States in violation of existing immigration laws should be a crime in and of itself despite whether **[*227]** he or she has committed a felony or misdemeanor. The severity of the crime should not matter in terms of setting goals for federal law regarding who should be prosecuted and removed from the United States.

As to the second concern raised against a bill criminalizing unlawful presence, such a provision will place state officers not in more but rather less difficult enforcement roles. Instead of trying to compete with federal laws that lack support for state enforcement efforts, state officials will be cooperating with federal law in removing illegal immigrants. With adequate resources, states will have another mechanism by which to convict and remove those who violate the law while reducing recidivism for immigration law violations.

The federal government claims to understand Arizona's "legitimate concerns" on illegal immigration and "welcomes cooperative efforts ... to aid in the enforcement of the nation's immigration laws." ¹⁴⁰ But it is preventing exactly that by refusing to make the necessary amendments to the INA. The U.S. government is standing in its own way by refusing to enact change when it comes to balancing and enforcing immigration law.

Rather than expending the resources to effectively control illegal immigration now, the federal government has decided to support ineffective measures in order to avoid spending the resources that it does not have. However, the federal government is only postponing the inevitable. ¹⁴¹ The problem of illegal immigration in the United States cannot be controlled by only targeting criminal aliens. Enforcement agencies are directed to focus only on those who are deemed "enforcement priorities," and DHS struggles to maintain the resources to accomplish that goal. ¹⁴² As a result of such an extreme lack of resources, these agencies are forced to ignore the remaining population of illegal aliens present in the United States and their growing impact on society. While this excuse may have been acceptable in the past, the federal government is having a much bigger problem now when many individual states are demanding accountability. This inaction on the part of federal lawmakers enables an organized **[*228]** chaos, making it more burdensome and costly to the entire country in the future.

If unlawful presence were recognized as a federal crime, the federal government would be subscribing to goals to which the states already aspire to achieve. As a result, state goals would become federal goals, thereby eliminating

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ [703 F. Supp. 2d 980 \(D. Arizona 2010\)](#).

¹³⁹ Complaint at 3, [United States v. Arizona, 703 F. Supp. 2d 980 \(D. Ariz. 2010\)](#) (No. 10-1413). The government's complaint, which challenges the Arizona legislation on constitutional grounds, has not yet been adjudicated. The government's Motion for Preliminary Injunction, seeking to enjoin the State of Arizona from enforcing the new immigration law, was granted in part and denied in part. [United States v. Arizona, 703 F. Supp. 2d at 1008](#).

¹⁴⁰ Complaint, *supra* note 139, at 3.

¹⁴¹ See Seper, *supra* note 129 (noting that legislators like Representative Lamar Smith of Texas believe that the "Obama administration doesn't have the resources because they don't want them," the limits on detention capacity that hold them back are of their own making, and that it is "simply not serious about enforcing all of our immigration laws").

¹⁴² *Id.*

conflicts of interest and providing a truly united front for states to work with the federal government in combating illegal immigration.

Turning now to the third concern, there is no question that federal prisons in America are severely overcrowded, with criminal aliens representing the fastest growing segment of the federal prison population.¹⁴³ Over twenty-nine percent of prisoners incarcerated in Federal Bureau of Prisons facilities today are criminal aliens.¹⁴⁴ Among the alien prisoners, over half (55%) were unlawfully present in the United States at the time of their conviction.¹⁴⁵ Traditionally, federal law requires illegal immigrants who were convicted of crimes to serve their sentences before being deported.¹⁴⁶ If unlawful presence became a federal crime, the logical conclusion is that it would lead to an increase in the number of inmates in overcrowded prisons.

However, managing this issue is less harmful to society than refusing to punish unlawful presence altogether. Possible solutions to overcrowded federal prisons include allocating sufficient resources to create additional detention facilities for illegal aliens awaiting removal, assuring that conviction of unlawful presence or any other criminal offense results in removal in every case and possibly permanent exclusion from the United States,¹⁴⁷ and imposing reasonable sentences for those convicted of unlawful presence.

Another solution is to promptly determine the immigration status of each inmate and report those unlawfully present to the INS so they can be removed directly after they complete their sentence. According to the Federation for American Immigration Reform ("FAIR"), a large part of the problem contributing to prison overcrowding is that many criminal aliens are released into society to **[*229]** commit crimes again.¹⁴⁸ Reasons for this include the fact that "aliens are not identified in local and state jails, the INS is not informed of their presence, detention facilities are not available after they are released, they fail to report for deportation, or they return to the United States after deportation."¹⁴⁹ Criminalizing unlawful presence is an enhanced screening mechanism that will facilitate government cooperation in more effectively identifying criminal aliens when they enter the system and detaining them until they are removed. This will help deter future recidivists from continuing to take up space in federal prisons because they will no longer fall through the cracks of a broken system.

Fourth, the inclusion of a provision criminalizing unlawful presence in federal law is absolutely necessary to the enforcement of immigration law. To say that unlawful presence is not a crime is to undermine the very authority of the nation's laws themselves, along with the efforts of Congress and the federal government, that work to establish procedures for controlling immigration.

Lastly, one of the most compelling arguments made against criminalizing unlawful presence is that if unlawful presence were made a federal crime this would result in a police state with officers harassing and marginalizing immigrants and Hispanic residents who may be suspected of being illegally present. The concern is that lawful aliens and United States citizens will also be subject to unnecessary police surveillance and detentions while their immigration status is determined. This argument, while a legitimate concern on the surface, is an overstatement of the issue.

¹⁴³ Criminal Aliens, FAIR, http://www.fairus.org/site/News2?page=NewsArticle&id=16965&security=1601&news_iv_ctrl=1010 (last visited Feb. 15, 2012) [hereinafter Criminal Aliens].

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Peter H. Schuck, Op-Ed, Do Not Go Directly to Jail, N.Y. Times (Dec. 6, 2010), available at http://www.nytimes.com/2010/12/07/opinion/07Schuck.html?_r=1&nl=todaysheadlines&emc=a212.

¹⁴⁷ Criminal Aliens, *supra* note 143.

¹⁴⁸ Id.

¹⁴⁹ Id.

It is an exaggeration to say that a person's Fourth Amendment right to be free from unreasonable searches and seizures would be constantly violated by such a provision. Case law in this area is already a judicial quagmire comprised of vague criteria and convoluted reasoning as to what constitutes probable cause. If citizens who are lawfully residing in the country are expected to tolerate warrantless searches and seizures based on reasonable suspicion and probable cause, why is there an exception for illegal immigrants? The statute would not encourage harassment, but would enable reasonable investigations.

The idea of encouraging officers to attempt to determine a person's immigration status during a police stop, presumes that probable cause [*230] or reasonable suspicion exists. If an unlawful detention does occur, there are judicial safeguards in place to protect the victims and their constitutional rights. This has been the case for over a century. United States citizens, legal immigrants, and illegal immigrants are all entitled to the protections of the U.S. Constitution.¹⁵⁰ Therefore, a person who is present in the United States, regardless of his or her status, has standing to bring a claim against the government for a violation of his or her constitutional rights. Additionally, the "fruit of the poisonous tree doctrine" is designed to suppress unlawfully obtained evidence and is another safeguard that serves to protect the constitutional rights of individuals in the United States.¹⁵¹ In saying that attempts to discover lawlessness breed discrimination, the question asked must be who is being protected? Is it American citizens, or those who are here only through unlawful means?

It is perhaps an unpopular opinion that attempting to find illegal immigrants through such investigative detentions is a "necessary evil." The fact that the majority of illegal immigrants currently in the United States happen to be from a certain part of the world is not a compelling reason for the federal government to refuse to fix the problem. U.S. Supreme Court Justice Brandeis observed, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example... If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."¹⁵² Those who read racist motives behind a law criminalizing unlawful presence are completely missing the point. Further, proper training and education of law enforcement officials will reduce the risk that officers may use such investigative detentions in order to harass citizens. If the federal [*231] government does not criminalize unlawful presence, this provides less incentive for any immigrant to obey the law. The letter of the law becomes a mere formality and the spirit of the law is forgotten.

It is for this reason that many people can agree on one thing: the law should inflict just punishment on those who disobey it, for the benefit of everyone. Regardless of where a person is from, if he or she is present here as a result of violating the law, he or she should be subject to the consequences. What good is the law if it is not properly enforced?

While this Note in no way condones or tolerates discrimination based on race or national origin, a balance will not be achieved by dismissing the problem as a gut reaction to fear of such risks. For the federal government to do nothing is to continue to let the problem of illegal immigration fester in society. This Note also does not suggest that the criminalization of unlawful presence is the only solution necessary to the problem of illegal immigration. It is,

¹⁵⁰ See *Plyler v. Doe*, 457 U.S. 202, 210-16 (1982). Illegal immigrants who allege constitutional claims are protected by the Fourteenth Amendment Equal Protection Clause of the Constitution, which provides that no state shall deny "to any person" within its jurisdiction equal protection of the laws. *Id.* at 210. In this case, the Supreme Court expanded the controversial holding that illegal immigrants are "persons" within the meaning of the Fourteenth and Fifth Amendments by determining that, if illegal immigrants are persons according to the Constitution, then they are considered "within its jurisdiction" and therefore are entitled to protection under the Fourteenth Amendment as well. *Id.* at 210-15.

¹⁵¹ See generally Gary D. Spivey, Comment Note, "Fruit of Poisonous Tree" Doctrine Excluding Evidence Derived from *Information Gained in Illegal Search*, 43 A.L.R. 3d 385 (1972). The "fruit of the poisonous tree doctrine" is a specific application of the exclusionary rule, and "provides that when evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *Id.* § II(A)(4).

¹⁵² *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

however, a logical place from which to begin a discourse about the reality the United States is facing. The problem of illegal immigration is not going away, and if the federal government continues to reject change, the nature of this issue will wear a much more dismal face.

C. Amending Federal Immigration Law

Integrating unlawful presence into federal law may ultimately prove to be less difficult than getting lawmakers to agree that it should be included in the first place. The current framework of the INA lends itself to expansion. Certain parts of Arizona's law, as well as previous legislation attempting to criminalize unlawful presence, are all good models with which to begin.

Specifically, the final part of this Note will consider the scope of inclusion under a new unlawful-presence provision as well as strive to achieve a balance between the interests of the states and the federal government. The provision set forth is a suggestion and is intended to be the first building block of a new foundation for change in federal immigration policy, in the hope that this foundation is one that everyone can eventually agree on.

Unlawful presence could be added as a new provision to the INA that imposes criminal sanctions on those who have entered lawfully but who remain present in the United States without authorization. This would include any person found to be present in the country illegally for any period of time as a result of an expired visa or as a [*232] result of violating the terms of their non-immigrant status, regardless of their status upon entry. With sufficient federal resources and personnel support, this relatively minor revision to the INA will produce major steps forward in reducing the number of illegal immigrants in the country by more efficiently identifying and removing those who have already violated the law.

Another possible solution to the problem of illegal immigration would be to eliminate state-sanctuary policies that forbid police officers from arresting criminals based on their immigration status.¹⁵³ This would prevent those who have entered or remain in the country unlawfully from receiving a "free pass" for so doing. An alternative approach would be to criminalize unlawful presence in conjunction with an "earned legalization" process whereby illegal immigrants work to earn their status.¹⁵⁴ The idea is to provide a balance between immigration enforcement and preservation of human dignity through support for legal immigration.¹⁵⁵ An earned legalization process or guest-worker program could be instituted for those illegal immigrants of good moral character who enter the United States to find quality work or to be reunited with their family. The crime of unlawful presence could be in place to apprehend and remove dangerous [*233] criminal aliens. In combining these two programs, the federal

¹⁵³ See Hayworth & Eule, *supra* note 31, at 33.

¹⁵⁴ This process is advocated by the Roman Catholic Church and the U.S. Conference of Catholic Bishops. Frequently Asked Questions, *supra* note 5 (requiring undocumented immigrant workers to "earn" their permanent status by working for a six-year period before qualifying; it would also require the payment of a fine and English language capability). The U.S. Conference of Catholic Bishops states that this process is very different from the "amnesty" which has been given to illegal immigrants based solely on their unlawful presence in the United States. *Id.* (asserting that "amnesty" is the forgiving of a debt, whereas the "earned legalization" process is exactly that - earned).

¹⁵⁵ The Catholic Church does not support legislation that brings "undue harm" to immigrants or their families; rather, the U.S. Conference of Catholic Bishops "strongly oppose" H.R. 4437, one of the legislative bills mentioned in this Note that included provisions for criminalizing unlawful presence. *Id.* The Catholic Church does not condone illegal immigration because 1) it is contrary to federal law and 2) it is not good for society as many illegal immigrants are living outside the legal structures of the country and migrants are further subjected to abuse and exploitation as a result. *Id.* The Church, however, does believe that the U.S. immigration laws are broken and need to be changed so that immigrants can obtain legal status to enter and legally work in the United States to support their families. *Id.* The position of this Note does not deviate from the position of the Catholic Church. The first step in eliminating the abuse and exploitation of illegal immigrants in the United States is to make a change. The discussion of criminalizing unlawful presence is one possible solution proposed as a launch pad, but it is not the only change that can or should be made towards the regulation of illegal immigration. This Note acknowledges and fully supports the goals of the Catholic Church in preserving the dignity of the human person and creating an environment that is safe for immigrants and their families as well as being in compliance with federal law.

government would be better able to achieve a balance between encouraging lawful immigration for those seeking admission to the United States for the right reasons and preventing criminal aliens from remaining in the country for the wrong ones.

A provision that imposes criminal penalties on those who are unlawfully present would force the federal government to re-prioritize its enforcement goals to ensure that enforcement agencies justly combat all forms of illegal immigration. Such a provision will also lend support to current immigration law by serving as a deterrent. Criminalizing unlawful presence is not drastically different from what the federal government has in place now. An illegal alien can be civilly removed from the United States for being unlawfully present. The additional imposition of criminal penalties along with an increase in federal enforcement resources would be a change with the promise of effective and fair enforcement of United States immigration laws.

Conclusion

There are indeed many considerations, both practical and ideological, to take into account when making any amendments to federal immigration law which would criminalize unlawful presence. If United States history has taught us anything about illegal immigration, it is that there is no easy solution to fix the problem. This Note does not claim that criminalizing unlawful presence is an easy fix or the only fix. It does, however, try to explain the need for such a provision in federal law as a starting place to get the problem of illegal immigration under control.

A well-reasoned change is better than no change at all. By criminalizing unlawful presence in federal immigration law and allocating the resources to enforce such a law, the United States can begin to face reality head-on. This change would represent an incremental step forward for the nation. Numbers show that the problem of illegal immigration is worsening, and the federal government can no longer afford to reject change. With many states now forcing the issue by creating a new trend of enforcement legislation that incorporates unlawful presence provisions, they are attempting to do what federal immigration law does not. Now is the time for the federal government to listen and learn.

Criminalizing unlawful presence would allow the federal government to lead the way in unifying the states with purpose. By [*234] engaging widespread support for federal immigration policy, such a statute would restore the authority of our nation's immigration laws and would encourage and welcome the growth of lawful immigration. The new policy will achieve the goal that the INA was initially created to further, which is to foster immigration without discrimination, while preserving the purpose of laws as governing bodies and enforcing them for the benefit of a safe, organized society.