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### **Title**

The 1986 Immigration Reform and Control Act as Antecedent to Contemporary Latina/o/x Migration

### **Permalink**

<https://escholarship.org/uc/item/0rm94651>

### **Journal**

Chicana/o Latina/o Law Review, 37(1)

### **ISSN**

1061-8899

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### **Publication Date**

2020

### **DOI**

10.5070/C7371048096

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# THE 1986 IMMIGRATION REFORM AND CONTROL ACT AS ANTECEDENT TO CONTEMPORARY LATINA/O/X MIGRATION

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The author is very grateful to Jamila Cambridge, Howard University School of Law class of 2020, and Victoria Capatosto, Howard University School of Law Research and Instruction librarian, for their research assistance.

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## INTRODUCTION

The history of the sociopolitical conflict surrounding the U.S.–Mexico border and the concomitant status of Latinas/os/xs in the United States predates formalized immigration law.<sup>1</sup> The federalization

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<sup>1</sup> Scholars and advocates debate the terminology used to describe the incredibly diverse group known broadly as Latinas/os/x. The gendered use of “Latino” has also provoked a broader use of Latino/a; Latina/o; and Latinx, the last term more contemporarily used to include gendered and nonbinary people. Stephen Nuño-Pérez & Gwen Aviles, *Is ‘Latinx’ Elitist? Some Push Back at the Word’s Growing Use*, NBC NEWS (Mar. 7, 2019 8:31 AM), <https://www.nbcnews.com/news/latino/latinx-elitist-some-push-back-word-s-growing-use-n957036>; see generally Haley Patterson, *A Sociolinguistic Survey of “Latinx”* (2017) (honors thesis)

of immigration law began at the end of the nineteenth century, setting the cornerstone for current law and changing the legal status of the people living in the region. As a result, native Latina/o/x people were forcibly deterred and had to seek admission into the United States through an increasingly complex system of immigration law. But the imposition of formal restrictions could not stop the migration of people from Mexico and Central American countries, including Guatemala, Honduras, and El Salvador—the four countries from which the highest number of immigrants in the United States originate. These four countries serve as the focus of this discussion on the effects and role of the Immigration Reform and Control Act of 1986 (IRCA) on Latina/o/x migration trends since its passage.

In this Article, I discuss the effects of IRCA on Latina/o/x migration through a historical and critical legal studies lens. First, I discuss the history of immigration law and policy and the important and undeniable intersections between immigration law and formal and informal racial and ethnic discrimination. I provide a brief review of the history prior to the enactment of IRCA to understand the political context of its passage and of its effects. The Article then explores the passage of IRCA and its immediate effects on the legalization of millions of previously undocumented immigrants, while also noting the gendered implications of the legalization program. In fact, IRCA helped set the stage for continued gendered discrimination against women migrants by favoring the traditional male workforce in agricultural industries. Moreover, despite its antithetical purpose, the legalization program resulted in increased rates of undocumented migration from Central America.

Next, the Article contextualizes this historical perspective to more contemporary times by noting how IRCA-era migration trends are reflected in recent Central American migration patterns and in current

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(on file with the Nighthawks Open Institutional Repository, University of North Georgia, [https://digitalcommons.northgeorgia.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1014&context=honors\\_theses](https://digitalcommons.northgeorgia.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1014&context=honors_theses)) (“Latin Americans who do not subscribe to the gender binary system have trouble expressing their heritage because of being forced to self-identify as either Latino or Latina, while Latinx alleviates that tension.”). The term Latinx has its critics, however: “a large portion of the Spanish-speaking community feels that the new label misrepresents them. Those who argue against the term have often cited that it ‘excludes more people than it includes,’ and thus is counterintuitive if the goal truly is inclusivity.” *Id.* In this Article, I use the all-inclusive Latina/o/x, because, although it is perhaps cumbersome for the reader, it most accurately describes the breadth of people while allowing for accuracy and precision in both the Spanish and English translations.

political movements to bring legal relief to certain undocumented groups. Such efforts include the advocacy for the Deferred Action for Childhood Arrivals (DACA) program and the now-failed Deferred Action for Parental Accountability (DAPA) program. More recently, these IRCA-era migration trends have influenced increased numbers of families and children to take the risk of migrating to the United States. The Article concludes by commenting on the continuation of these entrenched historical trends.

## I. HISTORY OF IMMIGRATION LAW AND POLICY

In discussing Latina/o/x immigrant migration, it is important to recognize that racial and ethnic systemic discrimination has been intrinsic to U.S. immigration law and policy since its inception. This system in many ways set the stage for IRCA.<sup>2</sup> Federal immigration law developed in part as a reaction to Chinese immigration, with the intent to stop the flow of Chinese people into the United States. In the 1889 case of *Chae Chan Ping v. United States*, the U.S. Supreme Court upheld congressional plenary power to restrict the immigration of Chinese immigrants to the United States, noting that Chinese immigration brought “consequent irritation, proportionately deep and bitter, [which] was followed, in many cases, by open conflicts, to the great disturbance of the public peace.”<sup>3</sup> Concluding that Chinese laborers had a “baneful effect” on the country, the Court upheld the Chinese Exclusion Act, which prohibited certain immigration of Chinese nationals to the United States.<sup>4</sup>

The United States’ explicit targeting of immigrants of color continued throughout the nineteenth and into the twentieth centuries. While restricting or forbidding Asian, Latina/o/x, and African immigrants and other members of the “Black race,” it welcomed white immigrants from western and northern Europe.<sup>5</sup> In fact, the Immigration Act of 1924

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<sup>2</sup> I have written extensively about the discriminatory history of immigration law along racial and ethnic lines. See, e.g., Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. L. REV. 23, 264–701 (2014); Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 1006–13 (2016); Mariela Olivares, *Narrative Reform Dilemmas*, 82 MO. L. REV. 1089 (2018). This Part uses and builds upon my previous work.

<sup>3</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889).

<sup>4</sup> *Id.*

<sup>5</sup> See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 27 (NYU Press, 2nd ed. 2006) (noting the passage of the Chinese Exclusion Act in 1882, the creation of the “Asiatic barred zone” in 1917, a Senate bill excluding “all members of the African or black

restricted migration so that new migrants did not constitute more than 2 percent of the number of noncitizens from that country who were represented in the 1890 U.S. census.<sup>6</sup> This national origins quota intended to “confine immigration as much as possible to western and northern European stock” and disfavor immigrants of color.<sup>7</sup>

Through much of the twentieth century, U.S. immigration law and policy continued to favor white immigrants, who, it was believed, would more easily assimilate into a dominant white American culture.<sup>8</sup> These efforts manifested in various ways, including policies aiming to slow the rate of migration and expel Latina/o/x immigrants—especially Mexicans.<sup>9</sup> Perhaps one of the most notorious plans was the Bracero program, which operated from 1924 until its formal end in 1964. The program brought Mexican laborers from rural parts of Mexico to the United States to work agricultural and other manual labor jobs.<sup>10</sup> The Mexican temporary workers received no form of permanent lawful status and ultimately were deported during the program and at its end.<sup>11</sup> Many of those deported were U.S. citizens of Mexican ancestry.<sup>12</sup>

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race,” and a quota system designed to limit immigration to western and northern Europeans); Hiroshi Motomura, *Who Belongs? Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 368 (2012); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A ‘Magic Mirror’ into the Heart of Darkness*, 73 IND. L.J. 1111, 1120, 1127–30 (1998) [hereinafter “Race, the Immigration Laws, and Domestic Race Relations”].

<sup>6</sup> *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 5 at 1127–28.

<sup>7</sup> LÓPEZ, *supra* note 5, at 27 (internal quotation marks omitted).

<sup>8</sup> Motomura, *supra* note 5, at 369–71; *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 5 at 1129–30; LÓPEZ, *supra* note 5 at 27.

<sup>9</sup> Immigrants from Mexico have long constituted the largest group of Latina/o/x immigrants in the United States, comprising 25 percent of all immigrants in 2017—far above El Salvador, the nation with the second largest total group of Latina/o/x immigrants in the United States at 3 percent. Jynnah Radford, *Key Findings About U.S. Immigrants*, PEW RESEARCH CENTER (June 17, 2019), <https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants>.

<sup>10</sup> Motomura, *supra* note 5, at 370; S. Poverty Law Ctr., *Close to Slavery: Guestworker Programs in the United States*, (Feb. 19, 2013) <https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states>.

<sup>11</sup> Olivares, *Intersectionality at the Intersection*, *supra* note 2, at 1008–09; LÓPEZ, *supra* note 5, at 27 (citing U.S. Commission on Civil Rights, “The Tarnished Golden Door: Civil Rights Issues in Immigration” 10 (1980)); *see also* Kevin R. Johnson, *The Forgotten ‘Repatriation’ of Persons of Mexican Ancestry and Lessons for the ‘War on Terror’*, 26 PACE L. REV. 1, 2, 4 (2005) [hereinafter *The Forgotten ‘Repatriation’*]; Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a ‘Post-Racial’ World*, 76 OHIO ST. L.J. 600, 621–22 (2015).

<sup>12</sup> *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 5, at 27; *The Forgotten ‘Repatriation’*, *supra* note 11, at 4.

Immigration law and policy continued to target Latina/o/x immigrants in the twentieth century through indirect tactics. Although the Immigration and Nationality Act of 1965 (INA) repealed the national origin quota system and utilized race-neutral language, it also created a new limit on migration from the Western Hemisphere to only 120,000 individuals per year. This provision was “part of a compromise [for] those who feared a drastic upswing in Latin American immigration.”<sup>13</sup> Moreover, the INA and its 1976 Amendments imposed an annual immigration limit of 20,000 people per country,<sup>14</sup> a ceiling that drastically slowed migration of immigrants of color from certain “developing” countries, affecting Mexicans especially.<sup>15</sup>

In response, then-President Gerald Ford predicted ill effects on Mexican migration, noting: “I am concerned . . . about one aspect of the legislation which has the effect of reducing the legal immigration into this country from Mexico. Currently about 40,000 natives of Mexico legally immigrate to the United States each year. This legislation would cut the number in half.”<sup>16</sup> Although Ford vowed that he would advocate for reform to increase the number of immigrant visas for Mexican nationals, he was unsuccessful in getting any legislation through Congress during his presidency.<sup>17</sup>

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<sup>13</sup> *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 5, at 1132; *see also* Vázquez, *supra* note 11, at 631; Olivares, *Intersectionality at the Intersection*, *supra* note 2, at 1010; Pub. L. No. 89–236, 79 Stat. 921 (repealed 1976).

<sup>14</sup> Immigration and Nationality Act of 1965, Pub. L. No. 89–236, sec. 2, 79 Stat. 911, 911–12 (codified as amended at INA § 202(a), 8 U.S.C. § 1152(a) (1986)); *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 5 at 1333. The 1990 Immigration Act altered this quota and instituted a worldwide ceiling of 675,000 immigrants, while also changing the per-country limitations. *See* Michael J. Greenwood & Fred A. Ziel, “The Impact of the Immigration Act of 1990 on U.S. Immigration,” U.C. DAVIS, <http://migration.ucdavis.edu/mn/cir/greenwood/combined.htm>. The INA amendments of 1976 repealed the Western Hemisphere restrictions. INA Amendments of 1976, Pub. L. No. 94–571, sec. 2, 90 Stat. 2703, 2703 (codified as amended at INA § 201(a), 8 U.S.C. § 1151(a)).

<sup>15</sup> *Race, the Immigration Laws, and Domestic Race Relations*, *supra* note 5, at 1333 (noting the targeted effect on immigrants from “developing nations” like Mexico, the Philippines, and India). *See also* Olivares, *Intersectionality at the Intersection*, *supra* note 2, at 1010; Vázquez, *supra* note 11, at 631 nn.195–96 (citing MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA*, 261 (2004)).

<sup>16</sup> Presidential Statement on Signing the Immigration and Nationality Act Amendments of 1976, AMERICAN PRESIDENCY PROJECT (Oct. 21, 1976), <https://www.presidency.ucsb.edu/documents/statement-signing-the-immigration-and-nationality-act-amendments-1976>.

<sup>17</sup> *Id.*; *see also* Olivares, *Narrative Reform Dilemmas*, *supra* note 2, at 1102.

In 1977, Jimmy Carter pushed legislation to (1) raise the ceiling for the amount of Mexican nationals who could migrate, and (2) establish a legalization program for undocumented immigrants already in the United States. Though this effort was unsuccessful, it did result in the creation of the “Select Commission on Immigration and Refugee Policy” to “study and evaluate the existing laws, policies and procedures governing the admission of immigrants and refugees.”<sup>18</sup> Ronald Reagan, an ardent proponent of free markets who viewed undocumented migration as a result of unmet labor demands, assumed the presidency and considered the findings of the committee. Ultimately, Reagan advocated for regularizing the immigration status of migrant workers:

It makes one wonder about the illegal alien fuss. Are great numbers of our unemployed really victims of the illegal alien invasion or are those illegal tourists actually doing work our own people won't do? One thing is certain in this hungry world: No regulation or law should be allowed if it results in crops rotting in the fields for lack of harvesters.”<sup>19</sup>

Reagan's call for more open agricultural labor markets led to the introduction of the IRCA bill, first introduced to Congress in 1982. Congress eventually passed IRCA in 1986 with heavy bipartisan support in both the House and the Senate.<sup>20</sup> Reagan celebrated the new legislation and, at its signing, remarked: “Future generations of Americans will be thankful for our efforts.”<sup>21</sup>

## II. IMMEDIATE EFFECTS OF IRCA

Despite Reagan's recognition of the economic contributions of immigrants in the agricultural sector, IRCA did more than provide a path to legalization for some of the undocumented population. IRCA also sought to deter undocumented immigration, particularly from Central America.<sup>22</sup> To achieve these goals, IRCA changed the law in two

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<sup>18</sup> Evan Wyloge, *The Immigration Reform and Control Act: What it Is, Why it Matters*, Arizona State University (November 6, 1986), [http://asu.news21.com/archive/2009/the\\_first\\_immigration\\_amnesty](http://asu.news21.com/archive/2009/the_first_immigration_amnesty). See also Olivares, *Narrative Reform Dilemmas*, *supra* note 2, at 1102.

<sup>19</sup> Wyloge, *The Immigration Reform and Control Act*; see also Olivares, *Narrative Reform Dilemmas*, *supra* note 2, at 1102–03.

<sup>20</sup> Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, § 101(a)(1), 100 Stat. 3359, 3360–74 (codified as amended at 8 U.S.C. § 1324a (2012)).

<sup>21</sup> Wyloge, *The Immigration Reform and Control Act*; see also Olivares, *Narrative Reform Dilemmas*, *supra* note 2, at 1103.

<sup>22</sup> Dennise A. Calderon-Barrera, *Hoffman v. NLRB: Leaving Undocumented Workers*

ways, including: (1) creating strict prohibitions against employers hiring undocumented people; and (2) increasing antimigration enforcement measures at the United States border.<sup>23</sup> These provisions, however, were not ultimately successful in deterring further migration, as discussed more below. Most significantly for the purposes of this discussion, IRCA's third principle aim was its legalization programs, which have had widespread and longterm effects on Latina/o/x immigration to the United States.

In recognition of the large number of undocumented workers already in the country who were, in Reagan's words: "doing the jobs that Americans won't do," one of IRCA's legalization programs provided benefits to undocumented agricultural workers.<sup>24</sup> So-called "special agricultural workers" applying for the program had to prove that they resided in the United States for at least ninety days performing "seasonal agricultural services" between May 1985 and May 1986.<sup>25</sup> Although not explicitly stated in the law, the provision aimed to keep this cheap labor force in agricultural work, to the benefit of those who profited from their labor.<sup>26</sup> Importantly, IRCA created a direct path towards lawful permanent residence by providing that some undocumented workers who could prove U.S. residency since January 1, 1982 may qualify for an eighteen-month-long lawful "temporary resident status."<sup>27</sup> This temporary resident status would then lead to "permanent resident status" if individuals could demonstrate that they met the eligibility requirements.<sup>28</sup>

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*Unprotected Under United States Labor Laws?* 6 HARV. LATINO L. REV. 119, 120 (2003); H.R. REP. NO. 99-682, pt. 1, at 56 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5660 ("[T]he [Judiciary] Committee is convinced that as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or to violate status once admitted as a nonimmigrant in order to obtain employment will continue.").

<sup>23</sup> 8 U.S.C. § 1324a(a)(2), (b)(1).

<sup>24</sup> Immigration and Nationality Act, 8 U.S.C. § 1160 (2012).

<sup>25</sup> *Id.* § 1160(a)(1)(B); Hiroshi Motomura, *What is 'Comprehensive Immigration Reform'?* *Taking the Long View*, 63 ARK. L. REV. 225, 226 (2010) [hereinafter "Taking the Long View"]. See also Olivares, *Unreformed: Towards Gender Equality in Immigration Law*, 18 CHAP. L. REV. 419, 427 (2015) [hereinafter *Unreformed*] (In this Article, I highlight IRCA as just one of the ways that immigration law subordinates women migrants.).

<sup>26</sup> *Taking the Long View*, *supra* note 25, at 226 (discussing the political and commercial aims of the program).

<sup>27</sup> 8 USC § 1255(a); *Taking the Long View*, *supra* note 25, at 226.

<sup>28</sup> 8 USC § 1255(a); *Taking the Long View*, *supra* note 25, at 226 (discussing such requirements as being able to prove no felony convictions and English language proficiency).



The legalization provisions of IRCA had astounding demographic effects on the Latina/o/x immigrant population in the United States. IRCA directly resulted in almost 3 million undocumented immigrants becoming lawful permanent residents (LPR), amounting to over 80 percent of the estimated undocumented population achieving LPR status.<sup>29</sup> The majority of agricultural worker immigrants in the United States were Mexicans—likely a result of the Bracero guest worker program and Mexico’s geographic proximity. Immigrants from other Central American countries also comprised a large percentage of the workers. Thus, 82 percent of those who became LPRs under the IRCA agricultural worker provision were Mexicans and Central Americans.<sup>30</sup> Undeniably, then, the IRCA legalization program is an important component of the growing Latina/o/x presence in the United States. Since the 1970s, the nation’s Latina/o/x population has grown six-fold.<sup>31</sup> Current demographic estimates show that the U.S. Latina/o/x population reached a record 59.9 million in 2018 compared to 47.8 million in 2008.<sup>32</sup> By 2050, the Latina/o/x population is expected to reach 106 million people—double its current population.<sup>33</sup>

Despite bipartisan support, many criticized IRCA, especially the legalization program. Critics asserted that beneficiaries were receiving

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<sup>29</sup> Nancy Rytina, *IRCA Legalization Effects: Lawful Permanent Residence and Naturalization Through 2001*, OFFICE OF POLICY & PLANNING STATISTICS DIVISION, U.S. IMMIGRATION & NATURALIZATION SERVICE, 3, exhibit 1 (2002), <http://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf>; Hiroshi Motomura, *Making Legal: The DREAM Act, Birthright Citizenship, and Broad-Scale Legalization*, 16 LEWIS & CLARK L. REV. 1127, 1137 (2012) [hereinafter “Making Legal”]; *Unreformed*, *supra* note 25, at 427–28. To break this down, 1,763,434 obtained lawful status under the general legalization provision, and 1,277,041 obtained status as seasonal agricultural workers. Rytina, *supra*, at 3, exh. 1.

<sup>30</sup> María E. Enchautegui, *A Comparison of Today’s Unauthorized Immigrants and the IRCA Legalized: Implications for Immigration Reform*, 4 THE URBAN INSTITUTE (2013), available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412980-A-Comparison-of-Today-s-Unauthorized-Immigrants-and-the-IRCA-Legalized-Implications-for-Immigration-Reform.PDF>.

<sup>31</sup> Héctor Tobar, *How Latinos Are Shaping America’s Future*, NAT’L GEOGRAPHIC July 2018, available at <https://www.nationalgeographic.com/magazine/2018/07/latinos-hispanic-pow-er-america-immigration-future>.

<sup>32</sup> Antonio Flores et al., *U.S. Hispanic Population Reached New High in 2018, but Growth has Slowed*, PEW RESEARCH CENTER (July 8, 2019), <https://www.pewresearch.org/fact-tank/2019/07/08/u-s-hispanic-population-reached-new-high-in-2018-but-growth-has-slowed>.

<sup>33</sup> Jens Manuel Krogstad, *With Fewer New Arrivals, Census Lowers Hispanic Population Projections*, PEW RESEARCH CENTER (Dec. 16, 2014), <https://www.pewresearch.org/fact-tank/2014/12/16/with-fewer-new-arrivals-census-lowers-hispanic-population-projections-2>.

unfair prioritization towards legalization.<sup>34</sup> Immigrant advocates also criticized the program, asserting that it created heightened vulnerability of beneficiary family members, especially women.<sup>35</sup> Indeed, as I and others have written, the IRCA special agricultural worker legalization provision disproportionately benefited men, who were more often employed in agricultural industries.<sup>36</sup> Working undocumented women were more heavily employed in domestic work, which had no IRCA legalization protections, as “[n]o equivalent provision was available . . . to nannies and housecleaners, or even to hotel workers and hospital aides, which are predominantly female positions.”<sup>37</sup>

This preference for agricultural work and the accompanying documentary provisions that favored regular work in agricultural industries meant that IRCA legalization was provided overwhelmingly to Central American men, excluding women.<sup>38</sup> This resulted in women and children remaining dependent on men’s migration and immigration stability—a longstanding phenomenon that continues to the present-day as shown by increased levels of migration by families and unaccompanied children. Moreover, it should not be surprising that high levels of male migration would fuel continued migration of families coming to join fathers, husbands and partners. Research shows that rather than waiting for their family-based immigration petitions to be processed, family members simply joined IRCA beneficiaries in the United States, living and working unlawfully.<sup>39</sup> Further, beneficiaries typically filed for family-based immigration visas, creating a long backlog of visa applications that still exists today (though with less severe wait times).<sup>40</sup>

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<sup>34</sup> *Making Legal*, *supra* note 29, at 1138.

<sup>35</sup> *Id.*

<sup>36</sup> *Unreformed*, *supra* note 25, at 426–29; Margot Mendelson, *The Legal Production of Identities: Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN’S LAW J. 138, 205–06 (2004).

<sup>37</sup> Mendelson, *supra* note 36, at 205.

<sup>38</sup> *Id.* at 205–06; *Unreformed*, *supra* note 25, at 426–29; Laura E. Enriquez, *Gendered Laws: VAWA, IRCA and the Future of Immigration Reform*, HuffingtonPost.com, (Mar. 7, 2013), [http://www.huffingtonpost.com/laura-e-enriquez/domestic-violence-immigration\\_b\\_2793828.html](http://www.huffingtonpost.com/laura-e-enriquez/domestic-violence-immigration_b_2793828.html) (last visited Sept. 3, 2019).

<sup>39</sup> Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1454–55 (2008).

<sup>40</sup> Donald M. Kerwin, *More than IRCA: U.S. Legalization Programs and the Current Policy Debate*, Migration Policy Institute, 8 (Dec. 2010), <http://www.migrationpolicy.org/research/us-legalization-programs-by-the-numbers>.

In effect, IRCA's lack of provisions for family members partly provoked the increase in the undocumented population. Thus, although demographic and migration data show that IRCA resulted in the legalization of about 3 million previously undocumented people, the undocumented population in the United States rose through the 1990's and 2000's. The number of undocumented Mexicans in the United States, for example, reached its highest in 2007 at approximately 7,000,000—an increase of 4,000,000 since the IRCA legalization program 20 years prior.<sup>41</sup>

In addition to IRCA's lack of family-based protections, the surge in the undocumented population was due in part to the failure of subsequent immigration law reform required to address U.S. labor demands, such as reform in employment-based immigrant visa programs like employment-based lawful permanent residency and temporary worker provisions.<sup>42</sup> Further, although IRCA partially addressed the unauthorized employment of undocumented workers, it did not provide implementing regulations to establish protocol for the identity verification system and employment documentation provisions. As a result, employers complained about confusing implementing guidelines, their obligations, and the range of purported penalties imposed for violations.<sup>43</sup> Thus, IRCA did little to deter immigrants seeking unlawful employment.

Finally, IRCA's efforts to fortify the U.S.–Mexico border against continued or increased migration of undocumented immigrants resulted in exponential increases in United States governmental spending on border enforcement but did not stymie the rate of undocumented entry by immigrants. Indeed, after IRCA, the rate of migration by undocumented immigrants increased and actually led to more immigrants remaining longterm in the United States rather than returning to their home countries, in part so as to not risk the dangerous journey over

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<sup>41</sup> Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*, PEW RESEARCH CENTER, (Sept. 1, 2010), <http://www.pewhispanic.org/2010/09/01/us-unauthorized-immigration-flows-are-down-sharply-since-mid-decade>.

<sup>42</sup> *Id.*; Wishnie, *supra* note 39, at 1454 (noting that “A significant shortcoming of . . . IRCA . . . was the absence of any meaningful provision to manage future migration.”); Jennifer Gordon, *Transnational Labor Citizenship*, 80 *So. CAL. LAW REV.* 503, 528–29 (2007) (commenting that according to estimates in the early 2000s, undocumented immigrants make up nearly 5 percent of the U.S. labor force, and in sectors like restaurant cooks, construction and agricultural workers, the percentages are much higher).

<sup>43</sup> Kerwin, *supra* note 40, at 8; Pamela D. Nichols, *The United States Immigration Reform and Control Act of 1986: A Critical Perspective*, 8 *NW J. OF INT'L L. & BUS.* 503, 514–15 (1987).

the heavily-policed border.<sup>44</sup> In short, the IRCA programs provided important legalization and work authorization for millions of undocumented workers, the majority of who were Latinos (men), but also put into motion decades of increased immigration from Latin America.

### III. IRCA EFFECTS ON CURRENT MIGRATION TRENDS AND POLITICAL MOVEMENTS

Indeed, current migration trends of Latinas/os/x and recent efforts at both legalization programs and immigration deterrence programs illustrate the continuing effects of IRCA. According to a U.S. Census Bureau survey, by 2017, there were more than 44.4 million immigrants in the United States, representing approximately 13.6 percent of the total U.S. population.<sup>45</sup> By comparison, and to illustrate upward trends of migration post-IRCA, in 1970, immigrants represented approximately 4.7 percent of the U.S. population; 6.2 percent in 1980; 7.9 percent in 1990; and 11.1 percent in 2000.<sup>46</sup> Moreover, Mexican and Central American immigrants continue to represent a large portion of the immigrant population. In 2017, Mexicans remained the largest group of immigrants in the United States, making up approximately 25 percent of the total number of immigrants.<sup>47</sup> Demographic data from 2015 further indicates that 71 percent of undocumented immigrants hail from Mexico, Guatemala, Honduras and El Salvador, with Mexicans accounting for a majority of that percentage, too.<sup>48</sup> Still, the number of Mexican undocumented immigrants in the United States from 2007–2017 represented a much smaller share than the total number of undocumented immigrants in the past.<sup>49</sup>

Prognostication of future trends in immigration also point to sustained numbers of Latina/o/x migrants arriving and remaining in the

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<sup>44</sup> Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL. REV. 445, 454–55 (2004) (noting that the policy aimed at deterring future migration of immigrants by fortifying popular border crossing points resulted instead in immigrants crossing at other points of entry; immigrants more frequently using the services of smugglers to get them across the border; and more immigrants choosing to stay in the United States rather than risk leaving and having to make the dangerous journey again).

<sup>45</sup> Radford, *supra* note 9.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Marc R. Rosenblum & Ariel G. Ruiz Soto, *An Analysis of Unauthorized Immigrants in the United States by Country and Region of Birth*, MIGRATION POL'Y INST. (2015).

<sup>49</sup> Passel, *supra* note 41 (finding that “the decrease in the Mexican born [immigrants] was the major factor driving down the overall population of unauthorized immigrants in the U.S., which in 2017 was 1.7 million below its peak of 12.2 million in 2007.”).

United States, with numbers suggesting that, in 2065, 31 percent of the foreign-born population in the United States will be “Hispanic,” and 18 percent of the total population will be the children of foreign-born immigrants.<sup>50</sup> One estimate indicates that the percentage of unauthorized immigrant adults who have lived in the United States for at least a decade has gone from 44 percent of the undocumented population in 2000 to 63 percent in 2010.<sup>51</sup> And only 15 percent of the undocumented population in 2010 had lived in the United States for less than 5 years, compared with 32 percent in 2000.<sup>52</sup>

These continued rates of migration, and in particular permanent immigration, are due in part to IRCA’s failures to expand legalization eligibility to other immigrants, including to the families of workers who were able to legalize their status. Thus, many currently undocumented immigrants likely joined beneficiaries of IRCA’s legalization programs either at the time of IRCA or in subsequent waves. Further, IRCA’s effects include the high rates of children living in the United States (defined as under eighteen years old) born to a foreign-born parent or born abroad but living with a foreign-born parent. Data indicates that, in 2014, 25 percent of all children (or 17.5 million children) in the United States fell into one of those categories.<sup>53</sup> In 2000, 30 percent of the undocumented adult population lived with their U.S.-born children, either minors or adults.<sup>54</sup> By 2016, that number increased to 36 percent.<sup>55</sup>

IRCA’s legalization programs have also increased the number of mixed status families—families comprised of members with different

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<sup>50</sup> D’Vera Cohn, *Future immigration will change the face of America by 2065*, PEW RESEARCH CENTER (October 5, 2015), <http://www.pewresearch.org/fact-tank/2015/10/05/future-immigration-will-change-the-face-of-america-by-2065>.

<sup>51</sup> Paul Taylor, Mark Hugo-Lopez, Jeffrey S. Passel & Seth Motel, *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW RESEARCH CENTER (Dec. 1, 2011) (data is derived from figure 2), available at <https://www.pewresearch.org/hispanic/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood>.

<sup>52</sup> *Id.*

<sup>53</sup> Jie Zong et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Mar. 14, 2019), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-8>.

<sup>54</sup> Jeffrey Passel & D’Vera Cohn, *Number of babies born in U.S. to unauthorized immigrants declines*, PEW RESEARCH CENTER (Sept. 11, 2015), <http://www.pewresearch.org/fact-tank/2015/09/11/number-of-babies-born-in-u-s-to-unauthorized-immigrants-declines>.

<sup>55</sup> Jeffrey Passel & D’Vera Cohn, *Number of U.S.-Born Babies with Unauthorized Immigrant Parents Has Fallen Since 2007*, PEW RESEARCH CENTER (Nov. 1, 2018), <https://www.pewresearch.org/fact-tank/2018/11/01/the-number-of-u-s-born-babies-with-unauthorized-immigrant-parents-has-fallen-since-2007>.

immigration statuses. This status has caused difficulties for children of immigrants, both those who are U.S. citizens and those born abroad and raised in the United States.<sup>56</sup> The number of children born in the United States to immigrant parents (as opposed to foreign-born children) has increased from 77 percent of the total number of children of immigrants in 1990 to 88 percent in 2014.<sup>57</sup> Other recent data shows that a smaller percentage of these U.S.-born children were born to *undocumented* immigrants than in prior years.<sup>58</sup> This again supports the finding that more established immigrants are having U.S.-born children—one of the effects of the 1986 IRCA legalization program.

As I have previously written, the plight of foreign-born children who remain noncitizens in the United States represents a particularly poignant aspect of long-overdue immigration reform.<sup>59</sup> Foreign-born children who are brought to the United States without lawful status experience the troubling circumstance of being possibly deported to a country with which they may have little familiarity. This phenomenon came into sharp focus during the ongoing debate and litigation surrounding the Obama Administration's Deferred Action for Childhood Arrivals (DACA) program, which provides deferred action status to certain young people in the United States without status and the Deferred Action for Parental Accountability (DAPA), which sought to provide deferred action status to certain parents of United States citizen and lawful permanent resident children. DAPA intended to provide deferred action status to certain eligible parents, specifically those who could establish, among other requirements, a certain period of residency in the United States and lack of a criminal history.<sup>60</sup> Deferred action status does not equate to lawful status or even status that leads to lawfulness or United States citizenship, but rather deems the beneficiary as the least among governmental priorities for deportation and provides authorization for lawful employment.

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<sup>56</sup> Zong, *supra* note 53 (noting that of the 17.5 million children born to immigrant parents, 88 percent of them were themselves born in the United States, making them U.S. citizens).

<sup>57</sup> Passel & Cohn, *supra* note 54.

<sup>58</sup> *Id.* See also Angela M. Banks, *Deporting Families: Legal Matter or Political Question*, 27 GA. ST. UNIV. L. REV. 289, 306 (2011) (noting that mixed-status families are often created when immigrants with well-established ties to the United States have U.S.-born children).

<sup>59</sup> Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 79–90 (2013).

<sup>60</sup> *Executive Actions on Immigration*, U.S. DEPARTMENT OF HOMELAND SECURITY, <https://www.uscis.gov/immigrationaction#2> (last visited Sept. 2, 2019).

Several states challenged the DAPA program in federal court. The United States Supreme Court declined, however, to decide on the constitutionality and viability of the program.<sup>61</sup> When Donald Trump became president, his administration ultimately rescinded the DAPA policy in 2017.<sup>62</sup> Similar in some respects to DAPA, DACA provides certain young people deferred action status if they remain eligible under the program's provisions. Unlike DAPA, however, DACA was implemented in 2012 and has been administered since then.<sup>63</sup> Although the Obama Administration introduced an expansion of the eligibility provisions of DACA, which was halted by the 2016 United States Supreme Court decision, DACA in its original form still provides ongoing status for some beneficiaries although it remains in a precarious position under the Trump Administration's ongoing targeting of immigrants.<sup>64</sup>

IRCA's shortfalls (i.e., lack of legalization possibilities for women; employment verification failings and overall lack of enforcement) also set the foundation for the recent increased migration of family units and unaccompanied minors. Such migration skyrocketed beginning in about 2014, when undocumented immigrant women with their child(ren) and unaccompanied children entered the United States in record numbers. As I have previously documented, in fiscal year 2013, U.S. Customs and Border Protection (CBP) apprehended 21,553 unaccompanied children and 7,265 "family units"—meaning women and their child(ren)—along the South Texas border with Mexico. In 2014, CBP apprehended 49,959 unaccompanied children and 52,326 family units.<sup>65</sup> 2015 data shows that

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<sup>61</sup> United States v. Texas, 136 S. Ct. 2271 (2016).

<sup>62</sup> See *Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)*, DEP'T OF HOMELAND SECURITY (June 15, 2017), available at <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf>.

<sup>63</sup> *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERV., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Sept. 2, 2019).

<sup>64</sup> In September 2017, the Trump Administration announced the end of the DACA program, justifying its rescission because the Supreme Court found similar programs for parents of DACA recipients unconstitutional. Michael D. Shear, *Trump Has Right to End DACA, Justice Dept. Tells Supreme Court*, NY TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/us/politics/daca-trump.html?searchResultPosition=1> (Lawyers from the Department of Justice have continuously asserted that President Trump was "fully within his rights" to eliminate the DACA program).

<sup>65</sup> U.S. Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report* (2014), 2–3, available at <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf>; see also Olivares, *Intersectionality at the Intersection*, *supra* note

97 percent of the mothers and children detained were from Guatemala, Honduras, El Salvador, and Mexico, showing a continued targeting of Latina/o/x migrants.<sup>66</sup> After Trump’s crackdown on migrants entering at the southern U.S. border, apprehensions reached record numbers. Data shows that apprehensions of migrants in the first eight months of fiscal year 2019 totaled more than all apprehensions made in fiscal year 2018.<sup>67</sup> Moreover, Customs and Border Protection (CBP) apprehensions and detention of family units increased from approximately 23,000 in November 2018 to almost 59,000 in May 2019.<sup>68</sup> These current trends highlight the increased targeting of Latina/o/x people, and, specifically, a new focus on immigrant women and families.<sup>69</sup>

Since 2017, under Trump’s orders, Immigration and Customs Enforcement (ICE) and the Department of Homeland Security (DHS) ramped up the detention and prosecution of migrants who entered the United States without documentation, asserting that this Zero Tolerance Prosecution Policy was targeting criminals and serving to deter future prosecution.<sup>70</sup> This policy has caused ICE to jail parents who entered without documentation and forcibly remove their children to “family residential centers.” Under this Family Separation Policy, the parallel program to the Zero Tolerance Prosecution Policy, credible reports indicate that from January 2017 to Oct 15, 2018, almost 2,800 children—some as young as two years old—were stripped from their otherwise fit and

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2, at 974–75 (discussing these numbers and the effects on families); Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. UNIV. L. REV. 287 (2020) (discussing the rise in family detention).

<sup>66</sup> U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, (2015), <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (providing data for fiscal year 2014).

<sup>67</sup> Stefanie Pousoulides & Miriam Valverde, *The facts behind the detention of immigrants*, POLITIFACT, (July 8, 2019), <https://www.politifact.com/truth-o-meter/article/2019/jul/08/facts-behind-detention-immigrants>.

<sup>68</sup> U.S. Customs and Border Protection, *Southwest Border Migration FY 2019*, (Sept. 6, 2019), available at <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

<sup>69</sup> A comprehensive study on family detention revealed that historical practice and recent Trump Administration actions resulted in the jailing of thousands of women and children in detention centers. As one illustrative example of how family detention targets women and children, in August 2014, the ICE Karnes County detention center, which had been constructed to jail only male migrants had to convert to a family detention center, jailing women and children. See Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, 798–800 (2018).

. Olivares, *The Rise of Zero Tolerance and the Demise of Family*, *supra* note 65.

<sup>70</sup> See *id.*



capable parent or adult guardian.<sup>71</sup> The policy ignited a widespread outcry of resistance from all ranges of the political spectrum, ultimately leading to the formal end of the Family Separation Policy in June 2019.<sup>72</sup> Yet, the Trump Administration's attack on migrant families— affecting mostly Latina women and children— continues through their litigation efforts against family detention protections and other immigration protections.<sup>73</sup> Thus, although the trends of Latina/o/x migration differ demographically today than in the time of IRCA, the concerted governmental effort to target Latina/o/x migration and oppress immigrants is as robust now as it was then.

## CONCLUSION

As scholars and activists determine how the current subjugation of Latina/o/x immigrants will shape short and longterm political and social results, the DACA and DAPA programs provide illuminative lessons about IRCA's legacy. First, the IRCA legalization programs were incredibly far-reaching, affording status to approximately 3 million undocumented immigrants. Similarly, it is estimated that there are approximately 2 million undocumented young people who would be eligible under DACA.<sup>74</sup> As of April 2019, U.S. Citizenship and Immigration

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<sup>71</sup> See U.S. Dep't of Health and Human Services Off. of Inspector General, *Separated Children Placed in Office of Refugee Resettlement Care* (2019), (this report details the bungled implementation of the Family Separation Policy from its inception), available at <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>; see also *Family Separation by the Numbers*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation> (last visited Sept. 17, 2019).

<sup>72</sup> See Olivares, *The Rise of Zero Tolerance and the Demise of Family*, *supra* note 65.

<sup>73</sup> On August 21, 2019, the Trump Administration announced plans to terminate the Flores Agreement. The end of the Agreement will allow DHS to detain migrant families indefinitely, beyond the current twenty-day limit for holding children. Katie Reilly & Madeleine Carlisle, *The Trump Administration's Move to End Rule Limiting Detention of Migrant Children Rejected in Court*, TIME (Aug. 21, 2019), <https://time.com/5657381/trump-administration-flores-agreement-migrant-children>. Recently, Judge Dolly Gee of the Federal District Court in Los Angeles blocked the Trump Administration's plan to expand the time period for which children could be detained. Miriam Jordan, *Judge Blocks Trump Administration Plan to Detain Migrant Children*, NY TIMES (Sept. 27, 2019 7:15 PM), [https://www.nytimes.com/2019/09/27/us/migrant-children-flores-court.html?campaign\\_id=60&instance\\_id=0&segment\\_id=17413&user\\_id=1dc44f596824b545753ff59d03244cf9&regi\\_id=97271861ing-news](https://www.nytimes.com/2019/09/27/us/migrant-children-flores-court.html?campaign_id=60&instance_id=0&segment_id=17413&user_id=1dc44f596824b545753ff59d03244cf9&regi_id=97271861ing-news) (“Judge Dolly Gee of the Federal District Court in Los Angeles, who oversees the 1997 court settlement known as the Flores agreement, concluded that the administration's attempt to frame regulations that would carry out the mandate to protect migrant children—but allow them to be detained for long periods—was not adequate.”).

<sup>74</sup> Zong, *supra* note 53.

Services (USCIS) approved approximately 1.582 million DACA applications.<sup>75</sup> Although DACA has a precarious future, the possibility of immigration legislation that will eventually benefit young immigrants continues to be a possibility—especially as the 2020 presidential campaign season creates opportunity for such conversation. Some Democratic party presidential candidates voiced support for policies that, like DAPA, would regularize the status of other immigrants, including the parents of the DACA population.<sup>76</sup> Like IRCA a generation ago, such legislation could have widespread effects. For example, data shows that 3.61 million undocumented immigrants would have been eligible for the DAPA program.<sup>77</sup> Although programs like DACA and DAPA do not go as far as the legalization programs of IRCA and simply provide deferred action status rather than a direct pathway to lawful immigration status or United States citizenship, such regularization of status would provide stability for millions of people.

Moreover, though the DACA and DAPA programs do not rise to same level of the benefits as the IRCA 1986 legalization provisions, the DACA and DAPA beneficiaries were directly affected by IRCA, including its legalization program, and the lack of subsequent reforms. Even if the more recent arrivals of undocumented immigrant children and families from Central America are not as clearly related to direct beneficiaries of IRCA, the trend indicates a continued migratory pull and push from Central America. Further, these recently arrived immigrants are family units with children and/or unaccompanied children—all of whom, if allowed to stay in the United States, will contribute to the Latina/o/x population.

Importantly, efforts must continue to protect families and vehemently resist the breaking apart and jailing of migrant mothers and

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<sup>75</sup> U.S. Citizenship and Immigration Services, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012–2016* (April 30, 2019), available at [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA\\_FY19\\_Q3\\_APR\\_FINAL.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_FY19_Q3_APR_FINAL.pdf).

<sup>76</sup> Tara Golshan, *Elizabeth Warren's Immigration Proposal Goes Much Further Than a Pathway to Citizenship*, Vox (July 12, 2019 9:40 AM), <https://www.vox.com/2019/7/12/20690200/elizabeth-warren-immigration-proposal-2020> (“And as millions of undocumented immigrants who came to the US as children live in legal limbo as the administration sunsets the Deferred Action For Childhood Arrivals program, Warren is calling to expand the program for DREAMers and their families, as well as those with Temporary Protected Status.”).

<sup>77</sup> Zong, *supra* note 53.

children. Thus, as advocates and policymakers evaluate history to determine how best to implement immigration reform, it is imperative that longterm repercussions be considered. It is a lesson that immigration law and policy is not of the individual but, very often, of the family. The lessons and effects of IRCA teach us that law and policy must include pathways to unify and reunite families, regularize the status of longterm immigrants already here, and welcome the most vulnerable among them.