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## Less Enforcement, More Compliance: Rethinking Unauthorized Migration

Emily Ryo



### ABSTRACT

A common assumption underlying the current public discourse and legal treatment of unauthorized immigrants is that unauthorized immigrants are lawless individuals who will break the law—any law—in search of economic gain. This notion persists despite substantial empirical evidence to the contrary. Drawing on original empirical data, this Article examines unauthorized immigrants and their relationship to the law from a novel perspective to make two major contributions. First, I demonstrate that unauthorized immigrants view themselves and their noncompliance with U.S. immigration law in a manner that is strikingly different from the prevalent view of criminality and lawlessness found in popular and legal accounts. Unauthorized immigrants' decisions to cross the border—and to remain in the United States despite their lack of legal status—are likely shaped in large measure by their distinct normative views of themselves and their economic situations, as well as their perceptions about the lack of legitimacy of U.S. immigration law. Second, I show why understanding these views and values of unauthorized immigrants may have significant implications for promoting voluntary compliance with U.S. immigration law.

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## INTRODUCTION

Unauthorized immigrants,<sup>1</sup> often labeled as “illegal immigrants” or “illegal aliens” in both legal and popular discourse, are commonly portrayed as inveterate lawbreakers—the direct antitheses of law-abiding citizens.<sup>2</sup> For example, Justice Scalia in his partial dissent in *Arizona v. United States*—the 2012 case involving the constitutionality of Arizona’s immigration statute, S.B. 1070—described unauthorized immigrants in the following way: “Arizona bears the brunt of the country’s illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy.”<sup>3</sup> This view is common currency in U.S. courts.<sup>4</sup> Likewise, political discourse is rife with portrayals of unauthorized immigrants as lawless individuals. As Rick Santorum—a former U.S. Senator and presidential contender—noted in his discussion of unauthorized immigrants: “You can’t be here for 20 years and commit only one illegal act . . . because *everything* you’re doing while you’re here is against the law.”<sup>5</sup> These

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1. Following Thomas Alexander Aleinikoff and his colleagues, I generally use the term “unauthorized” to describe individuals who are in the United States without the legal permission of the U.S. government. See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 452–53 (7th ed. 2012) (using the term “undocumented” synonymously). At times, however, I use the term “illegal” interchangeably with “unauthorized” to describe the act of migration that occurs without the permission of the receiving country. On the moral, legal, and political valence of different terminology used in this area of research, see Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2038 n.1 (2008) (compiling relevant scholarship); Mila Paspalanova, *Undocumented vs. Illegal Migrant: Towards Terminological Coherence*, 4 MIGRACIONES INTERNACIONALES 79, 80 (2008) (arguing for the adoption of the term “undocumented/irregular migrant” in lieu of “illegal”).
  2. See generally JONATHAN XAVIER INDA, TARGETING IMMIGRANTS: GOVERNMENT, TECHNOLOGY, AND ETHICS 125 (2006) (explaining how unauthorized immigrants have been construed as “imprudent subjects who have failed to comport themselves ethically[;] as anti-citizens incapable of exercising responsible self-management, unable or unwilling to enterprise their lives or manage their own risks”).
  3. 132 S.Ct. 2492, 2522 (2012) (Scalia, J., dissenting).
  4. See, e.g., *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011) (“Illegal aliens are not ‘law-abiding, responsible citizens’ . . .” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008))); *United States v. Toner*, 728 F.2d 115, 128–29 (2d Cir. 1984) (“[I]llegal aliens are those who . . . are likely to maintain no permanent address in this country, elude detection through an assumed identity, and—already living outside the law—resort to illegal activities to maintain a livelihood.” (internal quotation marks omitted)).
  5. Gabe Licht, *Gay Rights, Immigration Dominate Santorum Stop*, SPENCER DAILY REP. (Dec. 8, 2011), <http://www.spencerdailyreporter.com/story/1792427.html> (emphasis added). Underlying these sentiments is the question often raised in popular discourse: “If illegal

perceptions in turn have significant policy implications. Many of the restrictive immigration-related state laws that have been enacted across the United States are borne of implicit and explicit anxieties about the perceived lawlessness of unauthorized immigrants.<sup>6</sup> Politicians have also used the rhetoric of immigrant criminality to justify continued increases in enforcement spending at the U.S.-Mexico border.<sup>7</sup>

These perceptions of immigrant criminality and lawlessness persist despite substantial empirical evidence to the contrary.<sup>8</sup> In a study comparing the recidivism rates of immigrants with and without legal status, for example, Laura Hickman and Marika Suttorp find no difference in the re-arrest rates of these two groups.<sup>9</sup> More generally, aggregate-level studies consistently find that communities with high concentrations of immigrants, including unauthorized immigrants, have lower crime rates.<sup>10</sup> Micro-level studies offer

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immigrants will break the law to get into this country, what other laws will they break?" Bruce Mauriello, *Supporting Illegal Immigration Is Not Christian*, ILLEGAL IMMIGR. STAT. (July 23, 2010), <http://www.illegalimmigrationstatistics.org/illegal-immigration-is-not-christian>; see also Francis Fukuyama, *Immigrants and Crime: Time for a Sensible Debate*, WALL ST. J., July 26, 2010, at A15 ("It is common to hear those who oppose immigration argue that the first act illegal immigrants commit on U.S. soil is to break the law—that is, our immigration laws—and that they are ipso facto criminals who will continue to disregard U.S. laws once in the country.").

6. Momentum for S.B. 1070, for example, grew out of the unsolved murder of a prominent Arizona rancher, for which the community blamed an unauthorized migrant. See JAN BREWER, SCORPIONS FOR BREAKFAST: MY FIGHT AGAINST SPECIAL INTERESTS, LIBERAL MEDIA, AND CYNICAL POLITICOS TO SECURE AMERICA'S BORDER 17–21 (2011); Jacques Billeaud & Amanda Lee Myers, *Arizona Law Comes After Years of Mounting Anger*, ABC NEWS (July 25, 2010), <http://abcnews.go.com/US/arizona-immigration-law-years-mounting-anger/story?id=11247140>; Nathan Thornburgh, *Border Crackdowns and the Battle for Arizona*, TIME (June 14, 2010), <http://www.time.com/time/magazine/article/0,9171,1993872,00.html>; Daniel B. Wood, *Robert Krentz Killing Stokes Fears of Rampant Illegal Immigration*, CHRISTIAN SCI. MONITOR (Mar. 31, 2010), <http://www.csmonitor.com/USA/2010/0331/Robert-Krentz-killing-stokes-fears-of-rampant-illegal-immigration>.
7. See, e.g., David Nakamura & Karen Tumulty, *Gov. Perry to Send National Guard Troops to Mexican Border Amid Migrant Crisis*, WASH. POST, July 21, 2014, [http://www.washingtonpost.com/politics/perry-to-send-national-guard-troops-to-mexican-border-amid-migrant-crisis/2014/07/21/499feb5a-110c-11e4-98ee-daea85133bc9\\_story.html](http://www.washingtonpost.com/politics/perry-to-send-national-guard-troops-to-mexican-border-amid-migrant-crisis/2014/07/21/499feb5a-110c-11e4-98ee-daea85133bc9_story.html) (discussing Texas Governor Rick Perry's plan to send state National Guard troops to the U.S.-Mexico border to "help identify potential criminal activity and alert law enforcement officers").
8. For a review of studies on immigration and crime, see Ramiro Martinez, Jr. & Matthew T. Lee, *On Immigration and Crime*, 1 CRIM. JUST. 2000, 485 (2000).
9. Laura J. Hickman & Marika J. Suttorp, *Are Deportable Aliens a Unique Threat to Public Safety? Comparing the Recidivism of Deportable and Nondeportable Aliens*, 7 CRIMINOLOGY & PUB. POL'Y 59, 77 (2008).
10. See generally Ramiro Martinez, Jr. et al., *Immigration and Crime in an Era of Transformation: A Longitudinal Analysis of Homicides in San Diego Neighborhoods, 1980–2000*, 48 CRIMINOLOGY 797, 817 (2010) (finding that, over a twenty-year period in the city of San Diego, communities with increasing immigrant populations saw a reduction in the number of homicides);

parallel conclusions, finding that immigrants are generally less crime-prone than native-born persons.<sup>11</sup> Kathleen Dingeman and Rubén Rumbaut, for example, show that the incarceration rate for young foreign-born males of Latin American origin is 1.7 times lower than the rate for native-born non-Hispanic white men and almost 12 times lower than the rate for native-born non-Hispanic black men.<sup>12</sup> Dingeman and Rumbaut further show that foreign-born Mexicans, Salvadorans, and Guatemalans—the groups that make up the bulk of the unauthorized population—have the lowest incarceration rates of any Latin American immigrant group.<sup>13</sup>

In sum, the current discourse is characterized by popular representations of unauthorized immigrants as lawless individuals on the one hand, and

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Graham C. Ousey & Charis E. Kubrin, *Exploring the Connection Between Immigration and Violent Crime Rates in U.S. Cities, 1980–2000*, 56 SOC. PROBS. 447, 452–53 (2009) (arguing that “contemporary immigrant communities erect important social networks that fortify traditional intact (two-parent) family structures” that “impede crime”); Lesley Williams Reid et al., *The Immigration-Crime Relationship: Evidence Across U.S. Metropolitan Areas*, 34 SOC. SCI. RES. 757, 775 (2005) (“The overall point is that contrary to public discourse, immigration does not inflate crime. In fact, we find that some aspects of immigration may actually lessen crime rates.”); Tim Wadsworth, *Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime Between 1990 and 2000*, 91 SOC. SCI. Q. 531, 548 (2010) (arguing that “patterns of immigration help explain the dramatic drop in violent crime rates that occurred between 1990 and 2000”). But see Charis E. Kubrin & Hiromi Ishizawa, *Why Some Immigrant Neighborhoods Are Safer Than Others: Divergent Findings From Los Angeles and Chicago*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 148, 161 (2012) (finding reduced crime rates in neighborhoods with high levels of immigrant concentration in Chicago, but not in Los Angeles).

11. See Martinez & Lee, *supra* note 8, at 496 (“[T]he major finding of a century of research on immigration and crime is that immigrants . . . nearly always exhibit lower crime rates than native groups.” (citations omitted)); see also Kristin F. Butcher & Anne Morrison Piehl, *Crime, Corrections, and California: What Does Immigration Have to Do With It?*, CAL. COUNTS: POPULATION TRENDS & PROFILES, Feb. 2008, at 1, 2 (“[I]mmigrants are underrepresented in California prisons compared to their representation in the overall population.”); John Hagan & Alberto Palloni, *Sociological Criminology and the Mythology of Hispanic Immigration and Crime*, 46 SOC. PROBS. 617, 630 (1999) (casting doubt on the hypothesis that immigration causes crime); Amie L. Nielson & Ramiro Martinez, Jr., *Nationality, Immigrant Groups, and Arrest: Examining the Diversity of Arrestees for Urban Violent Crime*, 27 J. CONTEMP. CRIM. JUST. 342, 355 (2011) (“Overall, the results indicate that immigrants are less likely to be arrested for robbery relative to aggravated assault than are natives controlling for relevant variables.”); Robert J. Sampson et al., *Social Anatomy of Racial and Ethnic Disparities in Violence*, 95 AM. J. PUB. HEALTH 224, 231 (2005) (finding that Latinos in Chicago neighborhoods have lower odds of engaging in violence than whites).
12. M. Kathleen Dingeman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 376 tbl.2 (2010); see also RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POLICY CTR., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 1 (2007).
13. Dingeman & Rumbaut, *supra* note 12.

scholarly analyses that refute the empirical basis for those representations on the other. Conspicuously missing from this discourse, however, are the views of individuals who are subject to U.S. immigration law. For the first time, this Article addresses that critical gap in knowledge by analyzing legal noncompliance from the perspective of current and prospective unauthorized immigrants.

Why might we care about the views and normative values<sup>14</sup> of unauthorized immigrants who, by virtue of their legal status, lack formal membership in our polity? I do not contend here that we ought to take seriously unauthorized immigrants' views and normative values because we are morally obligated to do so (though such a rationale may very well exist based on such theories as the world-systems theory of international migration).<sup>15</sup> Rather, my argument is much more circumscribed and practical. Noncompliance with U.S. immigration law occurs on a massive scale: There were roughly 11.7 million unauthorized immigrants living in the United States in 2012, according to the most recent estimate.<sup>16</sup> The U.S. government seeks to regulate the behavior of these immigrants and millions of prospective immigrants outside our borders. An understanding of the perspectives and motivations of those engaged in noncompliance might be important—indeed, critical—to achieving this regulatory goal, particularly if the government seeks to adopt a self-regulatory approach to governance. The self-regulatory approach focuses on activating people's internal values, rather than relying on threats of punishment, to

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14. Following Richard McAdams and Eric Rasmusen, I define “normative values” to mean those that are associated with feelings of obligation and judgments of right and wrong. See Richard H. McAdams & Eric B. Rasmusen, *Norms and the Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1573, 1576 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

15. World-systems theorists argue that international migration is one of the many natural outgrowths of capitalist penetration into the world market, and the increasingly unequal terms of trade between developed and underdeveloped countries. See DOUGLAS S. MASSEY ET AL., *WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENNIUM* 34–41 (1998). Insofar as international migration is a structural consequence of powerful states promoting their own interests at the expense of underdeveloped countries, obligations of rectification and redress might require those powerful states to attend to the concerns and needs of migrants and potential migrants. See Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice?*, in *DEBATING IMMIGRATION* 63, 76 (Carol M. Swain ed., 2007) (“[I]f we have exploited or oppressed poorer and weaker societies . . . then we have debts to these other societies . . .”).

16. Jeffrey S. Passel et al., *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, PEW RESEARCH HISPANIC TRENDS PROJECT (Sept. 23, 2013), <http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed>.

promote law-abiding behavior.<sup>17</sup> The benefit of value-based motivation is that it produces voluntary cooperation with legal authorities, which is not only less costly than legal enforcement, but also fundamental to the maintenance of liberal democratic institutions.<sup>18</sup>

This Article draws on original empirical data to make two major contributions to research on unauthorized migration. First, I demonstrate that unauthorized immigrants view themselves and their noncompliance with U.S. immigration law in a manner that is strikingly different from the prevalent view of criminality and lawlessness found in popular and legal accounts. The immigrants in this study viewed themselves as law-abiding individuals who valued legal order and respected national sovereignty. Consistent with these views, they made sense of their noncompliance with U.S. immigration law through various accounts that were characterized by certain value orientations and moral imperatives.

In brief, the immigrants in this study attributed their unemployment or underemployment underlying their migration decisions to structural forces beyond their individual control.<sup>19</sup> They also commonly discussed their deeply held commitments to supporting their families in times of need, and their pride in performing “legal” and “honorable” work to meet that need.<sup>20</sup> In addition, the immigrants distinguished their noncompliance with U.S. immigration law—which, from their perspective, allowed them to perform work that undeniably helped to build the U.S. economy—from noncompliance with other laws that would result in clear harm to others.<sup>21</sup> These results are consistent with, and provide a rich contextualized basis for understanding the statistical findings discussed above that cast doubt on popular notions of immigrant criminality. For example, this study’s findings offer a nuanced explanation for why unauthorized immigrants might engage in a particularized rather than a generalized form of noncompliance—that is, why they might violate U.S. immigration law but not other kinds of laws.

Second, I show why understanding the unauthorized immigrants’ views and normative values may have significant implications for promoting

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17. See generally Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 319 (2009) [hereinafter *Legitimacy and Criminal Justice*] (arguing that “feelings of obligation to obey the law” may be “engaged by legal authorities because they are linked to judgments about how authorities exercise their authority”).

18. See *id.* at 330; see also PATTI TAMARA LENARD, TRUST, DEMOCRACY, AND MULTICULTURAL CHALLENGES 39–42 (2012).

19. See *infra* Part IV.C.1.

20. See *infra* Part IV.C.1.

21. See *infra* Part IV.C.2.



voluntary compliance with U.S. immigration law. A well-established body of research shows that there are two important antecedents of law-abiding behavior: (1) relative congruency of the law with the moral values of those governed, and (2) belief in the legitimacy of legal authority.<sup>22</sup> My analysis shows that from the perspective of unauthorized immigrants, current U.S. immigration policy is neither in alignment with their expressed moral values nor legitimate. For example, prominent in the immigrants' narratives were discussions of the various ways in which the current U.S. immigration system violates fundamental notions of equality and fairness by operating in biased, hypocritical, and arbitrary ways.<sup>23</sup> Together with immigrants' expressed moral values undergirding their decisions to migrate, these beliefs about the lack of system legitimacy form a powerful normative account that might enable otherwise law-abiding individuals to violate U.S. immigration laws. These findings thus offer additional insights into why our current laws and enforcement policies have produced massive noncompliance and what type of measures might result in less enforcement but more compliance.

The rest of this Article proceeds as follows. Part I describes the major trends in contemporary U.S. immigration policy. This policy has relied heavily on the assumption that unauthorized immigrants are lawless individuals who will break the law—any law—in search of economic gain. I then discuss the principal failures of this policy and explain the need for a broader, more accurate understanding of unauthorized immigrants as individuals who possess deeply felt moral sensibilities and whose actions are guided by complex internal values.<sup>24</sup> Part II sets forth the theoretical framework for my analysis of how current and prospective unauthorized immigrants view U.S. immigration law and their own acts of noncompliance. Researchers have examined criminal offenders' "neutralization techniques" to better understand offenders' noncompliance decisions.<sup>25</sup> This Article applies this neutralization framework to examine unauthorized immigrants' law-related views and attitudes.

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22. See generally Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, 50 PSYCHOL. LEARNING & MOTIVATION 101, 117–19 (2009); *Legitimacy and Criminal Justice*, *supra* note 17, at 328–30.

23. See *infra* Part IV.C.3.

24. According to research on dehumanization, members of the dominant group often deny out-group members basic human attributes such as moral and other internal values. See generally Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY & SOC. PSYCHOL. REV. 252, 252–55 (2006); Lasana T. Harris & Susan T. Fiske, *Social Neuroscience Evidence for Dehumanised Perception*, 20 EUR. REV. SOC. PSYCHOL. 192, 199–203 (2009).

25. See Shadd Maruna & Heith Copes, *What Have We Learned From Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 221–22 (2005).

Part III describes the original group interview data that I collected from current and prospective unauthorized immigrants from Latin America and explains the methodology I used to carry out the empirical analysis. Part IV discusses the main empirical findings of the study. My analysis shows that, contrary to popular assumptions, current and prospective unauthorized immigrants do not simply stand “against the law”;<sup>26</sup> rather, they possess a much more complex and multifaceted legal consciousness. Current and prospective unauthorized immigrants unequivocally see themselves as law-abiding individuals notwithstanding their violations of U.S. immigration law. This self-perception is based on their belief that noncompliance with U.S. immigration law might be the only moral and responsible choice under the circumstances. I analyze the nature and content of these perceptions in this Part.

Part V considers some of the policy-related questions raised by the reconceptualization of unauthorized immigrants as complex moral agents, and highlights policy alternatives that deserve systematic investigation in light of this study’s findings. An important focus of the large body of research on why people obey or disobey the law is to investigate how empirical knowledge about human motivations, social norms, and law-related attitudes can be utilized to promote law-abiding behavior. For example, tax scholars working in this vein have advocated that the Internal Revenue Service “adopt a tax morale approach to tax compliance that recognizes the importance of taxpayers’ internal motivations.”<sup>27</sup> This approach does not call for giving lawbreakers “everything they want” or “appeasing them” by changing the law;<sup>28</sup> rather, the goal of this approach is to broaden our base of empirical knowledge about the individuals whose behavior the law seeks to regulate, in order to develop more principled, sustainable, and effective policies that engender greater voluntary compliance. Finally, I conclude by highlighting a

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26. Patricia Ewick and Susan Silbey contend that legal consciousness manifests itself in three predominant types: “before the law,” “with the law,” and “against the law.” See PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 45–49 (1998). Those “before the law” view or experience the law as objective, autonomous, powerful, and sacred. Those who are “with the law” imagine law as a game—a terrain of contestation or a set of procedures and resources that can be manipulated for personal advantage. Those who stand “against the law” feel trapped by it and seek ways to manage its power through distancing or acts of resistance. See *id.*

27. Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599, 602 (2007).

28. See Anthony E. Bottoms, *Interpersonal Violence and Social Order in Prisons*, 26 CRIME & JUST. 205, 256 (1999) (internal quotation marks omitted). These and similar charges have been leveled at research that examines the importance of incarcerated individuals’ perceptions of the legitimacy of legal authority to the maintenance of order in prisons.

number of important lines of inquiry for future research on the normative values of unauthorized immigrants.

### I. THE PUZZLE OF U.S. IMMIGRATION POLICY

In recent decades, U.S. immigration law has become increasingly defined by three major trends in its treatment of unauthorized immigrants: (1) a dramatic fortification of the U.S.-Mexico border, (2) an increasing criminalization of immigrants, and (3) growing local involvement in the enforcement of federal immigration laws. Many complex social, economic, and political forces underlie each of these enforcement-focused developments.<sup>29</sup> One commonality across these developments, however, is the assumption that unauthorized immigrants are lawless individuals who can be deterred only through escalating sanctions that increase the economic costs of noncompliance. As Douglas Massey and Fernando Riosmena have observed, “U.S. immigration and border policies basically follow the precepts of neoclassical economics, which views migration as a cost-benefit decision taken by individuals seeking to maximize earnings net of various costs.”<sup>30</sup> This view of human decisionmaking, formally known as the rational-choice or deterrence model, also forms an important foundation of the U.S. criminal justice system more generally.<sup>31</sup> Applied to immigration law, this model predicts that laws that decrease the economic benefits and increase the costs

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29. See generally BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* (2004) (discussing the major immigration policy reforms and enforcement strategies as an effort to “define America”); KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007) (discussing how U.S. immigration law and enforcement policies reflect the economic needs and biases of our times); Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1 (2012) (examining the complex interplay of political, social, and institutional factors that have produced the “dysfunctional” American immigration system); Motomura, *supra* note 1, at 2041–92 (examining various conceptual themes central to debates about unauthorized migration).

30. Douglas S. Massey & Fernando Riosmena, *Undocumented Migration From Latin America in an Era of Rising U.S. Enforcement*, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 294, 296 (2010) (citation omitted); see also Douglas S. Massey & Kristin E. Espinosa, *What’s Driving Mexico-U.S. Migration? A Theoretical, Empirical, and Policy Analysis*, 102 AM. J. SOC. 939, 940 (1997) (“Drawing on neoclassical assumptions, U.S. policymakers have sought to deter illegal migration by raising the costs and lowering the benefits of undocumented movement.”).

31. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765 (2010).

of unauthorized migration should produce significant deterrent effects.<sup>32</sup> The puzzle of the current enforcement of immigration policy, however, is that it has failed to produce the intended deterrence.

### A. Overview of Major Legal Developments

Unlawful entry into the United States is a petty misdemeanor<sup>33</sup> under U.S. federal law, punishable by up to six months in prison.<sup>34</sup> The penalty is harsher in cases of reentry by removed noncitizens.<sup>35</sup> But the historical practice was to voluntarily return most individuals apprehended at the U.S.-Mexico border to their countries of origin, rather than remove them through formal proceedings.<sup>36</sup> Most of these individuals would then try again to enter, eventually succeeding.<sup>37</sup> Some commentators thus have described the U.S. border policy as a “revolving door.”<sup>38</sup> In the mid-1980s, however, the U.S. Congress began undertaking an escalating series of measures to deter unauthorized migration.<sup>39</sup> This escalation gained renewed strength post-9/11, as unauthorized migration was transformed into a “national security threat” in political rhetoric.<sup>40</sup> As a result of these developments, the U.S. Border Patrol became the largest arms-bearing branch of the federal government apart from

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32. See George J. Borjas, *Economic Theory and International Migration*, 23 INT’L MIGRATION REV. 457, 460-61 (1989).

33. See generally *Lewis v. United States*, 518 U.S. 322, 326 (1996) (stating that offenses for which the statutory maximum penalty is imprisonment for six months or less are presumptively “petty” offenses).

34. 8 U.S.C. § 1325 (2012).

35. See 8 U.S.C. § 1326 (2012) (setting 10 and 20-year limits on prison sentences for removed noncitizens who reenter the United States without authorization).

36. In 2004, for example, more than 80 percent of all unauthorized immigrants who were removed or returned to their countries of origin were returned voluntarily, rather than under a removal order. See U.S. DEP’T OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS 94 tbl.36 (2011), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois\\_yb\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf).

37. See Katharine M. Donato & Amada Armenta, *What We Know About Unauthorized Migration*, 37 ANN. REV. SOC. 529, 532 (2011) (“[T]he number of attempts was usually one greater than the number of apprehensions, and all migrants simply tried to enter until they succeeded.”).

38. Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 287 (1998).

39. See Massey & Riosmena, *supra* note 30, at 295.

40. See generally David A. Harris, *Immigration and National Security: The Illusion of Safety Through Local Law Enforcement Action*, 28 ARIZ. J. INT’L & COMP. L. 383, 386-89 (2011) (explaining how advocates of stricter immigration enforcement changed the basis of their arguments from economic and labor concerns to issues of national security after 9/11).

the military itself, and the U.S.-Mexico border was transformed into “the most militarized frontier between two peaceful nations anywhere in the world.”<sup>41</sup>

Federal efforts to deter unauthorized migration consisted of both legislation and enforcement initiatives. In 1986, the Immigration Reform and Control Act (IRCA) criminalized the hiring of unauthorized immigrants and increased the Border Patrol’s budget.<sup>42</sup> In 1993 and 1994, Operation Blockade and Operation Gatekeeper were launched to prevent unauthorized entry through the borders in El Paso and San Diego, respectively.<sup>43</sup> Various federal laws were enacted in 1990,<sup>44</sup> 1996,<sup>45</sup> 2001,<sup>46</sup> 2002,<sup>47</sup> and 2005<sup>48</sup> to further these enforcement efforts.<sup>49</sup> In 2005, Operation Streamline was launched in Del Rio, Texas; it was subsequently implemented in other parts of the border between Mexico and Texas, Arizona, and New Mexico.<sup>50</sup> The most notable and controversial feature of Operation Streamline is the mandate that all unauthorized border crossers be criminally prosecuted, “regardless of their prior history.”<sup>51</sup> In part, these policies reflect an increasing convergence between immigration and criminal law—a larger trend that many scholars refer to as “cimmigration.”<sup>52</sup> This convergence has produced a significant increase in federal prosecutions and detentions of immigrants generally and unauthorized immigrants in particular.<sup>53</sup> In April

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41. Massey & Riosmena, *supra* note 30, at 295.

42. 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.).

43. See Massey & Riosmena, *supra* note 30, at 295.

44. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

45. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546; Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

46. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272.

47. Enhanced Border Security and Visa Entry Reform Act of 2002 (EBSVERA), Pub. L. No. 107-173, 116 Stat. 543.

48. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 302-23.

49. See Massey & Riosmena, *supra* note 30, at 295.

50. See Joanna Jacobbi Lydgate, Comment, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CAL. L. REV. 481, 483 (2010).

51. *Id.* at 484.

52. For an early use of this term, see Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

53. See generally Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL’Y REV. 429, 429 (2011); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1876 (2007); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281-82 (2010); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471-72

2012, immigration cases accounted for 59 percent of all federal prosecutions.<sup>54</sup>

More recently, there have also been increasing efforts to deter immigrants from remaining in the United States unlawfully. Unlawful presence and working without legal documents in the United States are not by themselves crimes under U.S. federal law, although they are deportable civil offenses.<sup>55</sup> Thus, individuals who legally enter the United States but subsequently lose their legal status have not committed a crime.<sup>56</sup> In 2006, however, the U.S. House of Representatives passed H.R. 4437, which proposed to criminalize unauthorized presence and to undertake other measures designed to strengthen border enforcement and raise penalties for unauthorized migration.<sup>57</sup> In response to this bill, millions of people mobilized in well-publicized protests across the country.<sup>58</sup> Although H.R. 4437 ultimately failed to pass the Senate, criminalization of unauthorized presence has been achieved at the local level through a growing number of state laws targeting unauthorized immigrants.<sup>59</sup> Alabama's H.B. 56, for example, makes it a misdemeanor for unauthorized immigrants to apply for, solicit, or perform work as an employee or independent contractor, and makes it a felony for unauthorized immigrants to enter into a "public records transaction" with the local or state government (for example, receiving a motor vehicle license plate, a driver's license, or a business license).<sup>60</sup>

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(2007); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 158–60 (2012).

54. See *Federal Prosecution Data for April 2012 Released*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (July 9, 2012), <http://trac.syr.edu/whatsnew/email.120709.html>.

55. See 8 U.S.C. § 1227(a)(1)(B) (2012); 8 C.F.R. § 287.3 (2014).

56. See 8 U.S.C. § 1227(a)(1)(C)(i) (2012) (providing that a visa holder who violates the terms of the visa is subject to deportation); *In re Santos*, 19 I. & N. Dec. 105, 109 n.2 (1984) ("No crime is implicated when an alien overstays his allotted time [in his visa].").

57. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

58. See Irene Bloemraad & Christine Trost, *It's a Family Affair: Intergenerational Mobilization in the Spring 2006 Protests*, 52 AM. BEHAV. SCI. 507, 507 (2008); Hector Cordero-Guzmán et al., *Voting With Their Feet: Nonprofit Organizations and Immigrant Mobilization*, 52 AM. BEHAV. SCI. 598, 600–02 (2008); Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 99–100 (2007); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780, 781–82 (2007).

59. See *2014 Immigration Report*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 7, 2015), <http://www.ncsl.org/research/immigration/2014-immigration-report.aspx> (listing immigration-related enactments in forty-three states and the District of Columbia).

60. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011), amended by H.B. 658, 2012 Leg., Reg. Sess. (Ala. 2012).

## B. Consequences of the Current Enforcement Policy

Studies show that these enhanced enforcement measures by themselves have not appreciably reduced unauthorized migration. Specifically, studies analyzing macro-level data find little to no association between the probability of apprehension at the U.S.-Mexico border and the total volume of unauthorized migration to the United States.<sup>61</sup> Studies of micro-level data support the same conclusion. For example, Wayne Cornelius and Idean Salehyan find in their analysis of survey data of over 600 returned immigrants and potential first-time immigrants in rural Mexico that perceptions of the danger and difficulty involved in unauthorized border crossings have little influence on propensities to migrate illegally.<sup>62</sup> Another recent study concludes that increased enforcement of U.S. immigration law through federal-state cooperative agreements has not significantly impacted the size of the Mexican immigrant population in the United States.<sup>63</sup>

Some observers might argue that the weak correlation between enforcement efforts and unauthorized migration favors a further ratcheting up of enforcement in order to tip the cost-benefit scale for unauthorized migration.<sup>64</sup> Such an argument, however, ignores the already-dramatic increase in enforcement spending under the current policy. The budget for U.S.

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61. See, e.g., Wayne A. Cornelius, *Impacts of the 1986 U.S. Immigration Law on Emigration from Rural Mexican Sending Communities*, in UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980S, at 227, 232–35 (Frank D. Bean et al. eds., 1990); Thomas J. Espenshade, *Does the Threat of Border Apprehension Deter Undocumented US Immigration?*, 20 POP. & DEV. REV. 871, 872 (1994); BELINDA I. REYES ET AL., PUB. POLICY INST. OF CAL., HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION, at viii (2002).
  62. Wayne A. Cornelius & Idean Salehyan, *Does Border Enforcement Deter Unauthorized Immigration? The Case of Mexican Migration to the United States of America*, 1 REG. & GOVERNANCE 139, 149–50 (2007); see also Scott Borger & Leah Muse-Orlinoff, *Economic Crisis vs. Border Enforcement: What Matters Most to Prospective Migrants?*, in MEXICAN MIGRATION AND THE U.S. ECONOMIC CRISIS: A TRANSNATIONAL PERSPECTIVE 95, 97–102 (Wayne A. Cornelius et al. eds., 2010); Jezmin Fuentes et al., *Impacts of U.S. Immigration Policies on Migration Behavior*, in IMPACTS OF BORDER ENFORCEMENT ON MEXICAN MIGRATION: THE VIEW FROM SENDING COMMUNITIES 53 (Wayne A. Cornelius & Jessa M. Lewis eds., 2007); Christina Gathmann, *Effects of Enforcement on Illegal Markets: Evidence From Migrant Smuggling along the Southwestern Border*, 92 J. PUB. ECON. 1926, 1938 (2008).
  63. Emilio A. Parrado, *Immigration Enforcement Policies, the Economic Recession, and the Size of Local Mexican Immigrant Populations*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 16, 33 (2012).
  64. See Gordon H. Hanson, *Illegal Migration from Mexico to the United States*, 44 J. ECON. LIT. 869, 914 (2006) (stating that the ratcheting-up argument rests on the belief that enforcement “becomes an effective deterrent to illegal entry at high levels of resource commitment”).

Customs and Border Protection (CBP) alone—a small subset of all enforcement spending<sup>65</sup>—essentially doubled between 2003 and 2011, increasing from \$5.9 billion in fiscal year 2003 (when CBP was created as part of the Department of Homeland Security) to \$11.7 billion in fiscal year 2013.<sup>66</sup> The ratcheting-up argument also overlooks the disproportionate emphasis placed on apprehending unauthorized immigrants relative to other offenders. An estimated 40 to 60 percent of those who attempt to cross the U.S.-Mexico border are apprehended.<sup>67</sup> As Edward Alden notes: “[O]nly the most serious criminals in the United States face a similar likelihood of apprehension.”<sup>68</sup> In short, the high cost of the current enforcement policy and the disparate treatment of unauthorized migration relative to other offenses have prompted many commentators to ask how much border security is enough, and at what cost.<sup>69</sup>

Aside from the apparent failure of the current enforcement policy to produce the intended deterrent effect, there are growing concerns about the negative unintended or collateral consequences of this policy. One such consequence is the rise in immigrant deaths along the U.S.-Mexico border since the mid-1990s, occasioned by the growing number of immigrants crossing through remote and dangerous areas.<sup>70</sup> Immigrant deaths have

65. For details on other costs of enforcement, see MARC R. ROSENBLUM, CONG. RESEARCH SERV., R42138, BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY 13, fig.2 and accompanying notes (2012).

66. U.S. DEPT OF HOMELAND SECURITY, BUDGET IN BRIEF FISCAL YEAR 2005 (2004), *available at* [http://www.dhs.gov/xlibrary/assets/FY\\_2005\\_BIB\\_4.pdf](http://www.dhs.gov/xlibrary/assets/FY_2005_BIB_4.pdf); U.S. DEPT OF HOMELAND SECURITY, BUDGET-IN-BRIEF FISCAL YEAR 2015 (2014), *available at* <http://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf>. To place these figures in perspective, the budget for the Civil Rights Division of the Department of Justice was less than \$145 million in fiscal year 2012. U.S. DEPT OF JUSTICE, SUMMARY OF BUDGET AUTHORITY BY APPROPRIATION (2012), *available at* <http://www.justice.gov/jmd/2013summary/pdf/budget-authority-appropriation.pdf>.

67. Edward Alden, *Immigration and Border Control*, 32 CATO J. 107, 115 (2012).

68. *Id.* Specifically, about 64 percent of all murders, 55 percent of all aggravated assaults, and 45 percent of all violent crimes result in arrests. *Id.*

69. See, e.g., James W. Ziglar & Edward Alden, *The Real Price of Sealing the Border*, WALL ST. J., Apr. 8, 2011, at A15; IMMIGRATION POLICY CTR., FISCALLY IRRESPONSIBLE: IMMIGRATION ENFORCEMENT WITHOUT REFORM WASTES TAXPAYER DOLLARS 1 (2011), *available at* [http://www.immigrationpolicy.org/sites/default/files/docs/Fiscally\\_Irresponsible\\_101911\\_0.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Fiscally_Irresponsible_101911_0.pdf); Georgeanne M. Usova, *Getting Nothing for Something: (Over)spending at the Border*, ACLU (Feb. 29, 2012, 11:20 AM), <http://www.aclu.org/blog/immigrants-rights-racial-justice/getting-nothing-something-overspending-border>.

70. Estimates of the death toll range from 3,861 to 5,607 between the mid-1990s to 2009. MARIA JIMENEZ, ACLU, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER 12 (2009), *available at* <http://www.aclu.org/sites/default/files/pdfs/immigrants/humanitariancrisisreport.pdf>; see also Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy*, 27 POP. & DEV. REV. 661, 669–76 (2001); Pia M. Orrenius, *The Effect of U.S. Border Enforcement on the Crossing Behavior of Mexican Migrants*, in CROSSING THE BORDER: RESEARCH FROM THE MEXICAN



increased even as border apprehensions have declined over the years, leading the Congressional Research Service to conclude that “border crossings have become more hazardous since the ‘prevention through deterrence’ policy went into effect in the 1990s.”<sup>71</sup> Another consequence of the current enforcement policy has been the increased demand for human smugglers and the involvement of Mexican organized crime syndicates, including drug cartels and gangs, in the increasingly profitable human smuggling business.<sup>72</sup> Moreover, the current enforcement policy has led to an increasing separation of family members on opposite sides of the U.S.-Mexico border. For example, the border buildup dramatically reduced the probability of return migration, changing what had been a cyclical pattern of temporary migration to a long-term residence or permanent settlement for many unauthorized immigrants.<sup>73</sup> The increasing detention and removal of parents of U.S. citizen children have also contributed to the unprecedented level of family separations.<sup>74</sup>

### C. The Need to Reconceptualize Immigration Noncompliance

The failure of current policy to deter unauthorized migration is not surprising in light of the large body of research on legal compliance that shows that it is extremely difficult to appreciably reduce the rate of illegal behavior by threats of legal punishment alone.<sup>75</sup> Tom Tyler, reviewing the results of empirical studies on the deterrence model, concludes: “All in all, the relationship between crime/deviance and variables specified by deterrence

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MIGRATION PROJECT 281 (Jorge Durand & Douglas S. Massey eds., 2004); STUART ANDERSON, NAT’L FOUND. FOR AM. POLICY, DEATH AT THE BORDER 1–2 (2010), available at <http://www.nfap.com/pdf/0505brief-death-at-border.pdf>.

71. ROSENBLUM, *supra* note 65, at 33.

72. See, e.g., Rob T. Guerette & Ronald V. Clarke, *Border Enforcement, Organized Crime, and Deaths of Smuggled Migrants on the United States-Mexico Border*, 11 EUR. J. CRIM. POL’Y & RES. 159, 164–66 (2005).

73. See, e.g., DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 128–33 (2002); Fernando Riosmena, *Return Versus Settlement Among Undocumented Mexican Migrants, 1980 to 1996*, in CROSSING THE BORDER, *supra* note 70, at 265–66.

74. See, e.g., Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1818–22 (2010); Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271, 1272–73 (2008).

75. For a review of empirical evidence supporting this conclusion, see Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765 (2010).

theory is modest to negligible.”<sup>76</sup> What, then, promotes law-abiding behavior? Studies consistently find that nonlegal social factors are more important to securing compliance than legal threats.<sup>77</sup> In particular, there is a substantial body of research that shows that the moral values of individuals and their perceptions of the legitimacy of legal authority are central determinants of law-abiding behavior.<sup>78</sup>

These studies, together with the evidence on the failures of current immigration policy, highlight the need for a more nuanced understanding of unauthorized immigrants and the values, beliefs, and attitudes that underlie their noncompliance decisions.

## II. THEORETICAL FRAMEWORK

The general analytical strategy that I employ in this study—focusing on the views of those individuals who are subject to the law—has been used to investigate noncompliance decisions in a variety of other legal contexts, including traffic laws and other everyday laws,<sup>79</sup> criminal laws,<sup>80</sup> tax laws,<sup>81</sup>

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76. *Legitimacy and Criminal Justice*, *supra* note 17, at 309 (internal quotation marks omitted).

77. For a review of these studies, see Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities Into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707 (2000); *see also* Bilz & Nadler, *supra* note 22; *Legitimacy and Criminal Justice*, *supra* note 17, at 328–30.

78. *Legitimacy and Criminal Justice*, *supra* note 17, at 329–30.

79. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (examining littering and parking violations, among other offenses); Mark A. Elliott et al., *Drivers' Compliance With Speed Limits: An Application of the Theory of Planned Behavior*, 88 J. APPLIED PSYCHOL. 964 (2003) (speeding); Harold G. Grasmick et al., *Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions*, 31 CRIMINOLOGY 41 (1993) (drunk driving).

80. *See, e.g.*, Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980) (theft and battery); Bruce A. Jacobs & Richard Wright, *Stick-up, Street Culture, and Offender Motivation*, 37 CRIMINOLOGY 149 (1999) (robbery); Robert F. Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292 (1977) (drug use); Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 L. & SOC'Y REV. 163 (1997) (spousal assault); Alex Piquero & George F. Rengert, *Studying Deterrence With Active Residential Burglars*, 16 JUST. Q. 451 (1999) (burglary).

81. *See, e.g.*, WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT (Joel Slemrod ed., 1992); Kornhauser, *supra* note 27, at 601; Loretta J. Stalans et al., *Listening to Different Voices: Formation of Sanction Beliefs and Taxpaying Norms*, 21 J. APPLIED SOC. PSYCHOL. 119 (1991); Michael Wenzel, *The Social Side of Sanctions: Personal and Social Norms as Moderators of Deterrence*, 28 LAW & HUM. BEHAV. 547 (2004).

environmental laws,<sup>82</sup> corporate laws,<sup>83</sup> fisheries laws,<sup>84</sup> and juvenile delinquency.<sup>85</sup> But this strategy has never been used to study immigration noncompliance. The original interview data that I collected from current and prospective unauthorized immigrants fills this significant gap in research and offers important new insights on unauthorized immigrants and their relationship to the law. In analyzing this interview data, I draw on neutralization theory,<sup>86</sup> one of the most widely known and frequently cited theories in criminology.<sup>87</sup>

### A. Neutralization Research

Neutralization theory has its origins in the work of Gresham Sykes and David Matza on juvenile delinquency.<sup>88</sup> According to Sykes and Matza, juvenile delinquents generally maintain at least minimal commitments to the dominant social order and typically experience guilt or shame for violating social norms.<sup>89</sup> In order to participate in deviant behavior, therefore, juvenile delinquents must find ways to rationalize the action or neutralize the guilt associated with it and insulate themselves from the blame of others.<sup>90</sup> Sykes

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82. See, e.g., Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55 (2003) (reviewing empirical studies).

83. See, e.g., Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 LAW & SOC'Y REV. 549 (1996); Sally S. Simpson, *Making Sense of White-Collar Crime: Theory and Research*, 8 OHIO ST. J. CRIM. L. 481 (2011).

84. See, e.g., Stig S. Gezelius, *Do Norms Count? State Regulation and Compliance in a Norwegian Fishing Community*, 45 ACTA SOCIOLOGICA 305 (2002); Aaron Hatcher et al., *Normative and Social Influences Affecting Compliance With Fishery Regulations*, 76 LANDECON. 448 (2000).

85. See, e.g., Peter G. Jaffe et al., *Youth's Knowledge and Attitudes About the Young Offenders Act: Does Anyone Care What They Think?*, 29 CANADIAN J. CRIMINOLOGY 309 (1987); Ross L. Matsueda et al., *Deterring Delinquents: A Rational Choice Model of Theft and Violence*, 71 AM. SOC. REV. 95 (2006); Raymond Paternoster, *Decisions to Participate in and Desist From Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective*, 23 LAW & SOC'Y REV. 7 (1989).

86. See Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664 (1957).

87. Jerry A. Jacobs, *Further Reflections on ASR's Greatest Hits*, 38 AM. SOC. 99, 106 tbl.5 (2007) (showing that *Techniques of Neutralization* is the tenth-most cited American Sociological Review article).

88. Sykes & Matza, *supra* note 86. More broadly, however, neutralization research may be understood as one strand of research within a broader research tradition associated with C. Wright Mills's "vocabularies of motive" and the sociology of "accounts." C. Wright Mills, *Situated Actions and Vocabularies of Motive*, 5 AM. SOC. REV. 904 (1940); see also Terri L. Orbach, *People's Accounts Count: The Sociology of Accounts*, 23 ANN. REV. SOC. 455 (1997); Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 AM. SOC. REV. 46 (1968).

89. Sykes & Matza, *supra* note 86, at 666.

90. *Id.* at 666-67.

and Matza called these rationalizations “neutralization techniques” and argued that these rationalizations were “extensions of patterns of thought prevalent in society rather than something created *de novo*.”<sup>91</sup> That is, neutralizations “do not materialize out of thin air at the individual’s discretion”;<sup>92</sup> rather, they are drawn from “a repertoire of culturally acceptable legitimations.”<sup>93</sup>

Sykes and Matza outlined five major techniques of neutralization: (1) *denial of responsibility*, whereby one excuses his or her actions by claiming they were beyond one’s control; (2) *denial of injury*, whereby one downplays the seriousness of his or her actions by contending that no party suffered as a result; (3) *denial of the victim*, whereby one justifies his or her actions by assigning negative characteristics to the victim; (4) *condemnation of condemners*, whereby one deflects accusations of misconduct by pointing out that the condemners are engaged in morally unworthy conduct themselves; and (5) *appeal to higher loyalties*, whereby one claims he or she acted in the service of a higher-order ideal or cause.<sup>94</sup>

Subsequent expansions of the theory have led researchers to uncover a wide range of other neutralization techniques.<sup>95</sup> In addition, the theory is no longer confined to the study of juvenile delinquents or even to legal noncompliance. For example, neutralization theory has been used to help explain behaviors such as cheating among students,<sup>96</sup> use of deadly force by police,<sup>97</sup> deer poaching,<sup>98</sup> whistleblowing,<sup>99</sup> workplace misconduct such as cyberloafing and property theft,<sup>100</sup> entering preteen daughters into beauty

91. *Id.* at 669; see also David Matza & Gresham M. Sykes, *Juvenile Delinquency and Subterranean Values*, 26 AM. SOC. REV. 712 (1961).

92. John E. Hamlin, *The Misplaced Role of Rational Choice in Neutralization Theory*, 26 CRIMINOLOGY 425, 431 (1988).

93. Elizabeth Murphy, *‘Breast Is Best’: Infant Feeding Decisions and Maternal Deviance*, 21 SOC. HEALTH & ILLNESS 187, 205 (1999).

94. Sykes & Matza, *supra* note 86, at 667–69.

95. See Maruna & Copes, *supra* note 25, at 234 (identifying defense of necessity, claim of normality, and claim of entitlement as additional neutralization techniques).

96. Emily E. LaBeff et al., *Situational Ethics and College Student Cheating*, 60 SOC. INQUIRY 190 (1990); W. William Minor, *Neutralization as a Hardening Process: Considerations in the Modeling of Change*, 62 SOC. FORCES 995 (1984).

97. William B. Waegel, *How Police Justify the Use of Deadly Force*, 32 SOC. PROBS. 144 (1984).

98. Stephen L. Eliason & Richard A. Dodder, *Neutralization Among Deer Poachers*, 140 J. SOC. PSYCHOL. 536 (2000).

99. Jana L. Pershing, *To Snitch or Not to Snitch? Applying the Concept of Neutralization Techniques to the Enforcement of Occupational Misconduct*, 46 SOC. PERS. 149 (2003).

100. Richard C. Hollinger, *Neutralizing in the Workplace: An Empirical Analysis of Property Theft and Production Deviance*, 12 DEVIANT BEHAV. 169 (1991); Vivien K. G. Lim, *The IT Way of Loafing on the Job: Cyberloafing, Neutralizing and Organizational Justice*, 23 J. ORG. BEHAV. 675 (2002).

pageants,<sup>101</sup> contemporary German youths' avoidance of the stigma of the Holocaust,<sup>102</sup> and coping strategies of domestic violence survivors.<sup>103</sup>

By applying this theoretical framework to understanding violations of U.S. immigration law, I do not mean to suggest that unauthorized immigrants are delinquents or deviants—terms that are often invoked in the neutralization literature owing to the theory's intellectual origins.<sup>104</sup> Certain illegal behaviors are not necessarily deviant by any definition except a legalistic one;<sup>105</sup> the behavior that underlies unauthorized migration—movement across national boundaries—is a clear case in point.

## B. The Role of Neutralizations in Noncompliance Decisions

I argue that neutralization techniques allow individuals who view themselves as law-abiding to disobey U.S. immigration law in light of their economic need.<sup>106</sup> There are at least two reasons to believe that neutralization techniques likely play an important role in shaping decisions to engage in unauthorized migration. First, in my previous work—in which I quantitatively analyze data from a large-scale survey of individuals in Mexico who were contemplating unauthorized migration to the United States—I find that prospective unauthorized immigrants' beliefs, values, and norms are significant determinants of their intentions to cross the border, controlling for relevant demographic and economic factors.<sup>107</sup> The same types of beliefs, values, and norms also lie at the core of many of the neutralization techniques analyzed in this Article.

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101. Martha Heltsley & Thomas C. Calhoun, *The Good Mother: Neutralization Techniques Used by Pageant Mothers*, 24 *DEVIANT BEHAV.* 81 (2003).
  102. Moshe Hazani, *The Universal Applicability of the Theory of Neutralization: German Youth Coming to Terms With the Holocaust*, 15 *CRIME, L. & SOC. CHANGE* 135 (1991).
  103. Kathleen J. Ferraro & John M. Johnson, *How Women Experience Battering: The Process of Victimization*, 30 *SOC. PROBS.* 325 (1983).
  104. See, e.g., Immo Fritsche, *Predicting Deviant Behavior by Neutralization: Myths and Findings*, 26 *DEVIANT BEHAV.* 483, 484 (2005) (“[N]eutralization theory has been assigned considerable importance for the explanation and prevention of deviant behavior in the fields of general delinquency and crime.”).
  105. See Jeffrey J. Roth & Jennifer J. Roberts, *Mala In Se and Mala Prohibita*, in *ENCYCLOPEDIA OF CRIMINAL JUSTICE ETHICS* 565, 565 (Bruce A. Arrigo ed., 2014) (“[T]here is nothing inherently immoral about driving a car at 100 miles per hour, but this behavior is *mala prohibita* in the jurisdictions where it is illegal.”).
  106. See generally Paul Cromwell & Quint Thurman, *The Devil Made Me Do It: Use of Neutralizations by Shoplifters*, 24 *DEVIANT BEHAV.* 535, 548 (2003) (“Neutralization focuses on how crime is possible, rather than why people might choose to engage in it in the first place.”).
  107. Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 *AM. SOC. REV.* 574 (2013) [hereinafter *Deciding to Cross*].

Second, although there is debate in the literature on whether neutralizations precede or follow the onset of noncompliant behavior, there is growing empirical evidence that shows that, at a minimum, neutralizations play an important role in the persistence and the desistance of noncompliant behavior.<sup>108</sup> As Shadd Maruna and Heith Copes explain, “neutralizations might start life as after-the-fact rationalizations but become the rationale or moral release mechanisms facilitating future offending.”<sup>109</sup> Applied to the case of unauthorized migration, this body of research suggests that even if neutralizations do not directly shape immigrants’ initial decisions to cross the border, neutralizations likely serve the important function of facilitating their decisions to continue to work and reside in the United States in violation of U.S. immigration laws.

### III. DATA AND METHOD

My analysis draws on interview data that I collected in connection with a larger research project designed to investigate a variety of factors that shape individual decisions to engage in unauthorized migration to the United States.<sup>110</sup> Between February and May of 2006, I organized ten group interviews with sixty-four current and prospective unauthorized immigrants from Latin America. Background characteristics of the interviewees are shown in Table 1. The majority of the participants were male (81 percent) and from Mexico (61 percent). The rest of the participants were from Honduras (20 percent), Guatemala (9 percent), El Salvador (6 percent), and Peru (3 percent).

TABLE 1. Interviewee Characteristics

Characteristics	Day Labor Centers	Migrant Centers	Day Labor and Migrant Centers
<b>Gender</b>			
Male	0.79	0.83	0.81
<b>Age (years)</b>			
Mean	39.93	29.97	35.19

108. See Maruna & Copes, *supra* note 25, at 271–81 (reviewing empirical evidence on the persistence/desistance theory of neutralizations).

109. *Id.* at 271.

110. See Emily Ryo, *Becoming Illegal: Modeling Rationality and Morality of Unauthorized Migrants* (2011) (unpublished Ph.D. dissertation, Stanford University) (on file with author).

Characteristics	Day Labor Centers	Migrant Centers	Day Labor and Migrant Centers
<b>Marital Status</b>			
Married	0.35	0.37	0.36
<b>Number of Children</b>			
Mean	2.56	1.87	2.23
<b>Education (years)</b>			
Mean	6.11	7.69	6.86
<b>Number of Family in U.S.</b>			
Mean	3.24	6.11	4.53
<b>Total Number of Successful Entries into U.S.</b>			
Mean	1.52	2.13	1.81
<b>Total Length of Stay in U.S. (years)</b>			
Mean	4.98	2.35	3.75
<b>Ever Applied for a Visa</b>			
Yes	0.15	0.13	0.14
<b>Plans to Return Home</b>			
Yes	0.68	0.97	0.81
<b>Country of Origin</b>			
El Salvador	0.00	0.13	0.06
Guatemala	0.15	0.03	0.09
Honduras	0.09	0.33	0.20
Mexico	0.71	0.50	0.61
Peru	0.06	0.00	0.03
<b>Total</b>	<b>34</b>	<b>30</b>	<b>64</b>

Group interviews were chosen over individual interviews for a number of reasons. First, the group-interview format easily allows for a nondirective approach, which is critical to eliciting a wide-ranging set of ideas and unanticipated responses.<sup>111</sup> Second, as Robert Merton discovered in his pioneering study of American men in the military during World War II,

111. See DAVID L. MORGAN, *FOCUS GROUPS AS QUALITATIVE RESEARCH* 10–13 (1997).

people are more likely to reveal and discuss sensitive information when they feel they are in a safe and comfortable environment with others who are like themselves or in similar situations.<sup>112</sup> Third, views about the law and legal authorities are often latent and deeply embedded in people's taken-for-granted assumptions about the world and their places in it.<sup>113</sup> Group interactions and dynamics were therefore helpful in teasing out the law-related views of the immigrants.

In recruiting participants for the group interviews, I targeted two populations: (1) unauthorized workers at day-labor centers<sup>114</sup> and hiring sites where day laborers congregate in California (specifically, in Mountain View, Oakland, San Francisco, and Santa Monica), and (2) individuals staying at migrant centers<sup>115</sup> located along the United States-Mexico border (in El Paso, Texas; Ciudad Juarez, Chihuahua; and Agua Prieta and Altar, Sonora). All interviewees were required to be eighteen years of age or older, speak Spanish, and be currently unauthorized or about to cross the border illegally. I recruited both men and women. That male participants constituted the majority of my sample is a reflection of the apparent gender imbalance found in the subject population rather than a function of my recruiting strategy. I initially focused on recruiting newcomers from Mexico in order to ensure some level of homogeneity, but I later found this requirement to be too restrictive and expanded my recruitment to all current and prospective unauthorized migrants from Latin America.

The group interviews were conducted in Spanish and moderated by two Mexican American community organizers. Both moderators worked closely with unauthorized immigrants and were well known in and respected by the communities serving these populations. The moderators' experiences and connections with the unauthorized community were essential to establishing the necessary rapport with the participants and in successfully carrying out the interview sessions. I worked closely with the moderators to test and develop a set of questions that served to guide the group interviews. These questions pertained to six distinct but related topics concerning unauthorized migration:

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112. See ROBERT K. MERTON ET AL., *THE FOCUSED INTERVIEW* (2d ed. 1990).

113. EWICK & SILBEY, *supra* note 26, at 15–17.

114. For helpful background information on day labor centers, see JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006); Abel Valenzuela, Jr., *Day Labor Work*, 29 ANN. REV. SOC. 307 (2003).

115. Migrant centers are charitable organizations, often affiliated with Catholic churches, that provide food and lodging to individuals who (1) are about to cross the border illegally, (2) have recently been deported while attempting to cross the border illegally, or (3) have recently made a successful illegal entry into the United States and are contemplating how to proceed.



(1) the decisionmaking process, (2) social norms about border crossing, (3) knowledge about U.S. immigration law, (4) immigrants' border crossing experiences, (5) attitudes toward the U.S. government and Americans, and (6) attitudes toward U.S. immigration law.

Each interview session lasted around two hours on average and took place at the day labor centers/hiring sites or migrant centers where the immigrants were recruited. The participants were served a meal or refreshments before or during the interview session; no monetary payments were provided. I made audio recordings of all interview sessions with the consent of the participants, and all of the recordings were later transcribed and translated from Spanish to English. I analyzed the resulting materials using ATLAS.ti, qualitative analysis software for systematically coding textual data for identification of major themes and their patterns and interrelationships. To the greatest extent possible, I attempted to preserve the authentic voice and colloquialism of the participants in the translation process. For example, when the immigrants used the phrase "sin papeles" to describe their unauthorized status, it was translated literally as "without papers" instead of "illegally." To protect the anonymity of individual participants, I refer only to their first names in discussing the results of my analysis.

#### IV. RESULTS OF EMPIRICAL ANALYSIS

This section presents the findings from my interviews with current and prospective unauthorized immigrants. I begin with a brief discussion on the salience of the law in their lives, which provides a broad context for understanding how the various types of neutralizations emerged during the interviews. Next, I discuss the immigrants' view of themselves as law-abiding individuals who value legal order and respect national sovereignty. I then analyze a number of major neutralizations that emerged during the interviews that help to reconcile these self-understandings of the immigrants with their current or intended noncompliance with U.S. immigration law.

##### A. Salience of the Law

As an initial matter, some observers might ask whether the interview process might have induced the study subjects to think about issues that are not necessarily salient or problematic for them in real life. The nature of this problem is akin to the problem of "non-attitudes" in survey research—that is, the willingness of respondents to offer an opinion on a survey even on issues

about which they have little to no knowledge.<sup>116</sup> This is also a potential problem that some scholars have noted in critiquing the “law-first” approach of some sociolegal scholarship.<sup>117</sup> Kay Levine and Virginia Mellema, for example, caution against privileging the role of law and assuming, rather than investigating, the law’s salience in studies of legal consciousness.<sup>118</sup>

My analysis suggests that law is indeed salient among current and prospective unauthorized immigrants and that the narratives that I present below are not mere artifacts of the interview process. The immigrants were never asked to provide justifications for their violations of U.S. immigration law—a situation that might have given rise to accounts that are artificially created for the interviewer.<sup>119</sup> Rather, the immigrants’ neutralizations emerged organically in the course of casual discussions that resembled everyday conversations about their experiences. Moreover, I did not assume that the law was the only—or even the most important—force shaping the immigrants’ sense of selves or their perceptions about their available choices. Thus, the interview questions touched on a broad range of topics that sought to capture the complexities and tensions inherent in any decisionmaking process, rather than focusing only on the role of law. As a result, the interview discussions ranged from reflections on the immigrants’ economic and social life in their home countries (both at the personal and community level), to the nature of their contact with other former and current immigrants.

My analysis shows that the justificatory narratives presented in this Article are prevalent and easily accessible among the immigrants. If these narratives were not salient in the minds of the immigrants, they might have had trouble comprehending the questions or engaging with the moderators and other participants during the group interviews. On the contrary, the immigrants generally did not hesitate to offer their views, and often their views were articulate and coherent, as I show below.

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116. See GEORGE F. BISHOP, THE ILLUSION OF PUBLIC OPINION: FACT AND ARTIFACT IN AMERICAN PUBLIC OPINION POLLS 22–23 (2005); Jon A. Krosnick et al., *The Impact of “No Opinion” Response Options on Data Quality: Non-Attitude Reduction or an Invitation to Satisfice?*, 66 PUB. OPINION Q. 371, 371–72 (2002).

117. Kay Levine & Virginia Mellema, *Strategizing the Street: How Law Matters in the Lives of Women in the Street-Level Drug Economy*, 26 LAW & SOC. INQUIRY 169, 171 (2001).

118. *Id.*

119. See Maruna & Copes, *supra* note 25, at 260–61.

## B. Law-Abiding Selves and Respect for National Sovereignty

Although the immigrant interviewees were not directly asked whether and to what extent they viewed themselves as law-abiding, it was clear from the discussions that the immigrants viewed themselves as moral, law-abiding individuals. These views were evident in their frequent references to God in their discussions of how they arrived at their decisions to cross the border (for example, “I prayed a lot to God”). They also frequently referenced God in their descriptions of their border-crossing experiences (for example, “Thanks to God I made it over here”).<sup>120</sup> The immigrants also actively distinguished themselves from real and imagined “delinquents” and “criminals.”<sup>121</sup> This self-image was often implicitly projected in the immigrants’ narratives, but it was also explicitly invoked at times. Consider Fernando’s statement regarding the immigration bill that was proposed by Congress in 2006 to criminalize unauthorized presence in the United States:

The new immigration law wants to treat us like criminals. The immigrants that are coming here aren’t delinquents. People think that we’re delinquents. But . . . we are not going to hurt anybody or anything.<sup>122</sup>

Speaking of the same proposed bill, José asserts that such a law would likely deter many immigrants from crossing the border, not because it would raise the economic costs of migration, but because the criminal label would fundamentally violate their self-image:

José: If we would have known that they [the U.S. government] were going to treat us like criminals here, we wouldn’t come . . .

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120. That faith and prayer play a prominent role in the lives of immigrants is not surprising, given that the vast majority of Latin Americans are Christians, mostly Roman Catholics. See *The Global Catholic Population*, PEW RESEARCH RELIGION & PUB. LIFE PROJECT (Feb. 13, 2013), <http://www.pewforum.org/2013/02/13/the-global-catholic-population/> (showing that 72 percent of the population in Latin America-Caribbean was Catholic in 2010); see also JORGE DURAND & DOUGLAS S. MASSEY, *MIRACLES ON THE BORDER: RETABLOS OF MEXICAN MIGRANTS TO THE UNITED STATES* (1995) (discussing the role of religion in the immigrants’ recounting of difficult and stressful situations they have faced in their migratory journey); PIERRETTE HONDAGNEU-SOTELO, *GOD’S HEART HAS NO BORDERS: HOW RELIGIOUS ACTIVISTS ARE WORKING FOR IMMIGRANT RIGHTS* (2008) (explaining how religion provides immigrants and their political supporters with material and social resources).

121. For a helpful review of research on social-boundary drawing and the mobilization of such boundaries in the creation of identities and status formation, see Michèle Lamont & Virág Molnár, *The Study of Boundaries in the Social Sciences*, 28 ANN. REV. SOC. 167 (2002).

122. Interview with Fernando, in Altar, Sonora, Mex. (May 16, 2006).

*Moderator:* You wouldn't come? Even if you have the need . . . ?

*José:* Because over there [at home] at least you don't have a bad record. We are honest.<sup>123</sup>

Other immigrants took pains to explain that on occasions when the U.S. Border Patrol apprehended them, they were treated differently because they had a "clean record" that set them apart from others. Ponciano, for example, relates his experience of being apprehended in this way:

So then the law . . . it chased me. But when immigration [the Border Patrol] got me, three times they got me[,] . . . they had to take pictures of me and fingerprints all over to see if they could find a crime that I might have committed. They searched, and searched, and searched. And those three times I came out with a clean record . . . . Yes, I came out clean. And others, their first or second time, they find crimes in the computer . . . . It says, well, you did this crime . . . . You are going to be locked up and they are going to deport you. They investigate you well. And they investigated me, and since I haven't done anything, he [the Border Patrol agent] says, "Come back, if you want; if luck is on your side, come back."<sup>124</sup>

In addition to perceiving themselves as law-abiding, many of the immigrants expressed both a respect for the purported sanctity of national borders and a belief that sovereign nations have a fundamental prerogative to control their borders. In this vein, the immigrants often invoked a house owner/guest analogy, as illustrated here in Efrén's observation about the border fence between the United States and Mexico:

As far as I'm concerned it's their house and they can do what they want. They want to put up a fence . . . well, if I had a house I'm going to put up a fence, and my neighbor can't say anything because it's my house.<sup>125</sup>

Many of the immigrants framed the issue of sovereignty as a matter of protection for the citizens residing within the nation-state—"countries have a right to defend their territories," as one interviewee put it.<sup>126</sup> The immigrants thus took it for granted that when it came to keeping out the "bad" people—criminals, gangsters, drug traffickers, terrorists, and the like—nation-states had every right to use whatever method available to prevent their entry. The

123. Interview with José, in S.F., Cal. (Apr. 7, 2006).

124. Interview with Ponciano, in Mountain View, Cal. (Feb. 25, 2006).

125. Interview with Efrén, in Santa Monica, Cal. (May 31, 2006).

126. Interview with Lorenzo, in Mountain View, Cal. (Apr. 29, 2006).

following exchange between the moderator and Rigo powerfully captures this widespread sentiment:

*Moderator:* Do you think that the country has a right to restrict immigration?

*Rigo:* Yes, I agree with that. *It goes without saying.*

*Moderator:* Why?

*Rigo:* To protect their citizens. Well, I see it that way—to protect their citizens, because other countries are more . . . more aggressive.

*Moderator:* How are they more aggressive?

*Rigo:* Well, there's people that only come to, to . . . they don't come to work; they come to commit crimes.<sup>127</sup>

Another immigrant, Saul, offers a prescription for how sovereign nations might achieve this self-protection:

I think the government should classify. There should be an office that would classify people, and set in place very strict laws. For what? So that a person respects the rights of the country. For example, let's use an example: I cross into the United States and I arrive at an office where they will examine me, they will evaluate me . . . to see if I am a good person, if my intentions for coming to the United States are to work legally or to be among gangs or things like that. Well then, that is what the United States should do, evaluate and restrict people who can come to the United States.<sup>128</sup>

The immigrants thus took for granted that nation-states ought to be able to control their borders and to restrict immigration as they see fit in order to protect their citizens. In line with this assumption, when the immigrants were asked what they would want in an “ideal” immigration system, they unanimously converged on the idea of temporary work permits that would allow them to enter the United States to work for a limited period of time and then to return to their home countries safely.<sup>129</sup> In short, the immigrants did not call for a radical overthrow of the existing system; rather, they

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127. Interview with Rigo, in Mountain View, Cal. (Feb. 25, 2006) (emphasis added).

128. Interview with Saul, in Ciudad Juarez, Chihuahua, Mex. (May 13, 2006).

129. One immigrant suggested that the exorbitant fees that they now pay the human smugglers to help them cross the border should be given to the U.S. government instead to process the issuance of these temporary work permits.

acknowledged that national borders were important and voiced desires to be fully governed by the rule of law.<sup>130</sup>

In light of these representations of themselves as law-abiding individuals who value legal order and respect national sovereignty, a natural question arises: How do immigrants reconcile these views with their current or intended noncompliance with U.S. immigration law? Below, I discuss and analyze several major types of neutralizations that emerged during the interviews.

### C. Immigrants' Neutralizations

#### 1. Denial of Responsibility and Appeal to Higher Loyalties: Blamelessness and Family

For the immigrants in the study, denials of responsibility and appeals to higher loyalties were closely interwoven, maybe even inseparable. Denial of responsibility often entails individuals claiming that their behaviors are accidental.<sup>131</sup> The critical concept here is intentionality or volition. Sykes and Matza offer the following explanation: "As Justice Holmes has said, even a dog distinguishes between being stumbled over and being kicked, and modern society is no less careful to draw a line between injuries that are unintentional, i.e., where responsibility is lacking, and those that are intentional."<sup>132</sup> Denial of responsibility also often entails individuals claiming that their actions are due to forces beyond their control.<sup>133</sup> In other words, the individual denying responsibility might see himself as being acted on rather than acting. These narratives of blamelessness are significant because they enable individuals to retain their sense of moral worth even as they engage in violations of the law.<sup>134</sup>

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130. In some ways, these views and expressed preferences illuminate the far-reaching power of the law to shape and constrain people's basic conception of what is possible and desirable, even as they challenge and question its perceived oppressive underpinnings. See David M. Engel, *How Does Law Matter in the Constitution of Legal Consciousness*, in *HOW DOES LAW MATTER* 109, 134 (Bryant G. Garth & Austin Sarat eds., 1998) ("Even when relatively powerless persons adopt a counterhegemonic view of the world . . . they construct it around the cultural shapes and forms that law helps to create.").

131. Sykes & Matza, *supra* note 86, at 667.

132. *Id.*

133. *Id.*

134. The centrality of such perceptions of blamelessness in shaping people's behavior and their moral judgments about themselves and others has been well-documented in other nonlegal contexts. For example, according to Michele Landis Dauber in her study about the origins of the American welfare state, "[I]t is the very ability of claimants to narrate themselves as the morally blameless victims of a sudden catastrophe—a disaster—that has largely determined

When appealing to higher loyalties, individuals claim that their behaviors are consistent with the moral obligations of a smaller, specific group to which they belong.<sup>135</sup> The use of this neutralization does not imply that the individual rejects the socially dominant normative system; rather, other norms are seen as more pressing or deserving of precedence.<sup>136</sup> For example, legal noncompliance may result from the individual choosing to meet immediate and particularistic claims of friendship or familial responsibilities, rather than the more universal demands of law and legal institutions (to the extent there is a conflict between the two sets of obligations).

In the interviews, the immigrants employed denials of responsibility and adopted appeals to higher loyalties to frame their economic situations and their responses to those situations in pervasively moral terms. For example, while the immigrants frequently invoked the words “need” and “necessity” in discussions about their decisions to migrate, no immigrant described his or her situation in strictly financial or economic terms. Instead, these discussions of need were invariably framed within broader narratives of both personal blamelessness regarding the conditions giving rise to their situations and deeply felt personal responsibility to provide for their families—particularly their children—in the face of this fate.

More specifically, the immigrants depicted their decisions to cross the border as a direct response to structural forces that were beyond their individual control, such as the failure of their national and local economies and the corresponding scarcity of jobs that paid living wages. For example, Ana describes the situation she faced back at home in this way:

When I came over, I made my decision because I have two sons and I am a single mother. The reason why I came over is because I was working in a factory but I was earning only \$35 a week. It wasn't enough for my children's education. It wasn't even enough to pay for bus fare. It was then that I made the decision to come over here, leaving my sons, and migrating here.<sup>137</sup>

For those immigrants who had been farmers in their home countries, the larger forces at work also included natural calamities of some sort, which further

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the success or failure of a given claim.” Michele L. Landis, “*Let Me Next Time Be ‘Tried by Fire’*”: Disaster Relief and the Origins of the American Welfare State, 1789–1874, 92 NW. U. L. REV. 967, 971 (1998); see also MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE (2013).

135. Sykes & Matza, *supra* note 86, at 669.

136. *Id.*

137. Interview with Ana, in El Paso, Tex. (May 14, 2006).

accentuated the major underlying import of their stories—that their decisions to migrate were precipitated by dire situations brought on through no fault of their own. The following story that Miguel relates is illustrative of this point:

Ok, so when I was in my country . . . I planted coffee. [But] an illness entered the plants as well as little bugs . . . . I had received a credit from a bank . . . . But it turns out that when I was going to turn in the harvest, when I took the coffee out of the warehouse, the animals had eaten and ruined all of the coffee . . . . So then the bankers began to arrive and ask questions; they told us that if we can't pay in coffee, we would have to pay with our property. We then began to fight the case and we got a lawyer. I fought my case and told them that I have credit based on coffee, not on my land . . . . The bank got mad and found a way to fight the case and won. They put a big yellow "X" on my door that said that I couldn't enter. I had to leave my home with my children and went to my mother's. I told my mother that I was going to leave my children there so that they could go to school while I went in search of better work.<sup>138</sup>

Another motif prominent in the immigrants' explanations of their decisions to migrate involved higher loyalties they felt they owed to their families. For example, both Ana and Miguel above stressed the importance of their family obligations in their decisions to migrate. In these narratives, providing for one's children often played a central role. As Kevin explained, "One comes to succeed . . . . [E]veryone has children. You have to give the children a chance, because over there [at home] one cannot expect to succeed."<sup>139</sup> Likewise, Saúl was eloquent in his description of how far he was willing to go to provide for his children:

I have left my home and I have left my two children, and I don't know if I will see them again. . . . I have to cross, to give my children a better life. If my children don't have toys, I want them to have some. I don't ask God to give me riches; I just ask that I won't be in this poverty that I'm in, because . . . it hurts. It hurts as a parent. It hurts, if you're the father of the family, and you can't provide for them. All of that makes one risk one's life to come here [to the United States].<sup>140</sup>

These higher loyalties meant that unmet family needs in the midst of a crisis in their communities called for drastic action—even illegal action. It is

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138. Interview with Miguel, in S.F., Cal. (Apr. 7, 2006).

139. Interview with Kevin, in El Paso, Tex. (May 14, 2006).

140. Interview with Saul, in Ciudad Juarez, Chihuahua, Mex. (May 13, 2006).



important to note, however, that the immigrants did not view necessity as *carte blanche* to violate any and all laws. When asked whether necessity would justify noncompliance with other kinds of laws, the immigrants were uniform and unequivocal in their insistence that necessity could not be invoked rightfully to justify criminal behavior. Thus, in the minds of unauthorized immigrants, noncompliance with immigration law is of a different moral order than noncompliance with other laws. It is to this moral logic that I turn next through an examination of another common type of neutralization that emerged during the interviews—denial of injury.

## 2. Denial of Injury: “We Only Come to Work; We Don’t Come to Harm Anyone”

Denial of injury focuses on the extent of harm or injury caused by the act of noncompliance.<sup>141</sup> In the interviews, this neutralization technique emerged in response to two different sets of questions. The first line of inquiry was in the form of a follow-up question in response to the immigrants’ reference to necessity in explaining their migration decisions, as discussed above. The second line of inquiry asked the immigrants to share their views about the common complaint advanced by some observers in the United States that unauthorized immigrants hurt American workers by lowering wages and taking away their jobs.

When the immigrants were asked whether necessity justified other forms of legal noncompliance, they were unwavering in their view that crimes and other types of violations that might involve injury to third parties could not be justified even in situations of dire poverty or familial need. Rosa’s declaration, “we only come to work; we don’t come to harm anyone,” for example, was a common refrain among the immigrants.<sup>142</sup> There are two closely related ideas implicit in Rosa’s declaration that merit further discussion. First, of paramount importance in the minds of the immigrants, is that the substance of the work in which they engaged once they successfully entered the United States was legal and, therefore, not to anyone’s detriment.

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141. Sykes & Matza, *supra* note 86, at 667. Denial of victim is another common neutralization technique. *Id.* at 668. Sometimes offenders admit that their actions cause harm but neutralize moral indignation by denying the victim—for instance, by claiming that the victim acted improperly and thus does not deserve the victim status. *See id.* I characterize the immigrants’ accounts here as denial of injury rather than denial of victim, because their accounts generally do not acknowledge harm to third parties resulting from their action.

142. Interview with Rosa, in Mountain View, Cal. (Feb. 25, 2006).

In short, the immigrants assessed harm by considering the nature of the work they performed once in the United States. Rafael explains this perspective in this way:

It's more or less about the work. Who's going to fix the street?  
Make a house? Make a deck or do a good paint job? Always legally,  
you work legally, in an honorable way. I work legally and honorably.<sup>143</sup>

Other immigrants, like Fernando, emphasized that their work benefited, not harmed, the United States on the whole:

We are not going to steal, or kill; instead it's the Latino who has  
helped to make the United States, because the United States is  
now made up mainly of Latinos. Sixty to seventy percent, I  
believe, are foreign Latinos; the Anglo-Saxons are few. It's the  
Latinos who have helped develop the country.<sup>144</sup>

The second important idea implicit in Rosa's declaration above is that laws prohibiting behavior that is self-evidently harmful or criminal are fundamentally different from immigration laws. The distinction that the immigrants make here is in line with the longstanding distinction in Anglo-American law between actions that are deemed *mala in se*<sup>145</sup> and those deemed *mala prohibita*.<sup>146</sup> *Mala in se* are actions that are wrong in themselves, such as murder, rape, and theft. While these actions are formally prohibited by law, their wrongness exists independent of legislative prohibition. In contrast, acts considered *mala prohibita* are wrong merely because the government proclaims these actions to be wrong. This distinction is made evident in the following statements by Ruben and Luis, respectively:

*Ruben:* Immigration law is different from other laws. Immigrants  
who come to work should not be compared to those who kill or  
those who steal. It's with those that sell drugs or who crash cars  
they have the right to punish them in jail. But they [the U.S.  
government] are catching those of us who only cross the border  
and they are jailing us.

143. Interview with Rafael, in Oakland, Cal. (Mar. 11, 2006).

144. Interview with Fernando, in Altar, Sonora, Mex. (May 16, 2006).

145. BLACK'S LAW DICTIONARY 959 (6th ed. 1990) ("A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law . . . . An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state.").

146. *Id.* at 960 ("A wrong prohibited; a thing which is wrong *because prohibited*; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law; an act involving an illegality resulting from positive law." (emphasis in original)).

*Luis:* Some come to rape a woman or come to steal or others come to mess around. But I didn't come with that idea, I come to work, I have my employers. I work and I send money back to my country like I'm telling you—to pay the debt I owe to the bank.<sup>147</sup>

Given this distinction between violations of immigration law and other laws, one immigrant explained that a more accurate way to describe border crossing was to say that one was merely “tricking” the border patrol.

The second way in which the denial-of-injury neutralization emerged from the interviews was in response to a line of questioning about whether unauthorized immigrants might be displacing native workers in the United States. In response to this idea, the immigrants painted a distinct and rather unflattering portrait of American workers. In Luis's words:

[Americans] think that we are going to take their jobs. But they don't like to work, they are perfectly lazy. They are only receiving money from the government. Blacks as well as whites hardly work. You never see them washing dishes, or working in the yards . . . I worked for a long time in the cleaning business; they [Americans] never work in cleaning. In the fields, I have never seen them working in the fields either. But, in maintenance, in store maintenance, it's always the Mexicans . . . cleaning bathrooms, washing windows, all of that, washing cars[,] . . . the gringos never do that kind of work.<sup>148</sup>

If American workers were “perfectly lazy,” unauthorized workers were undoubtedly hardworking by contrast, as Rigo makes plain: “White people feel displaced by us, but it's not for something that we do wrong, it's because we do things right and with effort.”<sup>149</sup>

These perceptions also revealed a particular understanding and acceptance of racial hierarchy in the American labor market, with whites at the top and blacks at the bottom. For example, the immigrants emphasized their willingness to take on jobs that “not even black people want to do.”<sup>150</sup> Furthermore, the immigrants often stereotyped blacks as welfare recipients, presumably waiting for handouts rather than seeking work. As José noted, “Blacks complain that they don't have a job, and they go and ask welfare for help.”<sup>151</sup> Such internalization of racial stereotypes and imagined racial

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147. Interview with Ruben and Luis, in Agua Prieta, Sonora, Mex. (May 15, 2006).

148. Interview with Luis, in Agua Prieta, Sonora, Mex. (May 15, 2006).

149. Interview with Rigo, in Mountain View, Cal. (Feb. 25, 2006).

150. Interview with Oscar, in Mountain View, Cal. (Feb. 25, 2006).

151. Interview with José, in El Paso, Tex. (May 14, 2006).

hierarchy by newcomers is a testament to the continuing salience of race in American life and to an understanding of the American racial hierarchy that is international in its reach.<sup>152</sup> More importantly, these racial stereotypes served the essential role of reinforcing the immigrants' belief that they were not displacing native workers in the United States.

In summary, the immigrants denied potential injury resulting from their presence in the United States in two distinct ways: first, by focusing on the "legal" and "honorable" nature of the work in which they engaged once they entered the United States; and second, by drawing a fundamental distinction between immigration law and other laws—particularly criminal law—that prohibited conduct for which victims clearly existed. As Rosa declared: "We know well and beforehand that we are violating the law in crossing over here without papers. But in our conscience, it's not bad because it's not a crime that we are committing."<sup>153</sup> When confronted with the proposition that American workers were possible victims of unauthorized migration, the immigrants were emphatic that American workers could not claim injury, as they did not want the low-wage, low-status jobs that the immigrants were willing to take.

### 3. Condemnation of the Condemners: Three Critiques of the U.S. Immigration System

The final form of neutralization that I analyze is condemnation of the condemners. Individuals engaged in this neutralization shift the focus of attention from their actions to the motivations or behaviors of the people expressing disapproval. As it emerged in the interviews, condemnation of the condemners focused on what the immigrants perceived as three fundamentally unfair aspects of the U.S. immigration system: (1) class bias or the privileging of the wealthy, (2) racial bias, and (3) hypocrisy and arbitrariness apparent in the system.

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152. See WENDY D. ROTH, RACE MIGRATIONS: LATINOS AND THE CULTURAL TRANSFORMATION OF RACE 125-27 (2012) (discussing the diffusion of American racial classification schemas in migrant-sending communities abroad).

153. Interview with Rosa, in Mountain View, Cal. (Feb. 25, 2006).

### a. Class Bias

When asked during the interviews whether they had ever applied for a visa to enter the United States,<sup>154</sup> the immigrants in this study responded in a strikingly uniform fashion. Simply put, visas were reserved only for the rich, as Rigo explains:

In Mexico, I rented from a person who has a visa. The lady told me that it's impossible that they will give me a visa because they will conduct an investigation of you. In Mexico, they investigate you to see what properties you own. And you have to own a lot of properties in Mexico, like a home or a business; you understand? And money, and accounts—good bank accounts; I'm talking about one hundred thousand pesos. I guess a person . . . that rents in Mexico, who doesn't have money, or properties, they don't give them a visa.<sup>155</sup>

Other immigrants, such as Miguel, reached the same conclusion through reflections on their own personal experiences with efforts to obtain a visa:

Yes, I tried. I found out that they were charging me a lot. They told me to present three forms of identification and five hundred thousand lempiras. And we're talking about a great deal of money that back in that time was hard to come by. And they asked me for three hundred thousand lempiras on the side. With those two things they would give me the visa. And I didn't even have food to eat. So then a man, an American, came out [of the consulate office] and asked, "Do you have everything you need here?" And I told him no. There was a long line of people. And he was asking, do you have what you need here? No. And you? No. And everyone that said no, he would give them a ticket. And that ticket was so that when you arrived at the door, they would say okay, you can't get a visa. From that moment on was when I began to think of another way . . . of fixing my debt, the poverty . . .<sup>156</sup>

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154. Under U.S. immigration law, there are two types of temporary work visas that are available to unskilled immigrants: H-2A and H-2B. See 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2012); 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2012). But these visas impose substantial requirements and restrictions. Thus, "[f]or low-skilled workers in much of the world, U.S. admission policies make illegal immigration the most viable means of entering the country." GORDON H. HANSON, *THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION* 14 (2007).

155. Interview with Rigo, in Mountain View, Cal. (Feb. 25, 2006).

156. Interview with Miguel, in S.F., Cal. (Apr. 7, 2006).

For those immigrants who had applied for a visa and were denied, the common perception was that the U.S. government was collecting exorbitant fees only to deny their applications. Manuel explains:

So . . . I was there [at the consulate office] and well, I had made some money for the [visa] application, but I didn't get it. See, in Guatemala, you go and wait in line with maybe one thousand other people. Out of those thousand people they give out maybe twenty visas. So, in reality how much money is immigration collecting from those people?<sup>157</sup>

There was thus a prevailing sense that the U.S. immigration system was nothing more than a lucrative "business" enterprise, one in which the government profited off of the backs of poor people. In the words of Sigfredo:

Ok, well, I applied the first time in my country. And well, I was denied . . . . It's a business to get here into the United States. Thousands and millions of people present themselves annually. And out of those, three or four are granted. But what happens? That amount you pay, they don't give back to you. And it's the same case, when I presented my visa application, they collected money just to tell me no. It's a business, that's all. It's a business . . . . There needs to be a rule for those that can't pay—if you're not accepted, your money gets returned.<sup>158</sup>

Other immigrants described the U.S. immigration system as akin to a "lottery," something that only the lucky few "won"—assuming they had the necessary resources to enter themselves into the game in the first place. As José declares:

I knew that it was very hard to get a visa. But there must be people who won it, just like people win the lottery. And I heard that out of a hundred maybe one came out with a visa . . . . The visa is for the rich, for the tourist; for poor people there's no such thing.<sup>159</sup>

Consistent with the view that the U.S. immigration system was a lottery, the word "luck" featured prominently in the immigrants' discussions. Manuel, for example, observes: "In Guatemala you pay about one thousand quetzales, about two hundred dollars to apply for a visa . . . . But they don't give it to you, it's all luck!"<sup>160</sup>

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157. Interview with Manuel, in S.F., Cal. (Apr. 7, 2006).

158. Interview with Sigfredo, in S.F., Cal. (Apr. 7, 2006).

159. Interview with José, in S.F., Cal. (Apr. 7, 2006).

160. Interview with Manuel, in S.F., Cal. (Apr. 7, 2006).

In brief, the immigrants lamented the futility, maybe even the absurdity, of applying for a visa to enter the United States. In their minds, the reasons that compelled them to seek entry into the United States—lack of jobs and economic resources—were precisely the reasons that made them ineligible for a visa. The belief that the U.S. immigration system unfairly privileges the rich and operates as a business that extorts money from the poor informs the common perception among the immigrants that the system is lacking in legitimacy. Moreover, the view of the U.S. immigration system as a lottery in which the immigrants' fate is determined by luck rather than by a predictable and consistent set of rational rules is revealing in what it shows about the failure of the system to engender basic trust.

#### **b. Racial Bias**

Another way in which the U.S. immigration system fails to operate fairly and neutrally in the eyes of the immigrants relates to the perceived racial bias implicit in the system. On the one hand, many immigrants in the study resisted broad generalizations about U.S. Border Patrol agents. A common refrain in describing the U.S. Border Patrol was that there were “good” people and “bad” people. For example, in response to the question whether the U.S. Border Patrol treated all immigrants the same regardless of their sex, race, and country of origin, many immigrants responded as Rigo did:

It's just like everything else. There's good people . . . and there's bad people. It's like everything else. It all depends on the person you get. Because there's some whites who are racist[,] . . . completely racist and hates Mexicans. Then there are whites who are good. There are also racist Latinos; there's all kinds. In immigration, you find one of everything. Like you can find a white guy who's really nice and gives you water, something to eat[,] . . . you can also find a white guy who is racist, treats you bad, pushes you. There's everything at the border.<sup>161</sup>

In this vein, there was a concerted effort on the part of the immigrants to resist stereotyping U.S. Border Patrol agents. Nonetheless, there was an unmistakable shared understanding that immigrants from Latin America were at a significant disadvantage within the U.S. immigration system as a whole. Roberto describes the nature of this disadvantage in terms of their inability to “blend in” with white Americans at the border:

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161. Interview with Rigo, in Mountain View, Cal. (Feb. 25, 2006).

It has been shown that there are illegals from France or from other countries and immigration patrol, they don't check them; they only chase the Mexican and the blond is there, they don't have papers. Even the Mexican, if he's blond they won't inspect him.<sup>162</sup>

Many other immigrants echoed this sentiment, claiming that their ability to live and work without authorization in the United States depended heavily on being able to "mix" with or "pass" as white Americans. Ricardo explains how Canadians, for example, face a different set of opportunities in the United States:

Well, there is racism . . . . There are many Canadians that are working here illegally and nothing is ever said to them. I know Canadians who come here to work, they come to New York, Chicago, different places. But they [U.S. immigration authorities] never say anything to them . . . . They can mix with Americans. A dark person will always be discriminated.<sup>163</sup>

Of note here is that while there was a great deal of reference to Europeans and Canadians in these discussions, it was not the country or the region of origin as much as the skin color that mattered. Consider, for example, Rosario's story:

I have an uncle who came to Las Vegas and has white skin. And at the time, he was working at a restaurant with my brother. It's only the brown people that they were chasing, and my uncle remained because he says "we're all illegals and only because I have white skin," and his wife has white skin, they didn't detain him.<sup>164</sup>

If white or white-looking immigrants were perceived as receiving preferential treatment, immigrants perceived as singled out for the worst treatment were dark-skinned Latin Americans—Mexicans in particular. In addition to their skin color that made them easy targets of discrimination, there was a sense that Latin Americans were targeted because of their large and growing presence in the United States, which induced fears of cultural invasion among Americans. Ricardo puts it this way:

What happens is that the United States wants to have control over our race since we're invading their soil. California is 80 percent Latino. Arizona is 65 percent. In Texas we're talking about a population that is 80 percent Hispanic—they are now moving further north; they are leaving their lands more and more each day. The Anglo-Saxons, the whites, there are less of them every day and

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162. Interview with Roberto, in El Paso, Tex. (May 15, 2006).

163. Interview with Ricardo, in El Paso, Tex. (May 14, 2006).

164. Interview with Rosario, in El Paso, Tex. (May 15, 2006).



they're worried because we're becoming the majority. We are changing their culture. We speak Spanglish. We are influencing the entire system because there are more of us. So now what they want to do is implement their laws on us. How can they do that? By making anti-immigrant laws that will reduce our population. That's what I think.<sup>165</sup>

In sum, from the immigrants' perspective, if wealth is a prerequisite to entering the United States legally, skin color is critical to successfully entering the United States without authorization and evading enforcement once inside the country. More generally, these perceptions reveal a keen sense of understanding among unauthorized immigrants about the critical salience of race in American life and how racial bias might shape their opportunities within the U.S. immigration system.

### c. A Hypocritical and Arbitrary System

The final critique of the U.S. immigration system that emerged during the interviews involves two recurring sets of observations. The first of these observations relates to the immigrants' view that U.S. immigration policy operates in a hypocritical way. The second set of observations relates to their view that U.S. immigration law is arbitrary in how it grants admission and work opportunities to certain groups but not others.

First, the immigrants in the interviews were well aware that immigration policy in the United States had become increasingly more restrictive in recent years, yet they believed that in reality Americans actually needed and wanted a continuing flow of unauthorized immigrants. In essence, what the immigrants argued was that since unauthorized immigrants formed the backbone of the American economy, the tougher laws were essentially a ruse. For example, Rubén observes: "Immigration will never end like that [by passing harsher laws] . . . . If they [the U.S. government] wanted they would have already put every wall from corner to corner, but they don't want to for this reason: that we are the cheap labor."<sup>166</sup>

When probed why, if the United States was in such need of unauthorized immigrants, the U.S. government did not make it easier for them to work legally, the immigrants observed that denying them legal status served the useful function of maintaining existing power relations:

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165. Interview with Ricardo, in El Paso, Tex. (May 14, 2006).

166. Interview with Ruben, in Auga Prieta, Sonora, Mex. (May 15, 2006).

*Oscar:* They don't give us papers because if they did give us papers . . . it wouldn't be the same . . . .

*Moderator:* It wouldn't be the same because you wouldn't work as hard?

*Rigo:* It wouldn't be the same because we would crush the entire world.

*Josué:* We would want better jobs.

*Oscar:* Give us papers, we're going to want to be even managers!<sup>167</sup>

These immigrants are, in effect, advancing a criticism that many commentators and politicians also have articulated about the U.S. immigration system.<sup>168</sup> Ross Romero, a state senator from Utah, for example, described the apparent two-mindedness of the U.S. immigration system in this way: "On one hand, this nation puts out a no-trespassing sign . . . [and] [o]n the other hand, we put out a help-wanted sign."<sup>169</sup> The interview discussions showed that this apparent hypocrisy is not lost on the immigrants, and that they are well aware of the gap between tough political rhetoric and the reality of a U.S. economy that has come to depend so heavily on the labor of unauthorized immigrants.

Second, the immigrants viewed the U.S. immigration system as operating in deeply arbitrary ways. Specifically, there was a prevailing sense that the U.S. immigration system granted greater opportunities for certain national-origin groups based on capricious and ever-changing international politics, rather than based on a clear and well-established set of rules. Rigo, for example, points out that Salvadorans received exemption from deportation, purportedly because El Salvador had supported the United States during the U.S.-Iraq War:<sup>170</sup>

167. Interview with Oscar, Rigo, and Josué, in Mountain View, Cal. (Feb 25, 2006).

168. See, e.g., Aristide R. Zolberg, *Wanted But Not Welcome: Alien Labor in Western Development*, in POPULATION IN AN INTERACTING WORLD 36 (William Alonso ed. 1987) (discussing the contradictions underlying U.S. immigration policy); Peter Andreas, *The Making of Amerexico: (Mis)Handling Illegal Immigration*, 11 WORLD POL'Y J. 45, 52 (1994) (quoting a congressman as saying, "We will catch a few [illegal immigrants], round them up, and send them back, but not too many, because then who will do the work?"); Wayne A. Cornelius, *Controlling 'Unwanted' Immigration: Lessons from the United States, 1993-2004*, 31 J. ETHNIC & MIGRATION STUD. 775 (2005) (discussing the contradictions underlying U.S. immigration policy).

169. Joe Pyrah, *Sweeping Immigration Reform Passes State Senate*, DAILY HERALD (Feb. 25, 2008), [http://www.heraldextra.com/news/state-and-regional/govt-and-politics/article\\_bd8955b8-ef3b-5c84-8b71-970f3737055c.html](http://www.heraldextra.com/news/state-and-regional/govt-and-politics/article_bd8955b8-ef3b-5c84-8b71-970f3737055c.html).

170. In 1990, the U.S. government enacted a statute that conferred on Salvadoran asylum applicants a temporary protective status (TPS), which allowed them to reside and work in the country on a limited basis. See generally Susan Bibler Coutin, *From Refugees to Immigrants: The Legalization Strategies of Salvadoran Immigrants and Activists*, 32 INT'L MIGRATION

It's unfair. I'm going to tell you why it's unfair. I don't know if you have seen the news that the President from El Salvador sided with the U.S. in the war against Iraq. He sent soldiers and said that . . . there wasn't going to be any deportations of Salvadorans from the U.S. . . . Mexico didn't do that and there are no papers for us.<sup>171</sup>

Rigo then proceeds to observe, "Bush leaves and another one comes in . . . then, another law." The implication is that U.S. immigration law is vulnerable to political whims and expediency of whichever political party happens to be in power. Indeed, scholars have highlighted this very aspect of the U.S. immigration system; as Alison Mountz and her colleagues argue: "That the U.S. government treats immigrating groups differentially is apparent in even the briefest sketch of some recent decisions."<sup>172</sup> For example, in the 1980s and 1990s, the U.S. government granted Cubans, Nicaraguans, Salvadorans, and Guatemalans different legal status—ranging from temporary relief from deportation to outright amnesty—based largely on political factors and the nature of the U.S. government's involvement in those countries.<sup>173</sup>

To summarize, the immigrants in this study questioned the legitimacy of the U.S. immigration system by suggesting that it is rife with hypocrisy and arbitrariness that worked to the advantage of those in power. This stance closely resembles what Patricia Ewick and Susan Silbey describe as the legal consciousness of many marginalized groups: "Rather than objective, legality is understood to be arbitrary and capricious. Unwilling to stand before the law and unable to play with the law, people act against the law[.] . . . [P]eople talk about the ruses, tricks, and subterfuges they use to appropriate part of the law's power."<sup>174</sup>

The interview discussions about the perceived class and racial bias, and the hypocrisy and arbitrariness implicit in the U.S. immigration system make

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REV. 901, 904 (1998); Ari Weitzhandler, *Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens*, 64 U. COLO. L. REV. 249, 249–50 (1993). Since then, the U.S. government has continued to extend TPS to additional Salvadorans entering the United States. El Salvador has maintained a troop presence in Iraq since 2003 in support of the United States. In February 2006, the Bush Administration rewarded that support for the war effort by extending the TPS of eligible Salvadoran immigrants living in the United States. See CLARE RIBANDO, CONG. RESEARCH SERV., EL SALVADOR: POLITICAL, ECONOMIC, AND SOCIAL CONDITIONS AND RELATIONS WITH THE UNITED STATES 5 (2006).

171. Interview with Rigo, in Mountain View, Cal. (Feb. 25, 2006).

172. Alison Mountz et al., *Lives in Limbo: Temporary Protected Status and Immigrant Identities*, 2 GLOBAL NETWORKS 335, 336 (2002).

173. *Id.*

174. EWICK & SILBEY, *supra* note 26, at 28.

it clear that current and prospective unauthorized immigrants hold certain basic expectations of fairness and equality within the system. Whether or not such expectations are objectively justified as measured against an established benchmark of some sort is a separate question that is outside the scope of this Article. What is important for the purposes of this study, however, is that the failure of the U.S. immigration system to meet these expectations has had significant and negative implications for the perceived legitimacy of the system.

## V. IMPLICATIONS OF THE EMPIRICAL FINDINGS

One important aim of this study has been to reconceptualize unauthorized immigrants as individuals who possess complex moral values and a multifaceted legal consciousness. What are the policy implications of such a reconceptualization? Rather than attempting to answer this question by analyzing concrete blueprints for comprehensive reform or a detailed set of institutional designs to implement specific reform proposals, I take a broader approach. Specifically, this Part illustrates in broad conceptual terms the type of reorientation in thinking that might follow from the empirical findings presented above, and highlights alternative policy strategies that deserve more focused and systematic investigation. This broad approach recognizes that the normative values analyzed in this study are neither exhaustive nor representative of all possible values that might be operating among current and prospective unauthorized immigrants. It also recognizes that individual values and group norms are not static but dynamic, evolving in response to the changing sociocultural, political, and economic forces that operate at the micro and macro levels.

### A. Moral Values Underlying Unauthorized Migration

A well-established body of research shows that laws that are incongruent with public moral values are bound to generate widespread noncompliance.<sup>175</sup> For example, some observers attribute the mass violations of prohibition laws against alcohol during the 1920s and the common violations of drug laws in the contemporary era to moral perceptions regarding such laws; many people

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175. See, e.g., Bilz & Nadler, *supra* note 22; *Legitimacy and Criminal Justice*, *supra* note 17, at 328–30.

simply do not view the use of alcohol or drugs as immoral.<sup>176</sup> My empirical findings suggest that immigration law faces a similar challenge. Current and prospective unauthorized immigrants may not view violations of U.S. immigration law as immoral—on the contrary, the immigrants in this study considered such violations to be the only viable morally permissible option under the circumstances. Thus, legal restrictions on cross-border labor movement that are out of step with the continuing demands for unskilled foreign labor in the United States are likely to continue to produce mass noncompliance. What regulatory approaches might promote voluntary compliance in this context? I briefly explore two possible approaches informed by this study's empirical findings.

My analysis of the interview data shows that beliefs in the importance of “legal” and “honorable” work, and deeply held commitments to providing economic security to one's family are among the fundamental moral values shaping individual decisions to engage in unauthorized migration. Also prominent in the interview discussions were the immigrants' expressed respect for law and order, and their belief in the prerogative of nation states to protect their borders. Given these values, an expanded temporary worker program that facilitates legal entry for circular migration of workers who satisfy U.S. labor demands for unskilled foreign labor may produce greater overall voluntary compliance with the law than the current enforcement-focused approach. Such a temporary worker program, implemented fairly in practice,<sup>177</sup> may promote shared norms and expectations among current and prospective immigrants that there is a viable, legal avenue of fulfilling their expressed moral obligations to support their families through work. These shared norms and expectations in turn may encourage timely return

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176. See Bilz & Nadler, *supra* note 22, at 118–19; Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 719 (2000).

177. The current U.S. temporary guest worker programs have been criticized for failing to implement basic standards of worker protection. See, e.g., Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J.L. & POL'Y 79, 81 (2004); Howard F. Chang, *Guest Workers and Justice in a Second-Best World*, 34 DAYTON L. REV. 3, 7 (2008); Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 126 (2009); Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL. F. 219, 221 (2007). Hiroshi Motomura has argued that a viable program on circular migration or temporary worker migration must address issues of employer abuse and exploitation, as well as other complex social issues raised by the possibility that temporary workers might become a permanent servant underclass. See HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 221–29 (2014); Hiroshi Motomura, *Designing Temporary Worker Programs*, 80 U. CHI. L. REV. 263, 271–72, 286 (2013).

migration among current immigrants, as well as motivate prospective immigrants to wait to enter legally rather than attempt to cross illegally. Of note, programs that facilitate legal circular migration are also what many immigrants in this study described as their ideal alternative to the current system. As Dany explains:

A temporary visa . . . for a year and a half just to work. And then after that time they can deport you. When you go to the United States, you have a goal and those goals can be achieved in a short time . . . . We don't want a house with ten stories, limousines, cooks; we just want something little that would be sufficient enough to give back to our families. There should be temporary visas and the person that goes illegally should be sent to prison.<sup>178</sup>

Even if curtailing international migration is the desired end—a goal that might be at odds with the labor market demands of the U.S. economy and the fundamental dynamics of globalization<sup>179</sup>—such an end might be achieved more effectively by recognizing the complex moral agency of unauthorized immigrants. For example, given the current and prospective immigrants' understanding of themselves as law-abiding individuals, they are likely to choose the behavioral option that does not require violating the law, so long as that option fulfills their desire for “legal” and “honorable” work and their commitment to providing for their families. Moreover, such an option need not offer equal or greater wages than what the immigrants might be able to obtain through unauthorized migration; as my analysis has shown, current and prospective unauthorized immigrants do not seek to simply maximize their net earnings in disregard of all other values.<sup>180</sup> Putting these insights together, one way to provide such an option to current and prospective immigrants might be to increase U.S. investment in employment-generating economic development of sending communities.<sup>181</sup> In short, this study's findings

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178. Interview with Dany, in Altar, Sonora, Mex. (May 16, 2006).

179. See generally Gordon H. Hanson, *Immigration and Economic Growth*, 32 CATO J. 25, 28 (2012) (“[L]ow-skilled immigration greases the wheels of the U.S. labor market.” (citation omitted)); Richard B. Freeman, *People Flows in Globalization*, 20 J. ECON. PERSP. 145, 145 (2006) (“[P]eople flows are fundamental to creating a global economy[,] and . . . the interplay among immigration, capital and trade is essential to understanding the way globalization affects economies.”).

180. See *supra* Part IV.C.1–IV.C.3.

181. See, e.g., Devon Roepcke, Comment, “Should I Stay or Should I Go?: Preventing Illegal Immigration by Creating Opportunity in Mexico Through Microcredit Lending”, 38 CAL. W. INT’L L.J. 455, 458 (2008) (exploring the use of microcredit to create economic opportunities in sending communities in an effort to reduce unauthorized migration). For a helpful discussion of the challenges related to bringing together immigration and international

suggest that a focused developmental strategy that promotes job opportunities at home might result in a self-regulating system that could more effectively deter unauthorized migration than threats of legal sanctions.

## B. Legitimacy Perceptions

The findings of this study also point to a need for further research on the relationship between perceptions of the legitimacy of U.S. authority and voluntary compliance with U.S. immigration law. A growing body of research finds that (1) the perceived fairness of procedures is significantly related to perceptions of legitimacy of authority, and (2) perceptions of legitimacy are in turn associated with greater voluntary legal compliance.<sup>182</sup> For example, in an empirical study analyzing immigrant neighborhoods in New York City, David Kirk and his colleagues find that “legal cynicism” has a negative effect on public cooperation with the police.<sup>183</sup> They further find that people are less cynical of the law when legal procedures are deemed to be fair and just.<sup>184</sup> My previous study on individuals at risk of engaging in unauthorized migration from Mexico to the United States is also instructive.<sup>185</sup> This study, based on a large-scale survey, indicates that perceptions of procedural justice are significantly related to beliefs about the legitimacy of U.S. legal authority, and that these legitimating beliefs are in turn associated with a lower likelihood of intending to migrate illegally to the United States.<sup>186</sup>

These studies call for investigations into the causal relationship between perceptions of procedural justice, legitimating beliefs, and voluntary compliance. These studies also call for a greater understanding of the content of perceptions related to procedural justice.<sup>187</sup> There are two types of

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development policies, see KATHLEEN NEWLAND, MIGRATION POLICY INST., MIGRATION AND DEVELOPMENT POLICY: WHAT HAVE WE LEARNED? (2011), available at <http://www.migrationpolicy.org/pubs/migrationdevelopment-2011.pdf>.

182. See, e.g., Kent W. Smith, *Reciprocity and Fairness: Positive Incentives for Tax Compliance*, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 223 (Joel Slemrod ed. 1992); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 379-80 (2006).

183. David S. Kirk et al., *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 93 (2012).

184. *Id.* at 83.

185. *Deciding to Cross*, *supra* note 107.

186. *Id.*

187. Some observers might argue that the rational-choice view of unauthorized immigrants, see *supra* notes 32-34 and accompanying text, suggests that affording greater procedural

procedural justice: fair decisionmaking and fair interpersonal treatment.<sup>188</sup> With respect to fair decisionmaking, my analysis suggests that current and prospective unauthorized immigrants view the U.S. immigration system as lacking in basic transparency, predictability, and rule-based qualities. This perception is most evident in the immigrants' characterization of the U.S. immigration system as a "business" or a "lottery," in which only the lucky few "win" visas to enter the United States legally.<sup>189</sup> Thus, the system is seen as devoid of neutrality and rationality—two core organizational features that legitimate legal institutions. Addressing these and related perceptions might be an important priority in policy reform insofar as perceptions of procedural justice promote greater voluntary compliance with immigration law. Reversing perceptions of unfair decisionmaking requires establishing clear, consistent, and transparent rules for the allocation and distribution of visas, particularly worker visas.<sup>190</sup> The current H-2 visa programs, which are the primary institutional mechanisms designed to provide unskilled workers with legal channels of entry, appear to have largely failed at this basic level.<sup>191</sup>

Fair interpersonal treatment, the second type of procedural justice, demands neutral and respectful treatment of individuals coming in contact with legal authorities. My analysis shows that there are widespread perceptions among current and prospective unauthorized immigrants of racial discrimination in the U.S. immigration system.<sup>192</sup> The question of racial bias and racial profiling has gained even greater significance in recent years with the increasing involvement of local authorities in immigration enforcement across the country. For example, according to a recent report, Hispanic immigrants are disproportionately targeted for removal from the United States through the U.S. Immigration and Customs Enforcement's federal-

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protection will decrease the anticipated costs of noncompliance, leading to a greater violation of the law. The implicit underlying assumption in this logic is that immigrants view fairness issues in purely instrumental terms. But the consistent finding of the research on legal noncompliance in a variety of different legal contexts is that people care about procedural justice regardless of whether or not they receive a favorable outcome. See Paternoster et al., *supra* note 84, at 165–66 (summarizing empirical research on the noninstrumental view of procedural justice).

188. See *Legitimacy and Criminal Justice*, *supra* note 17, at 319.

189. See *supra* Part IV.C.3.a.

190. For details on an innovative proposal to create an independent agency that would set the number of labor immigration visas, see Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1810 (2010).

191. See Eleanor G. Carr, *Search for a Round Peg: Seeking a Remedy for Recruitment Abuses in the U.S. Guest Worker Program*, 43 COLUM. J.L. & SOC. PROBS. 399, 400–01 (2010).

192. See *supra* Part IV.C.3.b.



local cooperation program known as Secure Communities.<sup>193</sup> Countering perceptions of racial bias among current and prospective immigrants might require, at a minimum, a careful reconsideration of race-based practices and racial profiling in immigration enforcement<sup>194</sup> that have been endorsed by U.S. courts.<sup>195</sup> These reform efforts on the ground may have important payoffs to the extent that perceptions of procedural justice lead to greater voluntary compliance with immigration law.

### CONCLUSION

This Article examines, for the first time, how current and prospective unauthorized immigrants view the morality and legitimacy of U.S. immigration law and their own acts of noncompliance. Inasmuch as these normative values shape noncompliance decisions, efforts to deter unauthorized migration through enforcement measures that ignore these underlying values are likely to be ineffective. In many other areas of law, there has been a longstanding recognition of the importance of understanding and taking into consideration the attitudes, beliefs, and values of individuals in promoting law-abiding behavior.<sup>196</sup> Developing a sound immigration policy may require no less appreciation of the underlying values of the individuals whose behavior the law seeks to regulate.

I conclude by highlighting a number of important directions for future research. The law is a pervasive and obtrusive force that intimately defines and threatens the everyday existence of unauthorized immigrants.<sup>197</sup> The

193. AARTI KOHLI ET AL., SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 2 (2011), available at [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf).

194. See, e.g., David Antón Armendáriz, *On the Border Patrol and Its Use of Illegal Roving Patrol Stops*, 14 SCHOLAR 553, 554–56 (2012) (outlining the racial profiling associated with Boarder Patrol's roving patrol stops); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675 (2000); Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447 (2006).

195. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (holding that under the Fourth Amendment, it was “constitutional to refer motorists selectively” to a secondary inspection area within a permanent immigration checkpoint, “even if . . . such referrals are made largely on the basis of apparent Mexican ancestry”); *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (holding that “Mexican appearance” alone would not justify an immigration stop, but stating that it may be “a relevant factor” in the reasonable-suspicion calculus required in immigration stops made by roving border patrol).

196. See *supra* text accompanying note 79–85.

197. Cf. Levine & Mellema, *supra* note 117, at 179 (“[L]ives [of women in the street-level drug economy] are overdetermined by the law, in that they are constantly bumping up against the criminal justice and welfare systems . . .”); Austin Sarat, “. . . *The Law is All Over*”: Power,

omnipresence of the law for unauthorized immigrants suggests that the neutralizations and related justificatory narratives presented in this Article may play an important role in many aspects of their law-related behavior and decisionmaking beyond the immediate context of compliance with immigration law. For example, how do unauthorized immigrants' views of necessity, familial need, and harm to others shape their decisions to seek or forgo different types of public services in the United States? Do unauthorized immigrants' views about racism and hypocrisy implicit in the U.S. immigration system influence their perceptions of, and willingness to cooperate with, local law enforcement? How do unauthorized immigrants' views about the importance of "legal" and "honorable" work impact their decisions to assert or relinquish workplace protection through the law?<sup>198</sup> A systematic investigation of these and other related questions promise to deepen our understanding of how unauthorized immigrants perceive themselves, their relationship to the law, and their available options within legal institutions in the United States.

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*Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 344 (1990) ("Law is, for people on welfare, repeatedly encountered in the most ordinary transactions and events of their lives.").

198. Cf. Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561 (2010) (analyzing the effect of illegality on legal mobilization by examining the narratives that unauthorized workers advance to justify not making claims for workplace protection); Leticia M. Saucedo & Maria Cristina Morales, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J.L. & PUB. POL'Y 641, 642 (2012) (concluding that "[t]he narratives that make migrants protagonists in border crossing stories also make them agents who are able to endure undesirable workplace conditions").

