

# GUILTY UNTIL PROVEN “ESSENTIAL”: A MERITOCRATIC PATHWAY TO CITIZENSHIP FOR UNDOCUMENTED WORKERS

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Less than a year and a half after the Trump administration promulgated its “public charge” rule<sup>1</sup> and nine months after the former president issued a proclamation freezing green card issuance,<sup>2</sup> a group of one hundred lawmakers beseeched House leadership to provide an expedited pathway to citizenship for undocumented essential workers sustaining the economy amidst the global COVID-19 crisis.<sup>3</sup> Many of these prospective recipients comprise the very group the Trump administration sought to bar from legal permanent resident status because of their income or education level.<sup>4</sup> Ironically, the workers whom President Trump presented as threats to the American economy<sup>5</sup> have helped preserve it during the pandemic,<sup>6</sup> and the Biden

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1. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at 8 C.F.R. pt. 103, 212, 213, 214, 245, 248) (held invalid by *Cook County, Illinois v. Wolf*, 417 F.Supp.3d 1008 (N.D. Ill. Oct. 14, 2019)).

2. Proclamation No. 10014, 85 Fed. Reg. 23,441 (April 22, 2020), <https://www.federalregister.gov/documents/2020/04/27/2020-09068/suspension-of-entry-of-immigrants-who-present-a-risk-to-the-united-states-labor-market-during-the>. This order was extended twice by Proclamation 10052, 85 Fed. Reg. 38, 263 (June 22, 2020) and Proclamation 10131, 86 Fed. Reg. 417 (Dec. 31, 2020), and finally revoked by President Biden’s Proclamation of February 24, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/a-proclamation-on-revoking-proclamation-10014/>.

3. Sabrina Rodriguez, *Democrats press for path to citizenship in Covid relief*, POLITICO (Jan. 30, 2021), <https://www.politico.com/news/2021/01/30/immigration-citizenship-pathway-coronavirus-relief-463994>.

4. See 8 C.F.R. 212.22; Immigration & Nationality Act § 212(a)(4)(a).

5. See, e.g., Michael D. Shear, Miriam Jordan & Caitlin Dickerson, *Trump’s Policy Could Alter the Face of the American Immigrant*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/us/immigration-public-charge-welfare.html> (“I am tired of seeing our taxpayer paying for people to come into the country and immediately go onto welfare and various other things.”) (quoting President Trump); Proclamation No. 10014, 85 Fed. Reg. 23,441 (April 22, 2020) (“[W]e must be mindful of the impact of foreign workers on the United States labor market, particularly in an environment of high domestic unemployment and depressed demand for labor.”); Ben Schreckinger, *Donald Trump storms Phoenix*, POLITICO (July 11, 2015), <https://www.politico.com/story/2015/07/donald-trump-storms-phoenix-119989> (“[The Mexican people are] taking our jobs. They’re taking our manufacturing jobs. They’re taking our money. They’re killing us.”) (quoting Donald Trump).

6. See FWD.us, *FWD.us Estimates Show Immigrant Essential Workers are Crucial to America’s COVID-19 Recovery* (Dec. 16, 2020), <https://www.fwd.us/news/immigrant-essential-workers/>; Testimony of Tom Jawetz Before U.S. House Judiciary Subcommittee on Immigration and Citizenship, “Immigrants as Essential Workers During COVID-19” (Sept. 28, 2020), <https://www.americanprogress.org/issues/immigration/reports/2020/09/28/490919/immigrants-essential-workers-covid-19/>.

administration has swiftly promoted legislation<sup>7</sup> that would implicitly recognize their critical contribution.<sup>8</sup> While the regulatory pendulum may have swung dramatically with a Democrat-controlled House now sustained by the Biden administration, creating a pathway to citizenship for undocumented immigrants is by no means a novel or radical objective. In 2016—Trump’s election year—84% of Americans favored a path to citizenship for undocumented immigrants.<sup>9</sup> In the heat of the pandemic, public recognition of immigrants’ contributions has only burgeoned.<sup>10</sup> This paradigm shift toward accepting immigrants into the U.S. community, given their visible contributions, elucidates a background principle that has informed the country’s conception of “membership” undergirding immigration law and policy for decades: that of *meritocracy*.<sup>11</sup> To be absorbed into the United States, one has to earn their standing. While the Biden administration’s plan to streamline legal residence for essential workers is laudable, it is still a post hoc response to their economic output—predating but finally highlighted by the pandemic—and one that is transactional even if humane.

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7. See White House, “Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System” (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/> [hereinafter White House Fact Sheet].

8. See *id.* (“The [U.S. Citizenship Act of 2021] creates an earned path to citizenship for our immigrant neighbors, colleagues, parishioners, community leaders, friends, and loved ones—including Dreamers and the essential workers who have risked their lives to serve and protect American communities.”)

9. Jim Norman, *Solid Majority Still Opposes New Construction on Border Wall*, GALLUP (Feb. 4, 2019), <https://news.gallup.com/poll/246455/solid-majority-opposes-new-construction-border-wall.aspx>.

10. See CTR. FOR AM. PROGRESS ACTION FUND AND HART RESEARCH ASSOCS., WINNING THE IMMIGRATION DEBATE DURING COVID-19 (July 2020), [https://cdn.americanprogress.org/content/uploads/2020/09/28102223/JawetzImmigrantsCOVID-testimony1.pdf?\\_ga=2.263375054.330507268.1604621400-868953987.1604621400](https://cdn.americanprogress.org/content/uploads/2020/09/28102223/JawetzImmigrantsCOVID-testimony1.pdf?_ga=2.263375054.330507268.1604621400-868953987.1604621400) (finding a 16% increase from April 2020 to June and July 2020 in surveyed respondents who believe undocumented immigrants contribute a fair amount or a great deal to providing essential services during COVID-19).

11. See Jean-Baptiste Farcy, *Equality in Immigration Law: An Impossible Quest?* 20 HUM. RTS. L. REV. 4, 725 (Dec. 2020) (“[C]ontemporary immigration and citizenship laws increasingly use meritocratic criteria to distinguish among migrants. Although framed in universal terms, these criteria create differences of treatment among migrants based on their income, level of education and economic worth. However, from a legal perspective such differences of treatment rarely amount to prohibited discrimination.”); Rebecca Tesfai, *Is there any merit to the merit-based immigration system? What Sub-Saharan African immigrant labor and housing market outcomes tell us about U.S. economic and immigration systems*, SOCIOLOGY COMPASS (Mar. 29, 2021), <https://onlinelibrary.wiley.com/doi/10.1111/soc4.12873>. See also *President Trump Address to Joint Session of Congress*, C-SPAN.ORG, Feb. 28, 2017, <https://www.c-span.org/video/?424147-1/president-trump-addresses-joint-session-congress> (“It is a basic principle that those seeking to enter a country ought to be able to support themselves financially. Yet, in America, we do not enforce this rule, straining the very public resources that our poorest citizens rely upon. . . Switching away from [the] current system of lower-skilled immigration, and instead adopting a merit-based system, we will have so many more benefits.”). See generally SUSAN F. MARTIN, A NATION OF IMMIGRANTS (2nd ed. 2021) (discussing various immigration “models” adopted by early American colonies); DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA’S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE (2020).

## UNDOCUMENTED ESSENTIAL WORKERS

The Department of Homeland Security issued a memorandum<sup>12</sup> in March 2020 (with three subsequent updates) demarcating industries where workers are deemed “essential” for COVID-19 regulatory objectives. Essential workers include those in health care, childcare, food services, manufacturing, and many other sectors.<sup>13</sup> One in five individuals in the U.S. essential workforce is an immigrant, constituting 5.2 million workers in total.<sup>14</sup> Nearly one million of these workers are young undocumented immigrants brought to the United States as minors, known as “Dreamers,” pursuant to the 2019 American Dream and Promise Act.<sup>15</sup> More than 70% of these workers have lived in the United States for over a decade,<sup>16</sup> the average period of residence being 14 years.<sup>17</sup> Undocumented immigrant workers are generally at higher risk of contracting COVID-19 due in part to working frontline jobs that expose them more frequently to opportunities for viral transmission.<sup>18</sup> Strikingly, FWD.us estimates that immigrants have been 50% more likely to contract COVID-19 than U.S.-born citizens.<sup>19</sup>

Essential workers represent a large sector of family units that are financially stable and largely integrated into their localities. About half (52%) of undocumented immigrant essential workers are married and live with their spouse, and 57% have at least one child in their household.<sup>20</sup> About 40% of this immigrant demographic own their own home; 61% live at two times or higher the poverty level in their communities; and 60% have completed high school or further education.<sup>21</sup> In 2019, undocumented immigrant essential workers paid up to \$48 billion in federal, state, and local taxes and generated about \$144 billion for spending.<sup>22</sup>

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12. Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, from Christopher C. Krebs (Director of Cybersecurity and Infrastructure Security Agency, CISA) (Mar. 19, 2020), <https://www.cbia.com/resources/coronavirus/coronavirus-state-federal-updates/department-homeland-security-essential-industries/>.

13. See Centers for Disease Control and Prevention, *Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles* (last visited Jan. 13, 2021), <https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html>.

14. See FWD.us, *FWD.us Estimates Show Immigrant Essential Workers are Crucial to America's COVID-19 Recovery* (Dec. 16, 2020), <https://www.fwd.us/news/immigrant-essential-workers/>.

15. *Id.*

16. *Id.*

17. See Testimony of Tom Jawetz Before U.S. House Judiciary Subcommittee on Immigration and Citizenship, “Immigrants as Essential Workers During COVID-19” (Sept. 28, 2020), <https://www.americanprogress.org/issues/immigration/reports/2020/09/28/490919/immigrants-essential-workers-covid-19/>.

18. FWD.us, *supra* note 14. About 69% of undocumented immigrants work in frontline essential jobs compared to 48% of U.S.-born individuals. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

## LEGISLATIVE BACKGROUND

On his first day in office, President Biden sent Congress the U.S. Citizenship Act of 2021 (“U.S. Citizenship Act”), a comprehensive reform bill contemplating expedited pathways to citizenship for Deferred Action for Childhood Arrivals (DACA) recipients (or “Dreamers”), Temporary Protected Status (“TPS”) holders, and immigrant farmworkers who meet certain criteria qualifying them for immediate green card conferral.<sup>23</sup> The bill also allows other undocumented individuals—totaling 11 million immigrants counting Dreamers, TPS holders, and farmworkers—who were present in the United States on or before January 1, 2021, to apply for temporary legal status with the opportunity to apply for legal permanent resident (LPR) status (i.e., green cards) five years later, contingent upon paying taxes and passing criminal and national security background checks.<sup>24</sup> Legal permanent residents would be eligible to apply for citizenship three years after obtaining LPR status. The bill was introduced in the House and Senate on February 18, 2021. In response, Representative Maria Salazar (R-Florida) led twelve Republican members of Congress on March 17 in announcing a comprehensive immigration reform approach that would require undocumented individuals, excluding Dreamers, to spend ten years on a new work visa status before transitioning to a five-year path toward citizenship eligibility.<sup>25</sup>

Republican critics fear that Biden’s comprehensive plan will incentivize further unlawful immigration,<sup>26</sup> while some Democrats and immigration advocacy groups are skeptical that such a behemoth bill will secure the needed 60 votes in the Senate or survive a filibuster to pass.<sup>27</sup> Given decades of stalemate over comprehensive efforts toward immigration reform, the latter are pushing for a piecemeal approach through more targeted bills with a higher

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23. See White House Fact Sheet, *supra* note 7. This announcement aligned with Vice President Kamala Harris’s indication to Spanish-language Univision just over a week earlier that the Biden administration would automatically grant green cards to Dreamers, TPS holders, and undocumented essential workers, excising five years from the normal wait time for naturalization for approximately 5 million undocumented immigrants. Anthony Advincula, *Biden backs green cards for undocumented ‘essential workers’ and Dreamers*, INQUIRER (Jan. 20, 2021), <https://usa.inquirer.net/62153/biden-backs-green-cards-for-undocumented-essential-workers-and-dreamers>.

24. U.S. Citizenship Act, H.R. 1177, 117th Congress (2021). An identical bill has been introduced in the Senate. U.S. Citizenship Act, S.348, 117th Congress (2021). See also White House Fact Sheet, *supra* note 7. The Department of Homeland Security would be authorized to waive the presence requirement for individuals who were deported on or after January 20, 2017, and who were physically present for at least three years prior to removal for family unity and other humanitarian purposes. *Id.*

25. See Tal Axelrod, *House Republicans offer rebuttal to Biden immigration plan*, THE HILL (Mar. 17, 2021), <https://thehill.com/latino/543671-house-republicans-offer-rebuttal-to-biden-immigration-plan>.

26. Cindy Carcamo, Andrew Castillo, & Molly O’Toole, *Biden plans early legislation to offer legal status to 11 million immigrants without it*, L.A. TIMES (Jan 15, 2021), <https://www.latimes.com/california/story/2021-01-15/biden-to-send-congress-bill-to-legalize-11-million-immigrants-who-lack-documentation> (“Such rewards will attract more people to illegally enter the U.S. to await their eventual green card, undermining border security.”) (quoting Lora Reis, former acting deputy chief of staff at the Department of Homeland Security).

27. See Michael D. Shear, *Congressional Democrats roll out Biden’s immigration plan, offering an eight-year path to citizenship*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/live/2021/02/18/us/joe-biden-news#congressional-democrats-roll-out-bidens-immigration-plan-offering-an-eight-year-path-to-citizenship>.

probability of bipartisan approval.<sup>28</sup> Immigrant advocates argue that incremental legislation could help pave the way for broader legalization efforts,<sup>29</sup> and two narrower bills aimed at Dreamers<sup>30</sup> and farmworkers<sup>31</sup> have already garnered support from lawmakers and interest groups across the aisle.<sup>32</sup>

The U.S. Citizenship Act of 2021 does not discretely provide an expedited pathway to legal permanent residence for all essential workers, and House Democrats have filled this gap with the Citizenship for Essential Workers Act.<sup>33</sup> Introduced in both the House and Senate in March,<sup>34</sup> the bill facilitates immediate adjustment of status to legal permanent residence for undocumented essential workers in health care, agriculture, construction, hotels and hospitality, food, sanitation, domestic work, childcare, disaster recovery, laundry, janitorial, transportation, warehousing, manufacturing, and other sectors, including undocumented individuals who worked in essential industries but lost employment due to COVID-19 (encompassing termination or voluntary departure due to unsafe conditions).<sup>35</sup> Undocumented relatives of essential workers who died from COVID-19 would also be eligible.<sup>36</sup> Applicants would be subject to background checks,<sup>37</sup> and the three- and ten-year bars for re-entry given unlawful presence would be repealed.<sup>38</sup> The act has been justified on both compensatory grounds as a just response to immigrant workers' contributions<sup>39</sup> as well as on

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28. *Id.*

29. See Bipartisan Policy Center, *This Week in Immigration* (Mar. 8, 2021), <https://bipartisanpolicy.org/podcast-episode/episode-89-this-week-in-immigration/>.

30. The American Dream and Promise Act, H.R. 6, 117th Congress (2021) (Passed in the House 228-197 on March 18, 2021, providing a pathway to citizenship for about 2.5 million Dreamers and about 400,000 TPS holders). See John Wagner, Colby Itkowitz, & Amy B. Wang, *House passes bills to open path to citizenship for young undocumented immigrants, legal status for farmworkers*, WASH. POST (Mar. 18, 2021), <https://www.washingtonpost.com/politics/2021/03/18/joe-biden-live-updates/>.

31. The Farm Workforce Modernization Act, H.R. 1603, 117th Congress (2021) (Passed in the House 247-174 with the support of 30 Republicans. *Id.* The bill provides legal status for existing farmworkers, updates and streamlines the H-2A guest worker program to expand access to foreign workers, and provides for electronic verification).

32. See Bipartisan Policy Center, *This Week in Immigration* (Mar. 8, 2021) (interviewing Jonathan Sarager, Director of Federal Government Affairs at Western Growers), <https://bipartisanpolicy.org/podcast-episode/episode-89-this-week-in-immigration/>.

33. Citizenship for Essential Workers Act, H.R. 1909, 117th Congress (2021); Citizenship for Essential Workers Act, S. 747, 117th Congress (2021).

34. H.R. 1909, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1909?s=1&r=12> (last visited April 6, 2021) (introduced by Representative Joaquin Castro, D-TX); S. 747, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1909?s=1&r=12> (last visited April 6, 2021) (introduced by Senator Alex Padilla, D-CA).

35. H.R. 1909; S. 747; see also *Citizenship for Essential Workers Act Fact Sheet*, CASTRO FOR HOUSE (Feb. 26, 2021), <https://castro.house.gov/imo/media/doc/2.26.21%20Fact%20Sheet%20-%20Citizenship%20For%20Essential%20Workers%20Fact%20Sheet%20.pdf> [hereinafter *Citizenship for Essential Workers Act Fact Sheet*].

36. *Citizenship for Essential Workers Act Fact Sheet*, *supra* note 35.

37. *Id.*

38. *Id.*

39. See Padilla Announces Pathway to Citizenship for Essential Workers in First Bill as Senator, OFFICE OF U.S. SENATOR PADILLA (Feb. 26, 2021), <https://www.padilla.senate.gov/press-releases/padilla-announces-pathway-to-citizenship-for-essential-workers-in-first-bill-as-senator/>, ("I'm proud to lead my colleagues with Representative Castro to give undocumented essential workers the protections they have earned.") (Quoting Senator Alex Padilla).

economic grounds<sup>40</sup> in light of the critical role these workers will continue to play as the nation recovers from COVID-19.

#### MEMBERSHIP AND MERITOCRACY

The U.S. Citizenship Act and the Citizenship for Essential Workers Act trail a long tradition of meritocracy-based acceptance and absorption of immigrants,<sup>41</sup> dating back to the country's founding where various "membership models" ranged from admitting foreigners based on religious ideology (as in Massachusetts), to the economic needs of the locality (as in Virginia), to an open-border, pro-pluralism paradigm (as in Pennsylvania).<sup>42</sup> After the federal government commandeered immigration regulation, the U.S. began excluding immigrants based on race with the Chinese Exclusion Act of 1882<sup>43</sup> and began accepting immigrants based on economic need with a 1942 Executive Order establishing the "Bracero Program" to furnish the agricultural industry with Mexican workers.<sup>44</sup> Since then, the immigration administrative state has enshrined meritocratic ideals through the provision of certain nonimmigrant visas for "extraordinary ability . . . demonstrated by sustained national or international acclaim" in sciences, arts, education, business, or athletics<sup>45</sup>; less prominent individuals who have nonetheless attained a "high level of achievement" in similar fields<sup>46</sup>; "culturally unique" artists and entertainers<sup>47</sup>; and inter-company transferees with "specialized knowledge"<sup>48</sup> of a company product and its application in international markets or an "advanced level of knowledge" of a company's processes and procedures<sup>49</sup>—beyond admission provisions for students, family members of residents, and those requiring humanitarian need. The Trump administration paired its public charge rule limiting access to lawful permanent residence for low-income individuals<sup>50</sup> with talk of adopting a merit-based point

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40. See *Estimates Show Immigrant Essential Workers are Crucial to America's COVID-19 Recovery*, FWD.US (Dec. 16, 2020), <https://www.fwd.us/news/immigrant-essential-workers/>.

41. See Jean-Baptiste Farcy, *Equality in Immigration Law: An Impossible Quest?* 20 HUM. RTS. L. REV., 725, 725 (2020).

42. See SARAH F. MARTIN, *A NATION OF IMMIGRANTS*, 1–2, 213–19, 253–54, 265–86 (1st ed. 2010).

43. Immigration Act of 1882, Pub. L. No. 47-376.

44. See *Bracero Agreement (1942-1964)*, IMMIGRATION HISTORY, <https://immigrationhistory.org/item/bracero-agreement/> (last visited Apr. 6, 2021); *Agreement of August 4, 1942: For the Temporary Migration of Mexican Agricultural Workers to the United States as Revised on April 26, 1943*, by an Exchange of Notes Between the American Embassy at Mexico City and the Mexican Ministry for Foreign Affairs, FARM WORKERS, <http://www.farmworkers.org/bpaccord.html> (last visited Apr. 6, 2021).

45. I.N.A. § 203(b)(1)(A)(i); see also I.N.A. § 101(a)(15)(O)(i).

46. See I.N.A. § 101(a)(46); 8 C.F.R. § 214.2(o)(3)(ii).

47. See I.N.A. § 101(a)(15)(P)(iii).

48. See I.N.A. § 101(a)(15)(L).

49. See I.N.A. § 214(c)(2)(B).

50. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at 8 C.F.R. pt. 103, 212, 213, 214, 245, 248) (held invalid by *Cook County, Illinois v. Wolf*, 417 F.Supp.3d 1008 (N.D. Ill. Oct. 14, 2019)). Proclamation No. 10014, 85 Fed. Reg. 23,441 (April 22, 2020). This order was extended twice by Proclamation 10052, 85 Fed. Reg. 38,263 (June 22, 2020) and Proclamation 10131, 86 Fed. Reg. 417 (Dec. 31, 2020).

system similar to that found in Canada and Australia that would evaluate immigrants for green cards based on age, skills, job and salary offers, education, and English proficiency.<sup>51</sup> This exclusivity fails to capture the economic value of many low-skilled workers now deemed “essential” by pandemic standards. Ideally, these workers would have greater access to legal status moving forward as their spouses attain LPR status and citizenship, potentially within the coming decade.

While the Biden administration’s proposed immigration package contemplates admission for spouses and children,<sup>52</sup> the Citizenship for Essential Workers Act accelerates the journey to legal permanent residence only for spouses of essential undocumented workers who have *died* from COVID-19.<sup>53</sup> This token of sympathy and gratitude is surely warranted but effectuates arbitrarily underinclusive treatment of undocumented spouses who do not offer work deemed “essential”—perpetuating the meritocratic approach.<sup>54</sup> It fails to recognize the economic contributions made by spouses of essential workers, whose invisible domestic and caretaking work facilitates the “essential” work performed by their frontline spouses.<sup>55</sup> Moreover, it leaves uncompensated the un-essential spouses for the heightened risk of COVID-19 exposure they absorb by continuing to live with their essential-worker partners. Finally, both proposals would require background checks for eligibility for either immediate legal permanent residence under the Citizenship for Essential Workers Act<sup>56</sup> or temporary legal status preceding green card application under the U.S. Citizenship Act.<sup>57</sup> The latter bars from eligibility individuals who have committed felonies or three misdemeanors,<sup>58</sup> communicating a centuries-old notion of American disinterest in accepting (and helping) “undesirables”<sup>59</sup>—regardless of their vested interest in remaining in

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51. See *President Trump Address to Joint Session of Congress*, C-SPAN.ORG (Feb. 28, 2017), <https://www.c-span.org/video/?424147-1/president-trump-addresses-joint-session-congress>; Muzaffar Chishti & Jessica Bolter, *Merit-Based Immigration: Trump Proposal Would Dramatically Revamp Immigrant Selection Criteria, But with Modest Effect on Numbers*, MIGRATION POL’Y INST. (May 30, 2019), <https://www.migrationpolicy.org/article/merit-based-immigration-trump-proposal-immigrant-selection>.

52. White House Fact Sheet, *supra* note 7.

53. Citizenship for Essential Workers Act Fact Sheet, *supra* note 35.

54. While legal permanent residents can sponsor their undocumented spouses, the process is even lengthier than that undertaken when a citizen sponsors their undocumented spouse. *Can I Sponsor My Undocumented Spouse’s Green Card?*, BOUNDLESS, <https://www.boundless.com/immigration-resources/undocumented-spouse/> (last visited Apr. 6, 2021).

55. See Alan Hyde, *The Law and Economics of Family Unification*, 28 GEO. IMMIGR. L. J. 355, 355 (2014).

56. Citizenship for Essential Workers Act Fact Sheet, *supra* note 35.

57. White House Fact Sheet, *supra* note 7.

58. U.S. Citizenship Act of 2021, S.348, 117th Cong. § 1102(a) (2021) (amending INA to include § 245(G)(c)(1)(A)(i–iii)).

59. See, e.g., 13 J. of Cong. 105–06 (Sept. 16, 1788) (encouraging states to pass laws to prevent admitting convicted malefactors into the United States); *New York v. Miln*, 36 U.S. 102, 102–03 (1837) (upholding state power to enact laws requiring ship captains to identify foreign passengers arriving at ports of entry and excluding certain groups of “undesirable” immigrants); Benjamin J. Klebaner, *State and Local Immigration Regulation in the United States before 1882*, 3 INT’L REV. OF SOC. HIST. 269, 2713 (1958); Anna O. Law, *Lunatics, Idiots, Paupers, and Negro Seamen—Immigration Federalism and the Early American State*, 28 STUD. AM. POL. DEV., 107, 109 (2014).

the country. Individuals who have committed such crimes are, by incident of birth, doubly penalized given the threat of deportation and ineligibility from citizenship, despite the reliance of family members on their presence or the danger they may face upon return to certain home countries.<sup>60</sup> This criminal ban has incited criticism from various immigration and criminal reform groups.<sup>61</sup> While Dreamers are welcomed based on their innocence, and agricultural and other essential workers have “earned” their presence, those with a criminal record are not only disqualified from an elitist system but they (and their families) are harshly punished given the unique circumstances of immigrants.

Awarding undocumented immigrants legal status solely on account of their post hoc service to American citizens fails to acknowledge the circumstances arguably justifying the unlawful entry of many of these individuals. It legitimizes their presence based on subsequent behavior, not based on possible initial motives for surreptitious arrival—including family unification, urgent financial need of individuals and families, “false negative” credibility findings for those who warranted but were denied asylum upon application,<sup>62</sup> flight from violence that doesn’t quite fit the shape required for refugee status under current law,<sup>63</sup> or disqualification from otherwise warranted asylum due to, for example, past involvement in crime.<sup>64</sup> A social paradigm that presumptively condemns undocumented immigrants until they have “atoned” through economic contribution—apparently requiring a pandemic to elucidate—deemphasizes the root causes of migration, focusing instead on the red herring of immigrant “output.” While the U.S. Citizenship Act and the Citizenship for Essential Workers Act represent a crucial step in the right direction—and while immigrant workers’ contributions normatively ought to be recognized, celebrated, and compensated—they must be coupled with discussions about why migrants come and what circumstances we should accept *ex ante* as justifying admission to inform future policy. In light of evolving

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60. See, e.g., *Decriminalize Immigration*, NAT’L IMMIGRANT JUST. CTR., <https://immigrantjustice.org/issues/decriminalize-immigration> (last visited Apr. 6, 2021).

61. See *FWD.us Statement on the Citizenship for Essential Workers Act*, FWD.US (Mar. 18, 2021), <https://www.fwd.us/news/fwd-us-statement-on-the-citizenship-for-essential-workers-act/>; Nat’l Immigr. L. Ctr., *National Immigration Law Center Responds to the Introduction of the Citizenship for Essential Workers Act* (Mar. 17, 2021) <https://www.nilc.org/2021/03/17/nilc-responds-to-intro-of-citizenship-for-essential-workers-act/> (“While there is much to celebrate in this bill, we are deeply disappointed that it would add to existing bars in immigration law that already exclude many people from U.S. citizenship and leave them vulnerable to deportation for coming into contact with the racialized criminal legal system.”); Immigrant Legal Res. Ctr., *Undocumented Essential Workers Deserve Expedited Pathway to Citizenship* (Mar. 17, 2021), <https://www.ilrc.org/undocumented-essential-workers-deserve-expedited-path-citizenship>.

62. See generally *Questions and Answers: Credible Fear Screening*, USCIS, <https://www.uscis.gov/humanitarian/efugees-and-asylum/asylum/questions-and-answers-credible-fear-screening> (last visited Apr. 6, 2021).

63. See generally *Matter of A-B-*, 27 I. & N. Dec. 316, 318 (A.G. 2018) (“[A]n alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet, the asylum statute does not provide redress for all misfortune.”).

64. See, e.g., *Procedures for Asylum and Bars to Asylum Eligibility*, 88 Fed. Reg. 67202 (Nov. 20, 2020) (codified at 8 C.F.R. §§ 208, 1208).



social mores, such discussion may beget legislative broadening of the definition of “refugee” to accept more fleers of danger, extension, and expansion of TPS status (as Congress and the Biden administration have already initiated<sup>65</sup>) or extending more family-based or employment visas to immigrants seeking economic opportunity regardless of whether their knowledge is “special” or their skills are “extraordinary.” Rather than requiring migrants to earn their membership meritocratically, lawmakers and advocates would be well-served to internalize a presumption of the value accrued by safely admitting diverse groups for myriad other reasons.

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65. D’Vera Cohn, *Venezuelans, Burmese among more than 600,000 immigrants eligible for Temporary Protected Status in U.S.*, PEW RES. CTR. (Mar. 19, 2021), <https://www.pewresearch.org/fact-tank/2021/03/19/venezuelans-burmese-among-more-than-600000-immigrants-eligible-for-temporary-protected-status-in-u-s/>.