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Oh, I'm Sorry, Did That Identity Belong to You: How Ignorance, Ambiguity, and Identity Theft Create Opportunity for Immigration Reform in the United States

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Comment

OH, I'M SORRY, DID THAT IDENTITY BELONG TO YOU? HOW IGNORANCE, AMBIGUITY, AND IDENTITY THEFT CREATE OPPORTUNITY FOR IMMIGRATION REFORM IN THE UNITED STATES

"No subject touches the essence of the American experience more fundamentally than immigration, for our history is that of a heterogeneous people in quest of a homogeneous national identity."¹

I. INTRODUCTION

In 2004, Mr. Nassim Mohamed Leon, a Tanzanian man who legally immigrated to the United States and subsequently became a naturalized citizen, achieved a feat in defiance of the law of physics: being in two places at once.² While Mr. Leon was taken into custody for immigration violations, he was also somewhere else, completely unaware of the arrest.³ Identity theft made this feat possible: prior to 2004, Nicholas Montejo, a Mexican national who illegally immigrated to the United States, stole Mr. Leon's identity.⁴ During a successful attempt to obtain employment, Mr. Montejo provided an employer with a false alien registration card bearing his own name and photograph, but fabricated numbers that belonged to Mr. Leon.⁵ In addition, Mr. Montejo also used a fraudulent social security card, bearing a second set of numbers belonging to another victim.⁶ Following his arrest related to the immigration violation and the identity

3. See id. (explaining theft of Montejo's identity).
4. See id. (detailing identity theft against Mr. Leon). At trial, Montejo did not dispute the facts of the case, but instead asserted only that he lacked actual knowledge that the means of identification belonged to real people. See id. at 214-15 (discussing Montejo's trial). Montejo was found guilty of both an underlying offense and aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1). See id. at 215 (noting conviction). Montejo was sentenced to two years in prison related to aggravated identity theft and two years supervised release, as well as a $300 special assessment. See id. (detailing sentence). Montejo challenged the district court's interpretation of the scienter requirement's breadth, but lost his appeal. See id. at 217 (reasoning that government does not need to prove that defendant actually knew means of identification belonged to real person). For a further discussion of aggravated identity theft, see infra notes 91-151 and accompanying text.
5. See id. at 214 (providing details of identity theft).
6. See id. (discussing second instance of identity theft).
theft, Mr. Montejo explained that in 2002 he simply walked into the United States and purchased the false alien registration and social security cards for $60. He also admitted that he knew the documents were false when he purchased them to gain employment.

Beginning in 2006, Mr. Dinicio Gurrola III achieved the same unfavorable superhuman feat as Mr. Leon. Mr. Nicasio Mendoza-Gonzalez, an illegal immigrant, used Mr. Gurrola's identity and represented himself as a "citizen or national of the United States" when he completed a form in connection with his employment at a pork processing plant in Marshalltown, Iowa. Specifically, in order to verify his false identity, Mr. Mendoza-Gonzalez submitted a photo identification card in the name of Mr. Gurrola. Subsequently, the employer verified that the provided information matched Mr. Gurrola's social security number and the employer allowed Mr. Mendoza-Gonzalez to keep working at the plant. Mr. Mendoza-Gonzalez's employment continued until December 12, 2006, when officials from Immigration and Customs Enforcement raided the pork processing plant and arrested him.

Similarly, Mr. Gustavo Villanueva-Sotelo is a Mexican national who has illegally entered the United States three times and has been deported twice, each time following incarceration. After his third entrance into the country, police stopped Mr. Villanueva-Sotelo and asked him for identification; Mr. Villanueva-Sotelo provided the police officers with a permanent resident card bearing his own name, photograph, and country of origin, but someone else's alien registration number. Mr. Villanueva-Sotelo admitted that he knew the card was a fake.

7. See id. (describing ease with which identity was stolen).
8. See id. (noting that defendant possessed knowledge that identities were falsified).
10. See id. at 913-14 (recounting case facts).
11. See id. at 914 (detailing specific facts of defendant's act of identity theft).
12. See id. (providing further details of defendant's identity theft).
13. See id. (noting defendant's arrest).
15. See id. (describing defendant's act of identity theft).
16. See id. (noting defendant's knowledge of falsified documents). Villanueva-Sotelo was charged with unlawful entry of a removed alien in violation of 8 U.S.C. § 1326(a) and (b)(1), possession of a fraudulent document prescribed for authorized stay or employment in the United States in violation of 18 U.S.C. § 1546(a), and aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1). See id. (detailing charges against Villanueva-Sotelo). Villanueva-Sotelo pleaded guilty to the first two charges, but challenged the aggravated identity theft charge. See id. (noting defense strategy).
Despite these three men illegally entering the United States, obtaining documents they knew were falsified, being aware that the identities potentially belonged to others, and using the identifications to further their illegal residency, each of the three men, and others like them, could ultimately escape serious punishment, leaving innocent victims at risk for substantial economic and social injury.\(^{17}\) Whether or not they will evade punishment depends on the resolution of a developing controversy regarding the Identity Theft Penalty Enhancement Act (ITPEA).\(^{18}\) Currently, circuit courts are split as to whether the government must prove that a person, who committed identity theft in the course of committing one of ITPEA’s enumerated underlying felonies, actually knew the identity belonged to another person in order to trigger ITPEA’s mandatory two-year sentencing enhancement.\(^{19}\) The Fourth, Eighth, and Eleventh Circuits hold that the government does not need to prove the defendant actually knew the identity belonged to another person, while the First, Ninth, and D.C. Circuits take the opposite position.\(^{20}\) The confusion surrounding the breadth of ITPEA’s scienter requirement results from inher-

Villanueva-Sotelo avoided significant punishment, as the appellate court required the government to prove that Villanueva-Sotelo knew the registration number actually belonged to someone else, which the government could not do. See id. at 1236-37 (discussing actual knowledge element of aggravated identity theft charge). The district court judge granted Villanueva-Sotelo’s motion to dismiss the aggravated identity theft charge because the government did not prove that the defendant knew that the means of identification belonged to another person. See id. (explaining that actual knowledge element was not met). The government appealed, but the District of Columbia Circuit Court affirmed the district court’s ruling. See id. at 1250 (holding that government must prove defendant knew means of identification actually belonged to another person). As a result, Villanueva-Sotelo escaped the two year penalty enhancement. See id. at 1246 (discussing holding). For a further discussion of aggravated identity theft, see infra notes 91-151 and accompanying text.

17. For a discussion of the common injuries suffered by identity theft victims, see infra notes 163-87 and accompanying text.
19. See United States v. Godin, 534 F.3d 51, 55-56 (1st Cir. 2008) (explaining that “[t]he circuits are divided on the issue of whether the ‘knowingly’ scienter requirement in § 1028A(a)(1) extends to ‘of another person’’
20. Compare United States v. Mendoza-Gonzalez, 520 F.3d 912, 915 (8th Cir. 2008) (holding that “§ 1028A(a)(1) is unambiguous and that the Government was not required to prove that [the defendant] knew [the victim] was a real person to prove that he violated § 1028A(a)(1)”), petition for cert. filed, (U.S. July 15, 2008) (No. 08-5316), United States v. Hurtado, 508 F.3d 603, 609 (11th Cir. 2007) (same), cert. denied, 128 S. Ct. 2903 (2008), and United States v. Montejo, 442 F.3d 213, 217 (4th Cir. 2006) (same), with Godin, 534 F.3d at 61 (relying on rule of lenity to hold that “the scienter requirement must stretch to ‘of another person’”), United States v. Miranda-Lopez, 532 F.3d 1034, 1040 (9th Cir. 2008) (relying on rule of lenity, court held “that the government was required to prove that [the defendant] knew that the identification belonged to another person”), and Villanueva-Sotelo, 515 F.3d at 1245 (holding that viewing statute “as a whole . . . we think it clear that Congress never intended its ‘aggravated identity theft’ statute to
ent ambiguity in the statute's language. The split has far-reaching implications because Messrs. Montejo, Mendoza-Gonzalez, and Villanueva-Sotelo's respective stories are not the exception. With almost twelve million undocumented and illegal aliens in the United States who require identification to obtain jobs and avoid detection, these three examples potentially represent the tip of the iceberg for this form of identity theft of innocent, unsuspecting, and legitimate citizens and immigrants of the United States.

Indeed, this pervasive issue offers Congress an opportunity to provide significant immigration reform, which is desperately needed to address the approximately 470,000 immigrants who illegally enter the United States annually. In addition to identity theft, illegal immigration creates a variety of security and economic problems. This Comment demonstrates that legislative intervention into the circuit split over ITPEA is both necessary and advantageous. The Supreme Court will resolve the circuit split in 2009, and this Comment predicts that the resolution will be unfavorable to the concept of justice and the security of both United States' citizens and legitimate immigrants. Therefore, Part II of this Comment provides context for immigration reform's necessity by reviewing immigration policy in the United States since 1980 and explaining recent develop-

reach conduct like [the defendant's]). For further discussion of the circuit split, see infra notes 91-151 and accompanying text.

21. For discussion of the ambiguity inherent in the Identity Theft Penalty Enhancement Act (ITPEA), see infra notes 91-151 and accompanying text.


23. See id. at 2 (charting illegal immigration population from 2000 through 2007).

24. See id. at 1 ("Between 2000 and 2007, the unauthorized population increased 3.3 million; the annual average increase during this period was 470,000."). For further discussion of the statistics related to illegal immigration, see infra notes 65-69 and accompanying text.

25. For a discussion of the injuries suffered by victims of identity theft, see infra notes 163-87 and accompanying text.

26. For a discussion of the need for congressional action to narrow the scienter requirement, see infra notes 163-91 and accompanying text.

ments, or the lack thereof, in national policy.28 Part III clarifies the circuit split by synthesizing circuit courts’ opinions and predicts the Supreme Court’s resolution of the split.29 As part of this discussion, Part III examines the inherent ambiguity of ITPEA, suggests the most judicially responsible resolution to the circuit split (the expansive scienter requirement), and presents a relevant consideration for courts that interpret ITPEA but ultimately disagree with the expansive scienter requirement.30 Part IV explores the victimization of identity theft and the negative implications of ITPEA’s expansive scienter requirement, as well as demonstrates the potential for immigration reform.31

II. IMMIGRATION REFORM IN THE UNITED STATES


By 1980, immigrants achieved “illegal” status in one of two ways: (1) entering the United States in a surreptitious manner; for example, by sailing across the nation’s sea border or walking across the nation’s land border, or (2) entering the United States through a port of entry, but subsequently violating the terms of their visas; for example, by committing a crime or overstaying their visas.32 Unfortunately for such immigrants,

28. For an overview of United States immigration policy since 1980, see infra notes 32-90 and accompanying text. For a brief discussion of immigration policy prior to 1980, see infra note 32.

29. For discussion of the circuit split, see infra notes 91-151 and accompanying text.

30. For discussion of judicial resolution of the circuit split, see infra notes 145-51 and accompanying text.

31. For discussion of immigration reform and its advantages, see infra notes 192-205 and accompanying text.

32. See HOEFER ET AL., supra note 22, at 1 (“The unauthorized resident immigrant population is defined as all foreign-born non-citizens who are not legal residents. Unauthorized residents refer to foreign-born persons who entered the United States without inspection or were admitted temporarily and stayed past the date they were required to leave.”); see also BRIGGS, supra note 1, at 130 (explaining two classifications of illegal immigrants).

The quantitative monitoring of immigration began in 1921, when, in the wake of the First World War and the onset of the Red Scare, the United States plunged into isolationism, which led to the passage of the Quota Act of 1921. See DANIEL J. TICHENOR, DIVIDING LINES 143 (2002) (providing context for passage of Quota Act of 1921). The Quota Act of 1921, regarded as an “emergency act,” was renewed through 1924 to establish national quotas for immigration based on the number of foreign-born residents of each nationality living in the United States at the time of the 1910 census. See BRIGGS, supra note 1, at 43 (discussing Quota Act of 1921 and explaining that immigration was capped at 385,000 annually with preference for Western Europeans); TICHENOR, supra, at 143, 150 (explaining that Quota Act of 1921 favored family of legal immigrants and although regarded only as emergency legislature was renewed by Congress); CAROLYN WONG, LOBBYING FOR INCLUSION: RIGHTS POLITICS AND THE MAKING OF IMMIGRATION POLICY 47 (2006) (noting that Quota Act was first American immigration law that utilized numerical limits). In 1924, Congress updated the legislation and utilized the National Origins Formula, which based the quotas on the makeup of the national origins of the American population as a whole, and further restricted immigration from Europe and Asia.
the period between 1980 and 2005 brought remarkable changes in immigration policy, with a focus on illegal immigration.33 One commentator

See TICHENOR, supra, at 44 (describing further restrictions imposed by Immigration Act of 1924); WONG, supra, at 47-48 (noting that Immigration Act of 1924 limited not only total number of immigrants, but also controlled racial and ethnic makeup of immigrant population). The legislation also instituted the utilization of visas. See BRIGGS, supra note 1, at 46 (noting genesis of visas). Subsequently, in 1952, Congress passed the McCarran-Walter Act, which continued the national origins quota system but added a preference system based upon job skills and family reunification and made it easier to deport immigrants suspected of communist activities. See id. at 58-60 (detailing history of McCarran-Walter Act and outlining its legislative impact); TICHENOR, supra, at 189-97 (same); WONG, supra, at 49 (discussing perpetuation of quota system). The altered quota system was finally blown apart in 1965, on the heels of the Civil Rights Act, when Congress passed the Hart-Cellar Act, which dismantled the quota system and provided 170,000 visas for immigrants originating the Eastern Hemisphere and 120,000 visas for Western Hemisphere immigrants. See BRIGGS, supra note 1, at 62-66 (presenting context and history of Hart-Cellar Act); TICHENOR, supra, at 211-26 (same); WONG, supra, at 50-63 (providing thorough analysis of legislation and its impact).

During the same period, policymakers saw Mexican guestworkers as a source of cheap labor, which the country desperately needed during the Second World War. See BRIGGS, supra note 1, at 151-52 (arguing that “bureaucrats and members of Congress not only allowed, but invited, Mexican immigration during this period. . . . [P]olicymakers aggressively recruited a large supply of Mexican guestworkers to provide primarily cheap agricultural labor”). The United States negotiated an agreement with the Mexican government on a guestworker program, commonly referred to as the “Bracero Program,” which included protections for migrant workers, although the terms of the agreement were never enforced. See id. at 98-99 (detailing “Bracero Program”); TICHENOR, supra, at 167-75 (same); WONG, supra, at 64 (same). Also, because cheap labor was needed, the government essentially turned a blind eye to illegal immigration, and permissible illegal immigration from Mexico persisted until 1954, when the newly formed Immigration and Nationalization Service (INS) undertook “Operation Wetback.” See TICHENOR, supra, at 202 (recounting that INS launched “a military-style campaign to seize and deport Latino illegal aliens en masse”). The operation sought to remove over one million illegal immigrants, particularly Mexican immigrants, from the southwestern United States. See TICHENOR, supra, at 202 (noting objective of Operation Wetback and quoting one general who justified Operation Wetback as a necessary “drive against illegal Mexican labor,” in order to “wipe out the disease, criminal activity, juvenile delinquency, and social instability that attends any ‘wetback’ invasion”). Then, in 1964, the Bracero Program ended. See TICHENOR, supra, at 224 (explaining that “[t]he termination of the Bracero Program in 1964 was led by the AFL-CIO, which loathed the importation of temporary Mexican workers to harvest seasonal crops at low wages and under poor working conditions”). For a more critical depiction of United States’ legislation and policy toward Mexicans during this period, see Gilbert Paul Carrasco, Latinos in the United States: Invitation and Exile, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE OF THE UNITED STATES 190-200 (Juan F. Perea ed., 1997).

33. See TICHENOR, supra note 32, at 242 (arguing that from 1975-2000 American politics “witnessed remarkable transformations . . . policymakers focused their attention in these years on a problem that seemed to highlight the extent to which national borders had become porous and inadequately regulated: illegal immigration”)

It should be noted, however, that the number of legal immigrants entering the United States during this period soared, as the policies of the period also provided new opportunities for legal entry into the country. See id. at 243 (exploring
explained that the "American public, convinced that the country had lost control of its borders, readily embraced harsh crackdowns on illegal immigration, significant reductions in legal immigration . . . and limits on public benefits for aliens residing in the country."\textsuperscript{34} In one poll, over 90\% of respondents supported an "all-out effort to stop" illegal immigration.\textsuperscript{35}

An impetus for new immigration policies arose from the Supreme Court's 1982 decision in \textit{Plyler v. Doe},\textsuperscript{36} which held that undocumented children had a Fourteenth Amendment right to public education.\textsuperscript{37} In the \textit{Plyler} decision, Justice Brennan wrote, "[t]his situation raises the specter of a permanent caste of undocumented resident aliens encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits our society makes available to citizens and lawful residents."\textsuperscript{38} One commentator called the Supreme Court's decision "a stinging indictment of federal inaction," and asserted that the decision served as a catalyst in a polarized political climate to drive Congress to finally address the employment of illegal immigrants.\textsuperscript{39}

In 1986, four years later, Congress finally provided a solution, which it proudly regarded as humane, with the Immigration Reform and Control

\begin{itemize}
\item positive side of period's immigration policies and stating that "the immigration controls established from 1980 to 1990 were decidedly expansive for alien admissions and rights"); \textit{cf.} Briggs, \textit{supra} note 1, at 246 (commenting that "[t]he fact that the United States continues to accept a substantial number of legal immigrants . . . is a feature that sharply distinguishes it from other industrialized nations").
\item \textsuperscript{34} \textit{Tichenor}, \textit{supra} note 32, at 242 (relating public sentiment during period and into current political climate).
\item \textsuperscript{35} \textit{See} \textit{id.} at 243 (reporting results of public opinion poll).
\item \textsuperscript{36} 457 U.S. 202 (1982). Giving rise to this case, the Texas Legislature revised its education laws in 1975 to deny public education to children who were not "legally admitted" into the United States. \textit{See} \textit{id.} at 205 (reciting case facts).
\item \textsuperscript{37} \textit{See} \textit{id.} at 239-40 (asserting that denial of public education to children of illegal immigrants violates Fourteenth Amendment). The Court concluded that the state's classification of the children "deprives a group of children of the opportunity for education afforded [to] all other children simply because they have been assigned a legal status due to a violation of law by their parents." \textit{See} \textit{id.} at 238 (explaining negative consequence of classification based on parents' legal status). Consequently, the Court determined that the classification had to pass heightened scrutiny, which it failed because the children "have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment." \textit{See} \textit{id.} at 238-39 (presenting basis for Court's holding).
\item \textsuperscript{38} \textit{Id.} at 218-19 (renouncing Texas's classification).
\item \textsuperscript{39} \textit{See Tichenor}, \textit{supra} note 32, at 257 (analyzing \textit{Plyler} decision). In 1983, Congress attempted to pass an immigration reform bill that included a guestworker program and civil rights protection to legal aliens, but the bill died in the House of Representatives amid rumors that the White House would veto the bill in order to court Hispanic voters. \textit{See} \textit{id.} at 257-58 (explaining details of 1983 immigration reform bill and its eventual demise).
\end{itemize}
Act (IRCA). IRCA both offered amnesty to illegal immigrants who were fueling our economy by creating a guestworker program, and also included sanctions against employers who hire illegal immigrants in the future. Although IRCA was initially viewed positively, its long-term impact is controversial. IRCA essentially granted amnesty to over three million illegal immigrants present in the United States, but failed to extinguish the tide of annual illegal immigration flooding into the country because the regulations did not effectively curb the employment prospects of future illegal immigrants. IRCA’s inability to curtail the employment of future illegal immigrants stems from IRCA’s failure to institute a satisfactory identification system that employers could utilize to determine an employee’s eligibility for employment.

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40. See id. at 258-62, 263-67 (discussing Immigration Reform and Control Act (IRCA)); WONG, supra note 32, at 95-101 (same).

41. See TICHENOR, supra note 32, at 258-62, 263-67 (discussing IRCA); WONG, supra note 32, at 95-101 (same). IRCA included a voluntary verification program for employers to check the status of their employees, but made it illegal for employers to hire illegal immigrants. See TICHENOR, supra note 32, at 260 (detailing compromises made in IRCA from previous proposals); WONG, supra note 32, at 96 (noting that employer sanctions had been debated for fifteen years before becoming reality). Passage of IRCA, however, was contentious over two aspects: amnesty and guestworkers. See WONG, supra note 32, at 99-101 (recounting legislative pathway to passage). On the issue of amnesty, one commentator noted that “[n]o politician was advocating the mass deportation of illegal immigrants,” but disagreement existed over the expansiveness of the terms of the amnesty. See id. at 100 (explaining disagreement on issue of amnesty). Interestingly, Congress allowed illegal immigrants to apply for amnesty with designated community organizations, rather than the INS, because it expected illegal immigrants would fear registering directly with the government. See TICHENOR, supra note 32, at 264 (discussing “qualified designated entities”). With respect to the guestworker program, traditionally guestworkers would finish their work and be legally obligated to leave the country, but Democrats wanted to create a pathway to citizenship for people who contributed to the nation’s economy. See WONG, supra note 32, at 100 (explaining disagreement over guestworkers program). Congress reached a compromise on this issue, and IRCA narrowly passed, with a vote of 216 to 211. See id. at 100-01 (summarizing passed Act).


42. See TICHENOR, supra note 32, at 262 (explaining that “[a]lmost from the outset, the odds were stacked against employer sanctions working effectively to curb illegal immigration”).

43. See id. (considering IRCA’s shortcomings). The lack of a reliable identification system allowed illegal immigrants to easily avoid detection, which enabled an “underground industry of fraudulent documents” to flourish. See id. (criticizing IRCA’s ineffective identification verification scheme).

44. See id. (noting that “absence of a reliable identification system” doomed employer sanctions under IRCA from start).
Then, in 1990, Congress continued its crackdown on illegal immigration with the Immigration Act of 1990. The Act addressed IRCA's inadequacies by increasing funding for border patrol and implementing a test program for a more secure driver's license that could be used to verify employee eligibility. Also, the Act granted amnesty to family members of those previously granted amnesty in 1986, expanded employment-based visas, and eliminated sexual and ideological preferences in visas that lingered from Cold War immigration legislation. Finally, the Act increased the number of visas available to highly skilled workers, which were in demand with the onset of the technology boom.

Nevertheless, this congressional action did not quell public discontent, as evidenced by California's passage of Proposition 187 in 1994. Proposition 187's purpose was to deny illegal immigrants and their children welfare benefits, non-emergency healthcare, and public education.

45. See id. at 267-74 (examining Immigration Act of 1990); Wong, supra note 32, at 101-07 (same). Before submitting the bill for the Immigration Act of 1990, Senators Kennedy, Simon, and Simpson, cosponsors of the bill, asserted in a joint statement that:

We believe this compromise bill is a balanced attempt to serve the national interest; it preserves the immigration rights of those who have close family connections in this country; it stimulates immigration from earlier sources of immigration to our country that have contributed so much to America in the past; and it promotes the entry of those who are selected specifically for their ability to contribute their needed skills and talents to the development of our country.

See Tichenor, supra note 32, at 270-71 (relating joint statement of cosponsors) (citation omitted).

46. See id. at 273-74 (noting that conservatives were able to include some modest reforms directed at illegal immigration). Restrictionists were also able to limit the legal rights of criminal aliens facing deportation. See id. at 274.

47. See id. at 267-74 (recounting successes of legislation). For a discussion of the McCarran-Walter Act, which instituted the ideological and sexual preferences, see supra note 32.


49. See Tichenor, supra note 32, at 274-77 (discussing California Proposition 187); Wong, supra note 32, at 133 (discussing Proposition 187, and noting that "the most populous state of the Union, California, was witnessing a groundswell of public opinion against illegal immigration"). A poll conducted just prior to the 1994 mid-term election showed that voters placed the issue of illegal immigration just behind crime and welfare reform. See Tichenor, supra note 32, at 277 (describing poll).

50. See id. at 275 (explaining that Proposition 187's purpose was to deny illegal immigrants and their children public services); Wong, supra note 32, at 133 (noting that Proposition 187 was "an initiative to deny public services to illegal immigrants"). The initiative was a grassroots effort, and it thrust the issue of illegal immigration to the forefront of the nation's political dialogue. See Tichenor,
The strong public discontent over illegal immigration became further exacerbated in 1994, following the World Trade Center bombing by Islamic terrorists, who had illegally entered the United States virtually unfettered.\footnote{51} In 1996, Congress again sought to address these concerns and provide an effective solution by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).\footnote{52} IIRIRA "enhanced the government's ability to guard national borders . . . limited immigrant access to public benefits, required U.S. financial sponsors for newcomers, and established stringent provisions for criminal and undocumented aliens."\footnote{53}

Following the turn of the century, however, public sentiments toward illegal aliens were again enflamed by the terrorist attack on September 11, 2001, when nineteen Islamic terrorists hijacked four commercial airplanes and flew two into the World Trade Center in New York City and one into the Pentagon.\footnote{54} The fourth failed to reach its target and, due to the heroic intervention of passengers on the flight, crashed in Pennsylvania, raising the total number of causalities to almost 3,000 people.\footnote{55} Five of the hijackers were illegal aliens with fraudulent social security numbers.\footnote{56}

\textit{supra} note 32, at 275 (commenting that Proposition 187 was highly promoted by local organization Save Our State); \textit{Wong, supra} note 32, at 133 (noting that Proposition 187 "renewed attention to the ongoing problem of illegal border crossings from Mexico, as did several highly publicized attempts to land boats filled with illegal immigrants from China"). California's then-governor, Pete Wilson, supported Proposition 187, and it passed with 59% of the vote. \textit{See Tichenor, supra} note 32, at 277 (noting effect of support from California governor); \textit{Wong, supra} note 32, at 133 (same).


52. \textit{See id.} at 278-85 (discussing Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996).

53. \textit{Id.} at 283-84 (focusing on impact of IIRIRA). The law was deeply supported and, as a bill, passed the House of Representatives with a 333 to 87 vote and the Senate with a 97 to 3 vote. \textit{See id.} at 283 (detailing final amendments to Immigration Act of 1996 and its subsequent vote). The law has been regarded as "a pyrrhic victory for restrictionists." \textit{See id.} at 284 (relating opinion towards Immigration Act of 1996).

IIRIRA also added new bars to admission for illegal citizens because now, (1) if an immigrant were present in the United States for 180 days or less, then he or she would need to wait three years before being eligible for citizenship; or (2) if an immigrant were present in the United States for more than a year, then he or she would need to wait ten years before gaining eligibility. \textit{See Wong, supra} note 32, at 135 (outlining IIRIRA's achievements). The Act also increased border patrol agents by 5,000. \textit{See id.} (same).


55. \textit{See id.} (describing September 11th attacks).

Consequently, Congress passed the Patriot Act.\(^{57}\) The Patriot Act, among other initiatives, intends to prevent terrorists from gaining entry into the United States.\(^{58}\) It targets illegal immigration and calls for better implementation of existing immigration laws.\(^{59}\) The Patriot Act also calls for better and more sophisticated forms of identification in order to prevent counterfeiting and identification theft.\(^{60}\)

Subsequently, in 2005, Congress passed the REAL ID Act,\(^{61}\) which further benefits illegal immigration enforcement.\(^{62}\) The REAL ID Act mandates national standards for drivers’ licenses, and required states’ compliance by 2008.\(^{63}\) Additionally, the information presented on the licenses must be stored in a national database.\(^{64}\)

### B. Current Political Climate

The majority of Americans remain dissatisfied with Congress’s efforts to control illegal immigration—and with good reason.\(^{65}\) The Department

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58. See Margaret L. Lorenc, Comment, \textit{The Mark of the Beast: U.S. Government Use of RFID in Government-Issued Documents}, 17 ALB. L.J. SCI. & TECH. 583, 590 (2007) ("The Act called for the implementation of existing immigration laws in order to stop the entry of illegal aliens into the country and, ultimately, to prevent terrorists from gaining entry.").

59. See id. (discussing Patriot Act).

60. See id. ("The Act demanded a new level of security for documents used at ports of entry into the country that would prevent counterfeiting or tampering, be machine-readable, and able to interface with multiple agency data-processing initiatives.").


62. See id. (providing detailed description of REAL ID Act); see also Lorenc, \textit{supra} note 58, at 593 ("The REAL ID Act of 2005 was passed following the 9/11 Commission’s recommendations that identification documents be made more secure from forgeries by terrorists and illegal aliens."). One commentator explained that the Act was included in a military spending bill for Iraq because there was uncertainty whether the Act would survive the Senate. See Lorenc, \textit{supra} note 58, at 593 (explaining passage of REAL ID Act).

63. See Lorenc, \textit{supra} note 58, at 593 (noting objective of REAL ID Act). The mandated standards required that drivers' licenses "include a minimum amount of information about the card-holder, '[p]hysical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes,' and some kind of machine-readable technology." \textit{Id.} at 593 (outlining standards for identification system).

64. See id. (same).

of Homeland Security reported that the illegal immigrant population in the United States increased from 8.5 million in 2000 to 11.8 million in 2007. Of the 11.8 million illegal immigrants present in 2007, 35% entered the United States after January 1, 2000, despite contemporary immigration reform. Prior to the 2008 presidential election, voters in numerous polls ranked the problem of illegal immigration ahead of taxes, education, and the environment; illegal immigration ranked behind only the economy, the War in Iraq, the energy crisis, and healthcare. One well-respected poll reported that 59% of registered voters ranked the 2008 presidential candidates'—then-Senator Barack Obama and Senator John McCain—positions on the issue of illegal immigration as either "extremely important" or "very important" in determining how they would cast their vote.

66. See Hoefer et al., supra note 32, at 1 (providing statistics on illegal immigration in United States). The estimated breakdown of the country of origin for the 11.8 million illegal immigrants residing in the United States in 2007 is: Mexico—6,980,000; El Salvador—540,000; Guatemala—500,000; Philippines—290,000; China—290,000; Honduras—280,000; Korea—230,000; India—220,000; Brazil—190,000; Ecuador—160,000; and all other countries totaled 2,100,000. See id. at 4 (estimating breakdown of illegal immigrations by country of origin). From 2000 to 2007, the five largest increases in illegal population by origin, relative to the country of origin's level in 2000, were: Brazil (89% increase), India (81% increase), Guatemala (74% increase), Honduras (70% increase), and Mexico (49% increase). See id. (computing relative increase in illegal immigration population from 2000 to 2007 by country of origin). Of the 11.8 million illegal immigrants in the United States in 2007, approximately 2,840,000 (or 24%) resided in California, 1,710,000 (or 14%) resided in Texas, and 960,000 (or 8%) resided in Florida. See id. (presenting state of residence for illegal immigrants). Also, according to the report, 36% (or 4,200,000) of the illegal immigrants were between twenty-five and thirty-four years old and 30% (or 3,540,000) were younger than twenty-five. See id. at 5 (providing breakdown by age).

67. See id. at 1 (explaining that nearly 4.2 million (or 35%) of the total illegal immigrant population in 2007 entered in 2000 or later).


69. See USA Today/Gallup Poll, June 15-19 2008, available at http://www.pollingreport.com/prioriti.htm (reporting that presidential candidates' positions on "illegal immigration" were "extremely" to "very important" to 59% of voters when deciding whom to vote for).
Congress’s recent efforts at comprehensive immigration reform have failed. For example, in 2005, Senators Ted Kennedy and John McCain presented a bipartisan bill that would have provided comprehensive immigration reform through “earned adjustment,” rather than amnesty, but the bill failed to achieve majority support. After the Kennedy-McCain bill’s failure, Congress passed the far less comprehensive Secure Fence Act of 2006, which provides funding for a fence along the United States border with Mexico that included unmanned aerial vehicles, ground-based sensors, satellites, radar, and cameras to prevent illegal immigration. Then in 2007, Senate Majority Leader Harry Reid introduced the Immigration Reform Act of 2007 (IRA2007), regarded as a more conservative version of the Kennedy-McCain Bill of 2005. Nevertheless, IRA2007

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70. See Maurice Hew, Jr., The Fence and the Wall (Mart) . . . Maginot Line Mental-ity, 39 CONN. L. REV. 1383, 1386 (2007) (“President Bush’s push for ‘pro-immigra-
tion reform’ has not materialized following the tragic events of September 11, 2001.”); Dana Bash & Andrea Koppel, Senate Immigration Bill Suffers Crushing Defeat, CNN.COM, June 28, 2007, http://www.cnn.com/2007/POLITICS/06/28/immi-
gration.congress/index.html (noting failure of Congress to overhaul current im-
migration laws); Editorial, Illegal Immigration—Remember Reform?, PHILADELPHIA INQUIRER, May 3, 2008, at A08 (“Congress has repeatedly failed to address the need both to provide a process for illegal immigrants to become legal and to make it more difficult for them to illegally enter the United States.”).

cfm?articleid=31247&printerfriendlyvers=1 (discussing McCain-Kennedy immigra-
tion bill). Under the bill, named the Secure America and Orderly Immigration Act, a new type of visa would be established that would, “allow low-skilled foreign workers who have lined up jobs in the United States to come for three years. The visa could be renewed once for an additional three years. Illegal workers now in the United States would apply for H-5B visas that would be valid for six years. After the visa terms expire, immigrants could either return home or apply for permanent residence, and ultimately, citizenship.” See Zeller, supra, at 1 (explaining new visa that would help reduce number of illegal immigrants by giving them path to citizenship). The bill would also increase funding for border security and “allow illegal immigrants who pay fines and fees of at least $2,000, take English and civics courses, and undergo medical and background checks, to apply for green cards and eventually citizenship.” Id. (detailing other aspects of proposed legislation).

thorizing installation of fencing to control illegal immigration).

73. See id. (authorizing construction of fence along United States/Mexico border); Jonathan Weisman, With Senate Vote, Congress Passes Border Fence Bill, WASH.
POST, Sept. 30, 2006, at A1 (reporting that “Senate gave final approval last night to legislation authorizing the construction of 700 miles of double-layered fencing on the U.S.-Mexico border”).


The IRA would have accomplished the following: (1) extended to illegal immi-
grants the opportunity to obtain a “Z” visa and achieve legal status after paying $5,000 in fines and $2,000 in processing fees; (2) created a guestworker program;
failed to gain majority support in the Senate and died before a final vote.\textsuperscript{75}

Regardless, the perceived general inadequacy of Congress’s legislation in reducing illegal immigration has spurred state officials and private citizens to action.\textsuperscript{76} For example, volunteer border patrol groups like the Minutemen have formed and sought to take matters into their own hands.\textsuperscript{77} The Minutemen assert that their mission is to “see the borders and coastal boundaries of the United States secured against the unlawful and unauthorized entry of all individuals, contraband, and foreign military.”\textsuperscript{78}

Additionally, small towns, like Hazelton, Pennsylvania, are attempting to provide their own solutions to curtail the continued tide of illegal immigration and its perceived vices.\textsuperscript{79} In July 2006, Hazelton’s mayor, Louis J.
Barletta, introduced a strict ordinance against illegal immigrants after two were charged with the murder of a city resident.\(^{80}\) The ordinance, titled the Illegal Immigration Relief Act Ordinance, penalized both businesses that hired illegal immigrants by suspending their business permits and landlords who rented to people without occupancy permits, which could only be obtained by legal immigrants and citizens of the United States.\(^{81}\) Although the legality of these local efforts is questionable because of federal preemption, they remain strong examples of the level of discontent amongst United States citizens.\(^{82}\)

Thankfully, while politicians remain divided on a solution, they agree that the current system is not working and recognize that a majority of the country is demanding change.\(^{83}\) For example, the Republican Party, in its official platform, recently asserted that “[i]n an age of terrorism, drug cartels, and criminal gangs, allowing millions of unidentified persons to enter and remain in this country poses grave risks to the sovereignty of the United States and the security of its people.”\(^{84}\) The Democratic Party’s website also explains that “our current immigration system has been broken for far too long. We need comprehensive immigration reform, not
just piecemeal efforts. We cannot continue to allow people to enter the United States undetected, undocumented, and unchecked."  

Consequently, in order to make progress on immigration reform, Congress needs legislation that can achieve bipartisan support. The Identity Theft Penalty Enhancement Act (ITPEA) provides just that type of opportunity for bipartisan support. ITPEA is capable of rising above partisan politics because it focuses on protecting victims of illegal immigration. In order for Congress to understand the value of ITPEA to the solution for illegal immigration, it must first understand the recently discovered shortcoming of ITPEA; for that reason, Part III synthesizes the circuit courts' opinions related to the circuit split.

85. The Democratic Party, Comprehensive Immigration Reform, http://www démocrats.org/a/national/american_community/immigration/ (last visited Sept. 29, 2008) (asserting Democratic Party's position on immigration reform). The Democratic Party condemned both illegal immigrants and their employers because "those who enter our country's borders illegally, and those who employ them, disrespect the rule of the law." See id. (arguing need for immigration reform). To achieve the party's objective on illegal immigration, it asserted that:

We need to dismantle human smuggling organizations, combating the crime associated with this trade. We also need to do more to promote economic development in migrant-sending nations, to reduce incentives to come to the United States illegally. And we need to crack down on employers who hire undocumented immigrants. It's a problem when we only enforce our laws against the immigrants themselves, with raids that are ineffective, tear apart families, and leave people detained without adequate access to counsel. We realize that employers need a method to verify whether their employees are legally eligible to work in the United States, and we will ensure that our system is accurate, fair to legal workers, safeguards people's privacy, and cannot be used to discriminate against workers.

Id. (discussing how to effectuate Democratic Party's objectives regarding illegal immigration).

Then-presidential candidate Barack Obama stated during his acceptance speech for the party nomination that "[p]assions fly on immigration, but I don't know anyone who benefits when a mother is separated from her infant child or an employer undercuts American wages by hiring illegal workers." Then-Senator Barack Obama, Democratic Convention Acceptance Speech (Aug. 8, 2008), available at http://www.huffingtonpost.com/2008/08/28/barack-obama-democratic-c_n_122224.html (accepting Democratic presidential nomination).

86. For a discussion of the need for the Republican opposition to recent immigration legislation and the need for bipartisan support, see infra notes 192-94 and accompanying text.


88. For a discussion of ITPEA's ability to attract bipartisan support, see infra notes 192-94 and accompanying text.

89. For a discussion of the victimization of identity theft and effectiveness of ITPEA, see infra notes 163-87 and accompanying text.

90. For a synthesis of the circuit courts' interpretations of ITPEA, see infra notes 91-151 and accompanying text.
III. IDENTITY THEFT PENALTY ENHANCEMENT ACT

The relevant text of ITPEA targets a person who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" during one of the enumerated underlying offenses.\textsuperscript{91} The circuit courts are divided over whether the government must prove that the person who committed identity theft during one of the underlying felonies knew the stolen identity belonged to an actual person.\textsuperscript{92} The Fourth, Eighth, and Eleventh Circuits have held that the government does not need to prove the defendant actually knew the stolen identity belonged to another person.\textsuperscript{93} The First, Ninth, and D.C. Circuits have taken the position that the government must prove that the defendant

\textsuperscript{91} 18 U.S.C. § 1028A(a)(1) (2006) ("In general. Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.").

The underlying felonies listed in subsection (c) are "relating to theft of public money, property, or rewards," "relating to theft, embezzlement, or misapplication by bank officer or employee," "relating to theft from employee benefit plans," "relating to false personation of citizenship," "relating to false statements in connection with the acquisition of a firearm," "relating to fraud and false statements," "relating to mail, bank, and wire fraud," "relating to nationality and citizenship," "relating to passports and visas," "relating to obtaining customer information by false pretenses," "relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card," "relating to various immigration offenses," and "to false statements relating to programs under the Act." 18 U.S.C. § 1028A(c) (2006) (emphasis added).

For the purpose of ITPEA, "means of identification" is defined as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual." 18 U.S.C.A. § 1028(d)(7) (West 2008). Examples of "means of identification" include "name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number," as well as other electronic and physical identifiers, like fingerprints. \textit{Id.} § (d)(7)(A)-(D). According to the Supreme Court, "'[k]nowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness." Arthur Andersen, LLP v. United States, 544 U.S. 696, 705 (2005) (citing \textit{A.MERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 725 (1981); BLACK'S LAW DICTIONARY 888 (8th ed. 2004); WEBSTER's THIRD NEW INTERNATIONAL DICTIONARY 1252-53 (1993)).

\textsuperscript{92} See United States v. Godin, 534 F.3d 51, 55 (1st Cir. 2008) (explaining that "[t]he courts are divided on the issue of whether the 'knowingly' scienter requirement in § 1028A(a)(1) extends to 'of another person'").

\textsuperscript{93} See United States v. Mendoza-Gonzalez, 520 F.3d 213, 217 (4th Cir. 2006) (same).
knew the means of identification actually belonged to another person.94 This Comment's synthesis of the circuit courts' opinions, which includes consideration of ITPEA's plain language, title, surrounding text, legislative intent, the rule of lenity, and relevant Supreme Court precedent, demonstrates that the expansive scienter requirement enunciated by the First, Ninth, and D.C. Circuits is the best reading of the statute.95 Sadly, this reading will render ITPEA impotent in dealing with the common situation of an illegal immigrant utilizing a random identification number or card that actually belongs to a real person.96

A. Plain Language of the Text

All statutory interpretation begins in the same place: the plain language of the text.97 The plain language of ITPEA's text, however, is ambiguous.98 The plain language is susceptible to two equally plausible, but contrary interpretations: (1) "knowingly" does not reach "of another per-

94. See Godin, 534 F.3d at 61 (relying on rule of lenity, court held that, because of ambiguity in language of text, statutory structure, title, and legislative history, "the scienter requirement must stretch to "of another person"); United States v. Miranda-Lopez, 532 F.3d 1034, 1040 (9th Cir. 2008) (relying on rule of lenity because of ambiguity in statute's language and legislative history, court held "that the government was required to prove that [the defendant] knew that the identification belonged to another person"); United States v. Villanueva-Sotelo, 515 F.3d 1234, 1245 (D.C. Cir. 2008) (holding that "[v]iewing the list in combination with the statute's title and the legislative record as a whole, we think it clear that Congress never intended its 'aggravated identity theft' statute to reach conduct like [the defendant's]"), petition for cert. filed, 77 U.S.L.W. 3308 (U.S. Nov. 7, 2008) (No. 08-622).

95. For a synthesis of the circuit courts' opinions, see infra notes 98-151 and accompanying text.

96. For a discussion of the impotency of ITPEA under this interpretation in dealing with identity theft incident to illegal immigration, see infra notes 188-205 and accompanying text.

97. See Watson v. United States, 128 S.Ct. 579, 583 (2007) (citing Lopez v. Gonzalez, 549 U.S. 47 (2006); Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995); FDIC v. Meyer, 510 U.S. 471 (1994)) (explaining that when terms are not statutorily defined, interpretation begins with "the language as we normally speak it"). A deeply held rule of statutory interpretation is that when a statute is clear and unambiguous on its face, a court "need not and cannot" interpret the statute; only statutes "which are of doubtful meaning are subject" to courts' interpretations. See Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction § 45:2 (7th ed. 2007) (citing Jay v. Boyd, 351 U.S. 345, 357 (1956) ("But we must adopt the plain meaning of a statute, however severe the consequences.") (discussing problem of ambiguity in statutes).

98. See Godin, 534 F.3d at 59 (finding text of ITPEA to be ambiguous); Miranda-Lopez, 532 F.3d at 1040 (same); Villanueva-Sotelo, 515 F.3d at 1241 (discussing guidance Supreme Court precedent has provided to interpret ambiguous statutes). Ambiguity exists when the statute "is capable of being understood by reasonably well-informed persons in two or more different senses." Singer & Singer, supra note 97, § 45:2 (discussing ambiguity in statutes).
son;" and (2) "knowingly" modifies everything, including "of another person."99

The narrow reading is supported by classic Supreme Court precedent, which holds that the interpretation of the statute should be as close to the grammatical reading as possible.100 If the statute is examined through a purely grammatical lens, "knowingly" is an adverb and therefore only modifies the verbs "transfers, possesses, or uses," and certainly not "of another person," the statute's second prepositional phrase.101 The Supreme

99. See Villanueva-Sotelo, 515 F.3d at 1237 (recounting proposed antithetical readings of statute). As evidenced by the appeals, some criminal defendants argue that "knowingly" must modify "of another person," which would require the government to prove the defendant knew the means of identification belonged to another person. See Godin, 534 F.3d at 53-54 (explaining issue under appeal); Miranda-Lopez, 532 F.3d at 1038 (explaining government and defendants' conflicting interpretations of statute); United States v. Mendoza-Gonzalez, 520 F.3d 912, 915 (8th Cir. 2008) (noting that defendant "argues that the term 'knowingly' modifies not only 'transfers, possesses, or uses' but also the phrase 'of another person'"), petition for cert. filed, (U.S. July 15, 2008) (No. 08-5316); Villanueva-Sotelo, 515 F.3d at 1237 (explaining that defendant contended that "the statute is ambiguous and that the provision's title, purpose, and legislative history reveal Congress's intent to extend the mens rea requirement throughout the entire sentence, namely all the way to 'of another person'"); see, e.g., United States v. Hurtado, 508 F.3d 603, 608 (11th Cir. 2007) (rejecting defendant's argument government needed to prove defendant knew identification belonged to actual person), cert. denied, 128 S.Ct. 2903 (2008); United States v. Montejo, 442 F.3d 213, 217 (4th Cir. 2006) (same). In contrast, the government has consistently contended that "knowingly" does not reach "of another person." See Godin, 534 F.3d at 56 (explaining that government argued that "knowingly" only modifies verbs); Mendoza-Gonzalez, 520 F.3d at 915 (same); Villanueva-Sotelo, 515 F.3d at 1237 (noting that government asserted that scienter requirement extends only to "means of identification"); Montejo, 442 F.3d at 217 (explaining government's narrow reading of ITPEA).

100. See United States v. Goldenberg, 168 U.S. 95, 102-03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar."); Lake County v. Rollins, 130 U.S. 662, 670 (1889) ("To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them.").

101. See Godin, 534 F.3d at 56 ("In a purely grammatical sense, 'knowingly,' as an adverb, modifies only the verbs 'transfers, possesses, or uses.'"); Mendoza-Gonzalez, 520 F.3d at 915 (asserting that "knowingly" is an adverb and it grammatically modifies only the verbs in the statute); Villanueva-Sotelo, 515 F.3d at 1238 (citing ROBERT FUNK ET AL., THE ELEMENTS OF GRAMMAR FOR WRITERS 62 (MacMillan 1991)) ("The word 'knowingly' technically modifies only the verb that follows it ('uses'). It modifies neither the direct object ('means') nor the two prepositional phrases that follow ('of identification of another person')."); Hurtado, 508 F.3d at 609 ("The fact that the world 'knowingly'—an adverb—is placed before the verbs . . . indicates that 'knowingly' modifies those verbs, not the later language in the statute."); Montejo, 442 F.3d at 215 (citing FUNK ET AL., supra, at Ch. 4) ("Good usage requires that the limiting modifier, the adverb 'knowingly,' be as close as possible to the words which it modifies, here, 'transfers, possesses, or uses.'"). But see Miranda-Lopez, 532 F.3d at 1038-39 (arguing that limited scienter requirement is not only plausible and grammatically correct interpretation of statute).
Court, however, has not always confined its statutory analyses to the rules of grammar when interpreting a scienter requirement, but has equated “modify” “with words such as ‘apply,’ ‘extend,’ or ‘attach.’”

Here, a loose grammatical interpretation is necessitated by the fact that the scienter requirement must extend at least to “of identification,” or else the statute would criminalize “a person . . . ‘knowingly using’ or ‘transfer[ring],’ without lawful authority, anything at all that happened to contain a means of identification.” The scienter requirement could

An “adverb” is “a word that modifies an adjective, verb, or another word, expressing a relation of place, time, circumstance, manner, cause, degree, etc., e.g. gently, accordingly, now, here, why.” See E.S.C. Weiner, The Oxford Guide to English Usage, in THE OXFORD GUIDE TO THE ENGLISH LANGUAGE xvii (defining “adverb”). A “prepositional phrase” is “a phrase consisting of a preposition and its complement, e.g. I am surprised at your reaction.” See id. at xxi (defining “prepositional phrase”). A “preposition” is “a word governing a noun or pronoun, expressing the relation of the latter to other words, e.g. seated at the table.” See id. (defining “preposition”). A “direct object” is “the object that expresses the primary object of the action of the verb, e.g. He sent a present to his son.” See id. at xviii (emphasis added) (defining “direct object”).


Goldberg and Rollins may still control, urging the narrowest interpretation possible, because Arthur Andersen, Carter, X-Citement Video, and Liparota are legitimately distinguishable. See Mendoza-Gonzalez, 520 F.3d at 917 (distinguishing Court’s analysis of underlying statute in Arthur Andersen, X-Citement Video, and Liparota cases from ITPEA); Villanueva-Sotelo, 515 F.3d at 1258-61 (Henderson, J., dissenting) (distinguishing Court’s analysis of underlying statute in Clark, X-Citement Video, and Liparota cases from ITPEA); Hurtado, 508 F.3d at 609-10 (distinguishing Court’s analysis of underlying statute in X-Citement Video and Liparota cases from ITPEA); Montego, 442 F.3d at 216 (distinguishing Court’s analysis of underlying statute in Liparota case from ITPEA). In each of the four cases, the Supreme Court attempted to avoid potentially criminalizing a range of innocent conduct, which is not a concern with a penalty enhancement. See Arthur Andersen, 544 U.S. at 706 (remedying jury instructions that covered innocent conduct); Carter, 530 U.S. at 269 (reading general intent scienter requirement into statute in order to “separate wrongful conduct from ‘otherwise innocent conduct’”); X-Citement Video, 513 U.S. at 70 ("Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."); Liparota, 471 U.S. at 426 (arguing that broad scienter requirement "is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct"). For a discussion of Arthur Andersen, Carter, X-Citement Video, and Liparota, see infra notes 152-62 and accompanying text.

103. Villanueva-Sotelo, 515 F.3d at 1238 ("As the government concedes, the mens rea requirement must extend at least to the direct object’s principal modi-
stop there and the statute would be intelligible; however, with respect to
"of another person," recent Supreme Court precedent has interpreted
"knowingly" as expansively as possible in analogous criminal statutes.\footnote{104}
Three circuit courts have acknowledged and embraced this expansive in-
terpretation, which increases its credibility.\footnote{105} The expansive inter-
pretation is also supported by alternative, but grammatically consistent, rewrites
of the statute, which would easily solve the ambiguity.\footnote{106} Thus, the plain

\footnote{104. For a discussion of the relevant Supreme Court precedent, see infra
notes 152-62 and accompanying text.}

2d 1, 2 (D. Me. 2007)) (providing example to support argument). The necessity of
these conclusions is demonstrated by an example from a district court:

If during a bank conspiracy, I hand a defendant a sealed envelope asking
her to transfer it and its contents to another and she knowingly does so,
shes has knowingly transferred the envelope and its contents. But, if she
believes my statement that the envelope contains only a birthday card
when in fact it contains a forged social security card, the government
surely would not contend that she should receive the enhanced penalty.
\textit{Id.} at 58 (same); \textit{see also id.} at 57 (citing \textit{X-Citement Video}, 513 U.S. at 79 (Stevens, J.,
concurring) (arguing that statutory sentence is "not very long (fifteen words out of
a forty-seven word sentence), and it is one phrase out of four within the same
sentence. There are three additional phrases \textit{in the same sentence} to which 'of an-
other person' does not belong. It is as reasonable to read 'knowingly' to extend to
all of the words within the phrase it inhabits as it is to further divide the phrase and
limit the reach of 'knowingly' to just a portion of the phrase.')); \textit{Villanueva-Sotelo},
515 F.3d at 1241 (quoting \textit{Liparota}, 471 U.S. at 424) ("Congress has not explicitly
spelled out the mental state required. Although Congress certainly intended by
use of the word "knowingly" to require \textit{some} mental state with respect to \textit{some} ele-
ment of the crime defined in [the statute], the interpretations proffered by both
parties accord with congressional intent to this extent. Beyond this, the words
themselves provide little guidance. \textit{Either interpretation would accord with ordinary
usage."}).

\footnote{106. \textit{See Villanueva-Sotelo}, 515 F.3d at 1239 (exploring alternative rewrites of
statute). For example, if Congress had written, "whoever knowingly uses . . . an-
other person's means of identification," then "the statute would most plausibly
require proof that the defendant actually knew the means of identification used
belonged to someone else." \textit{Id.} (providing example of rewrite). According to the
United States Court of Appeals for the D.C. Circuit, this rewrite supports the ex-
pansive reading of the statute because "the phrases 'means of identification of an-
other person' and 'another person's means of identification' carry precisely the
same meaning." \textit{See id.} (comparing rewrite with actual text of ITPEA).}
language of ITPEA is susceptible to contrary, but plausible interpretations and is therefore ambiguous.107

B. Statute’s Surrounding Language and Structure

If the plain meaning of the text is ambiguous, then courts must next consider the statute’s surrounding language and structure in order to resolve the ambiguity.108 Subsection 1028A(a)(2) of ITPEA utilizes similar, but broader language than § 1028A(a)(1): “whoever, during and in relation to any [terrorism offense] knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document” shall be imprisoned with a mandatory sentence of five years which shall run consecutive to the underlying terrorism offense.109 Section 1028A(a)(2), however, is also susceptible to contrary interpretations, both of which are equally plausible.110 One interpretation, favorable to an expansive scienter requirement in § 1028A(a)(1), extends “knowingly” through “false identification document[s]” and includes all the elements in between.111 The second plausible interpretation limits the scienter requirement to only the two direct objects and their primary modifiers: “means of identification” and “false identification document.”112 Consequently, the surrounding language does not resolve the textual ambiguity.113

The title of the statute, “Identity Theft Penalty Enhancement Act,” is also available to help a court resolve the ambiguity in the text of subsection 1028A(a)(1).114 Unfortunately, the title is no less ambiguous because

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107. See Godin, 534 F.3d at 59 (finding text of ITPEA to be ambiguous); United States v. Miranda-Lopez, 532 F.3d 1034, 1040 (9th Cir. 2008) (noting different interpretations of ITPEA); Villanueva-Sotelo, 515 F.3d at 1241 (same).
108. See Bifulco v. United States, 447 U.S. 381, 387 (1980) (instructing that courts are to examine “the language and structure, legislative history, and motivating policies of the Act” to attempt to resolve statutory ambiguity in text).
109. See 18 U.S.C. § 1028A(a)(2) (2006) (emphasis added) (“Terrorism offense. Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.”).
110. See Godin, 534 F.3d at 59 (discussing § 1028A(a)(2) of ITPEA).
111. See id. (finding that “'knowingly' can reasonably be read to extend to 'of another person' because it reaches all the way to 'false identification document'”).
112. See id. (“A second reasonable interpretation is that ‘knowingly’ only extends to the two direct objects and their primary modifiers: ‘means of identification’ and ‘false identification documents.’”).
113. See id. (explaining that statute’s structure does not resolve ambiguity).
114. See id. (stating “[w]e may also look to the title of a statute to resolve ambiguity in the text”); United States v. Villanueva-Sotelo, 515 F.3d 1234, 1243 (D.C. Cir. 2008) (citing Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998)) (noting that courts may use title of statute to resolve textual ambiguity); Pa. Dep’t of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (“For interpretive purposes, [the title is] of use only when [it] shed[s] light on some ambiguous word
it can be interpreted either (1) literally, or (2) as a term of art. If interpreted literally, "theft," is defined as "the felonious taking and removing of personal property with the intent to deprive the rightful owner of it," which supports the more demanding expansive scienter requirement. For example, if this definition is controlling, then a defendant who randomly selected a string of numbers to use as a social security or alien registration number did not technically thief an identity because the defendant did not intend to deprive any specific, rightful owner of the number. In other words, the defendant would need to know that the identification belonged to an actual person. It is equally plausible, and perhaps more likely, however, that "theft" will not be interpreted in isolation but as the term of art "identity theft." Under this definition, identity theft could or phrase.")}, petition for cert. filed, 77 U.S.L.W. 3308 (U.S. Nov. 7, 2008) (No. 08-622).

115. See Godin, 534 F.3d at 59 (considering alternative readings of "identity theft" in title of statute).

116. See Villanueva-Sotelo, 515 F.3d at 1243 (quoting Merriam-Webster et al., Webster's Third New International Dictionary 2369 (1993)) (presenting traditional definition of theft); see also Black's Law Dictionary 1516 (8th ed. 2000) (defining theft). The Federal Trade Commission (FTC) discusses identity theft only in terms of identities that have been stolen. See Federal Trade Commission, Building a Better Credit Report, 19-21 (2008), available at http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre03.pdf. The FTC also provides several examples of how an identity thief may obtain identification information and in each example the thief would have known that the identity belonged to another person; for example, the thief may get information from businesses or other institutions by stealing it while he or she is on the job, steal your wallet or purse, steal your personal information through email or the phone by saying that he or she is from a legitimate company and claiming that you have a problem with your account, steal your credit or debit card numbers by capturing the information in a data storage device in a practice known as "skimming," steal personal information he or she finds in your home, and/or steal your mail, including bank and credit card statements, credit card offers, new checks, and tax information. See id. (defining identity theft and explaining nature of occurrences).

117. See Villanueva-Sotelo, 515 F.3d at 1243 (discussing definition of theft in relation to knowledge scienter requirement).

118. See id. (same).

119. See Godin, 534 F.3d at 59 ("It is also plausible that Congress intended to define 'identity theft' as using someone else's identity rather than taking someone else's identity."). For example, the harm is identical "whether someone (1) makes up a social security number, procures credit with that number, and does not repay or (2) steals a social security number from a database, procures credit with that number, and does not repay." See id. (providing support for term of art definition of identity theft).

Also, the House Report accompanying ITPEA explained that "[t]he term 'identity theft'... refer[s] to all types of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception, typically for economic or other gain, including immigration benefits," which notably does not explicitly include the scienter requirement at issue here. See H.R. Rep. No. 108-528, at 4 (2004), reprinted in 2004 U.S.C.C.A.N. 779, 780 (providing definition of identity theft). Furthermore, other sources, like the United States Department of Justice, utilize Congress's definition. See United States Department of
be defined as "using someone else’s identity rather than taking someone else’s identity." This definition supports the narrower reading of the scienter requirement because it does not contain an inherent knowledge requirement.

C. Legislative Intent

In addition to using the structure of a statute and the surrounding language in a statute to interpret ambiguous text, courts may also utilize the legislative intent, an external source of interpretation, to resolve the ambiguity. With respect to ITPEA’s legislative history, support for the

Justice, Identity Theft and Fraud, http://www.usdoj.gov/criminal/fraud/websites/idtheft.html (last visited Nov. 19, 2008) ("Identity theft and identity fraud are terms used to refer to all types of crime in which someone wrongfully obtains and uses another person’s personal data in some way that involves fraud or deception, typically for economic gain."). Congress defines identity theft more as a term of art than as an actual theft, which supports no need for the expansive scienter requirement. See id. (discussing “identity theft” as term of art); see also Home Office Identity Theft Steering Committee, Identity Theft—Identity Crime Definitions, http://www.identity-theft.org.uk/identity-crime-definitions.asp (last visited Nov. 18, 2008) ("This is a generic term for identity theft, creating a false identity or committing identity fraud."); Identity Theft, Identity Theft Definition, http://www.id-theft-info.com/index.html (last visited Nov. 18, 2008) ("Identity theft—also known as identity fraud, ID theft and ID fraud—is fraud perpetrated by a criminal who assumes someone else’s identity in order to profit illegally . . . . [I]n simple terms, someone pretends to be you in order to sign up for goods and services in your name—or they may simply use your details to access your already existing bank and/or credit card accounts.").

10. See Godin, 534 F.3d at 59 (giving alternate definition for “identity theft”).
11. See Identity Theft and Fraud, supra note 119 (noting that Congress defines “identity theft” as term of art, supporting no need for expansive scienter requirement).
12. See Bifulco v. United States, 447 U.S. 381, 390-98 (1980) (examining statute in question’s legislative history in attempt to resolve textual statutory ambiguity). Separation of powers principles require utilizing legislative history to interpret statutes because the court should recognize the will of the lawmaking branch of the government. See Singer & Singer, supra note 97, § 45:5 (discussing basis for utilizing legislative history). In ascertaining the legislative intent, courts should look to the “objective to be attained, the nature of the subject matter and the contextual setting, . . . [and] review the policy behind the statute, the legislative scheme, . . . [the] legislative history, . . . prior enactments, . . . [and] committee reports.” See id. (noting sources for ascertaining legislative intent).

It is important to acknowledge, however, that Supreme Court justices disagree as to whether, if the plain language of the text, surrounding text, and title of the statute each fail to resolve the ambiguity, courts should look to legislative history or, at this stage of interpretation, immediately apply the rule of lenity. See Honorable Patricia M. Wald, The Cinematic Supreme Court: 1991-1992 Term, 7 ADMIN. L.J. Am. U. 258, 252-53 (1993) (citing United States v. R.L.C., 503 U.S. 291, 311-12 (1992) (Thomas, J., concurring)) (noting that Justices Scalia and Thomas argued that courts should not consult legislative history); see also Ronald Benton Brown & Sharon Jacobs Brown, Statutory Interpretation: The Search for Legislative Intent 12 (2002) (“The idea that the legislature has one state of mind or ‘legislative intent’ when voting a bill into law is fiction. It consists of many people, each with his or her own mind. Each legislator’s different ‘state of mind,’ may have nothing to do with the content of the statute. Supporters of a bill are likely to
expansive, more conservative, scienter requirement may be found in what the legislative history does not say—at no point in the legislative history is the scienter requirement considered or addressed. At best, during the bill’s presentation to the House of Representatives, Congressman Sensenbrenner explained that identity theft is a term “used to refer to all types of crime in which someone wrongfully obtains and uses another person’s personal data in some way that involves fraud or deception, typically for economic or other gain including immigration benefits” and that “[t]his legislation will allow prosecutors to identify identity thieves who steal an identity, sometimes hundreds or even thousands of identities, for purposes of committing one or more crimes.” Likewise, Congressman Carter, one of the bill’s cosponsors, said both that ITPEA would “facilitate the prosecution of criminals who steal identities in order to commit felonies” and that “if a thief uses the stolen identity in connection with another Federal crime and the intent of the underlying Federal crime is proven, the prosecutor may not need to prove the intent to use the false identity in a crime.” These portions of the legislative history appear to place emphasis on theft, rather than a more loosely defined “identity theft;” however, neither actually discussed the breadth of the scienter requirement or conclusively demanded an exacting standard of knowledge from future defendants.

In the same vein, with respect to the scienter requirement, is the Committee of the Judiciary Report, which accompanied the final version of the bill and merely explained further that the statute’s purpose is to “[address] the growing problem of identity theft,” and is a response to identity thieves receiving short terms of imprisonment and probation be quite familiar with a bill’s contents and have particular intent with regard to its meaning, whereas many legislators will not. Some may vote for the statute despite its meaning because of a political deal with the bill’s proponents. Others may vote against the bill intending for it to have no effect.”); Singer & Singer, supra note 97, § 45:6 (“Since intention is a mental state and only individual persons have minds, only an individual can have an intention. It follows then that the idea of a legislative intent must be regarded as a fiction or a figure of speech.”). For a discussion of the rule of lenity and how it applies to ITPEA, see infra notes 152-62 and accompanying text.


before going on "to commit much more serious crimes." Accordingly, ITPEA "provides enhanced penalties for persons who steal identities to commit terrorist acts, immigration violations, firearms offenses, and other serious crimes." The "Performance Goals and Objectives" section only explains that ITPEA "is intended to reduce the incidence of identity theft and fraud and address the most serious criminals by providing stronger penalties" for committing identity theft simultaneously with one of the underlying offenses.

Also, the Committee of the Judiciary Report attempted to demonstrate the need for penalty enhancement by presenting eight cases where a defendant was convicted of identity theft but received nominal or insufficient punishments. In seven of the examples put forth by the bill's

127. See 150 CONG. REC. H4810, at 3 (contributing to legislative history).
128. See id. (same).
129. See id. at 10 (same). This section, however, may be construed to suggest that ITPEA is intended to serve both strong retributive and deterrent goals. Such a suggestion may favor the argument for a less stringent scienter requirement because enhancing the penalties that identity thieves receive should reduce the number of identity thefts. See BLACK'S LAW DICTIONARY 481, 1343 (8th ed. 2000) (defining "retribution" as "[p]unishment imposed as repayment or revenge for the offense committed; requital" and defining "deterrence" as "[t]he act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment").

This assertion is consistent with the essence of deterrence theory, which this Comment advocates. See Dane Archer et al., Symposium on Current Death Penalty Issues: Homicide and the Death Penalty: a Cross-National Test of a Deterrence Hypothesis, 74 CRIM. L. & CRIMINOLOGY 991, 991-92 (1983) (explaining basic deterrence theory). Deterrence theory advocates a relationship between the degree of punishment for a crime and the amount of incidence of the crime. See id. (same); see also Leslie C. Levin, The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions, 48 AM. U.L. REV. 1, 20 n.96 (1998) (citing HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 39 (1968)) ("Deterrence theory posits that punishment is inflicted to deter future wrongdoing by the person being punished (specific deterrence) and by others who might commit wrongs (general deterrence."). According to that relationship, if the punishment for a crime is increased, then the incidence of the crime should decrease. See Archer, supra, at 1 (same). It is worth noting, however, that deterrence theory relies on the belief that "potential offenders" are "rational actors who weigh the qualities of potential punishment before acting," which may not always be the case. See id. (same).

130. See H.R. REP. NO. 108-528, at 5-6 (2004), reprinted in 2004 U.S.C.C.A.N. 779, 781 (presenting "examples of instances in which persons involved in identity theft received little or no prison time" in order to demonstrate need for penalty enhancement).

In the first example, the defendant, an employee at Bally's Health Club, was sentenced to only fifteen months in prison after he stole personal information from club members and then provided the information to a terrorist who used the identity information as part of a plot to blow up the Los Angeles International Airport. See id. at 5 (listing examples of nominal or insufficient punishments for identity thieves). In the second example, the defendant was sentenced to thirty-six months' probation when identity thieves used a financial institution's clients' personal information to make illegal purchases after the defendant improperly accessed the financial institution's computer system, obtained personal information from patrons, and provided it to another party. See id. (providing second exam-
sponsors it seems that the convicted defendants knew the victims were actual persons, which would be consistent with the expansive scienter interpretation of the statute.\(^{131}\) The D.C. Circuit embraced this interpretation of the report.\(^{132}\) In one of the examples, however, it is unclear whether the defendant, when she used another person’s social security number to obtain employment while also receiving social security benefits, actually knew the identity belonged to another person.\(^{133}\) As a result, that list merely may provide some of the worst examples of identity theft injustice, and may not be exhaustive or exclusively illustrative of the application of ITPEA.\(^{134}\)

On the other hand, support for the narrow scienter requirement may be deduced from the fact that ITPEA replaced the Identity Theft and Assumption Deterrence Act.\(^{135}\) In 1998, Congress passed the Identity Theft and Assumption Deterrence Act, which Congress passed in response to the ballooning rate of identity theft in the United States and the lack of uniformity and effectiveness of state laws.\(^{136}\) In the Act, Congress provided

\(^{131}\) See United States v. Villanueva-Sotelo, 515 F.3d 1234, 1244 (D.C. Cir. 2008) (noting that, in examples provided, “the thief knew the stolen information belonged to another person—indeed, that was the very essence of the crime”), petition for cert. filed, 77 U.S.L.W. 3308 (U.S. Nov. 7, 2008) (No. 08-622).

\(^{132}\) See id. (same).

\(^{133}\) See United States v. Godin, 534 F.3d 51, 60 (1st Cir. 2008) (noting that it is unclear whether defendant knew that social security number belonged to real person in scenario involving woman who used another’s social security number in order to procure employment).

\(^{134}\) See Villanueva-Sotelo, 515 F.3d at 1255 (Henderson, C.J., dissenting) (refuting claim that Congress intended list to be exhaustive).


stiff penalties for identity thieves in hopes that the penalties would deter future identity theft. The Identity Theft Act proved ineffective, however, because law enforcement officials found it impossible to enforce. As a result, identity thefts increased exponentially in the years after Congress enacted the Identity Theft Act. Congress subsequently passed ITPEA to address the ineffectiveness of the Identity Theft and Assumption Deterrence Act. ITPEA, unlike the Identity Theft Act, created a penalty enhancement rather than simply criminalizing identity theft. In light of the difficulties faced in enforcing the Identity Theft Act, it is plausible that if Congress embraced deterrence theory, then it would have favored a narrower scienter requirement to alleviate the difficulties in the enforcement of the Identity Theft Act when drafting ITPEA.

Nonetheless, any assertion regarding the scienter requirement is based on flimsy evidence and is speculative at best because the scienter requirement is not directly addressed and legitimate evidence continues to support the two equally plausible interpretations of the statute’s language. Thus, the ambiguity persists.
D. Rule of Lenity

The Supreme Court has clearly stated that "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." 145 Thus, because a court may not reasonably ascertain the breadth of the scienter requirement from its plain meaning and other available sources, courts interpreting the scienter requirement in ITPEA should ultimately interpret the scienter requirement according to the rule of lenity. 146 Accordingly, courts should interpret ITPEA’s scienter requirement in favor of the defendant. 147

The expansive scienter requirement is the most favorable interpretation of ITPEA to the defendant. 148 The Supreme Court, when interpreting ITPEA’s scienter requirement under the rule of lenity, should find that ITPEA requires harsher sentences only for defendants who knew that the identity that they used actually belonged to another person. 149 Thus, in order to subject the defendant to the stern punishments of ITPEA, the government must prove that the defendant knew the means of identification belonged to another person. 150 Accordingly, an immigrant, who illegally entered or remained in the United States, obtained documents he or she knew were false, and used the identifications to further his or her illegal residency, could escape significant punishment if they believed the identity contained in the documents could actually belong to someone, but did not know for certain. 151


146. See Godin, 534 F.3d at 61 (relying on rule of lenity because of textual ambiguity, statutory structure, title, and legislative history, court held that “the scienter requirement must stretch to ‘of another person’”); Miranda-Lopez, 532 F.3d at 1040 (relying on rule of lenity because of ambiguous statutory language and legislative history, court held “that the government was required to prove that [the defendant] knew that the identification belonged to another person”); United States v. Villanueva-Sotelo, 515 F.3d 1234, 1246 (D.C. Cir. 2008) (holding that where legislative history failed to resolve ambiguity, rule of lenity required court to apply expansive scienter requirement), petition for cert. filed, 77 U.S.L.W. 3308 (U.S. Nov. 7, 2008) (No. 08-622).

147. See Godin, 534 F.3d at 61 (relying on rule of lenity); Miranda-Lopez, 532 F.3d at 1040 (same); Villanueva-Sotelo, 515 F.3d at 1246 (same).

148. See Godin, 534 F.3d at 61 (interpreting scienter requirement expansively); Miranda-Lopez, 532 F.3d at 1040 (same); Villanueva-Sotelo, 515 F.3d at 1246 (same).

149. See Godin, 534 F.3d at 61 (interpreting scienter requirement expansively); Miranda-Lopez, 532 F.3d at 1040 (same); Villanueva-Sotelo, 515 F.3d at 1246 (same).

150. See Godin, 534 F.3d at 61 (interpreting scienter requirement expansively); Miranda-Lopez, 532 F.3d at 1040 (same); Villanueva-Sotelo, 515 F.3d at 1246 (same).

151. See United States v. Hurtado, 508 F.3d. 603, 609 (11th Cir. 2007) (emphasis added) (asserting that illegal immigrants will be able to “use the identification of another person fraudulently in the commission of another enumerated felony so long as [they remain] ignorant of whether [the] other person is real”), cert. denied, 128 S. Ct. 2903 (2008).
E. Escape Hatch? United States Supreme Court Precedent: Distinguishable?

If the Supreme Court, or any other court, disagrees with this Comment's analysis or the impact of the expansive scienter requirement, then the Court likely will pursue the narrow reading of the scienter requirement by distinguishing the Court's precedent reading an expansive scienter requirement into ambiguous statutory language. Under this judicial analysis, the language of the ITPEA should be interpreted as close to the grammatical reading as possible, which would extend "knowingly" only to "means of identification" and not to "of another person." As discussed earlier, the most relevant Supreme Court precedent—Arthur Andersen, LLP v. United States, Carter v. United States, United States v. X-Citement Video, Inc., and Liparota v. United States—can be construed to support the argument that the scienter requirement is ambiguous and ultimately should be interpreted expansively. Regardless, ITPEA is a penalty enhancement, and none of the four precedential decisions involved a penalty enhancement. Also, in each of the four decisions, the Supreme

152. See United States v. Mendoza-Gonzalez, 520 F.3d 912, 917 (8th Cir. 2008) (distinguishing Arthur Andersen, X-Citement, and Liparota), petition for cert. filed. (U.S. July 15, 2008) (No. 08-5316); Hurtado, 508 F.3d at 609-10 (distinguishing X-Citement and Liparota); United States v. Montejo, 442 F.3d 213, 217 (4th Cir. 2006) (distinguishing Liparota).

153. See Mendoza-Gonzalez, 520 F.3d at 917 (distinguishing Arthur Andersen, X-Citement, and Liparota); Hurtado, 508 F.3d at 609-10 (distinguishing X-Citement and Liparota); Montejo, 442 F.3d at 217 (distinguishing Liparota).


158. See United States v. Villanueva-Sotelo, 515 F.3d 1234, 1241-43 (D.C. Cir. 2008) (discussing how Supreme Court precedent supports expansive reading of scienter requirement in ITPEA), petition for cert. filed, 77 U.S.L.W. 3308 (U.S. Nov. 7, 2008) (No. 08-622). For a discussion of Supreme Court precedent and how it supports a finding of ambiguity, see supra notes 152-60 and accompanying text.

Court was concerned about how a narrow requirement would criminalize unwitting, innocent conduct and, therefore, interpreted the scienter requirement as expansively as possible. 160 That is not a concern with ITPEA, because it is only applicable when the defendant has (1) been found guilty of an underlying felony; and (2) committed identity theft during or in relation to that felony. 161 Consequently, the Supreme Court, or any other court, could choose to distinguish the precedent, which would severely weaken the argument that the plain language of the text is ambiguous, bypass the need for this Comment’s analysis, and favor the narrow scienter requirement. 162

IV. Identity Theft’sVictimization and ITPEA’s Opportunity for Immigration Reform

It is unclear whether the Supreme Court will ultimately distinguish the relevant precedent; therefore, Congress should intervene and affirmatively establish a narrow scienter requirement in ITPEA because identity theft victimizes innocent, unsuspecting people and poses significant risks to both the economy and national security, especially with respect to illegal immigrants. 163 For example, more generally speaking, the Federal authorization cards in any manner not authorized by [the statute] or the regulations”).

160. See Arthur Andersen, 544 U.S. at 703 (acknowledging fear of criminalizing unwitting, innocent conduct when Court read “knowingly” expansively); Carter, 530 U.S. at 267-69 (interpreting scienter requirement expansively to separate innocent conduct from criminal conduct); X-Citement, 513 U.S. at 64 (seeking to avoid criminalizing innocent conduct); Liparota, 471 U.S. at 424-25 (noting that narrow scienter requirement would criminalize “a broad range of apparently innocent conduct”).


162. See United States v. Mendoza-Gonzalez, 520 F.3d 912, 915 (8th Cir. 2008) (holding that § 1028A(a)(1) is unambiguous and that the Government was not required to prove that [the defendant] knew that [the victim] was a real person to prove that he violated § 1028A(a)(1)”), petition for cert. filed, (U.S. July 15, 2008) (No. 08-5316); United States v. Hurtado, 508 F.3d 603, 609 (11th Cir. 2007) (same), cert. denied, 128 S.Ct. 2903 (2008); United States v. Montejo, 442 F.3d 213, 217 (4th Cir. 2006) (same).


Common examples of how identity thieves obtain victims’ personal information for exploitation include stealing wallets and purses containing identification and credit and bank cards, stealing mail, including bank and credit card statements, pre-approved credit offers, telephone calling cards and tax information, completing a “change of address form” to divert personal mail to another location, rummaging through personal trash, or the trash of businesses, for data in a practice known as “dumpster diving, fraudulently obtaining credit reports by posing as landlords, employers, or someone else who may have a legitimate need for the information, getting business or personnel records at work, finding personal information in a home, intercepting information on the internet, buying personal in-
Trade Commission (FTC) estimated the loss to businesses and financial institutions from identity theft to be approximately $47.6 billion and the cost to individual consumers to be approximately $5 billion.164 The FTC also estimated that 8.3 million adults discovered in 2005 that they were victims of identity theft.165 Those victims experienced upwards of $13,000 in damages and spent as many as 55-130 hours resolving the problem.166 Some victims even experienced non-economic damages such as having their utilities cut off, being denied credit, being subjected to criminal investigation, being arrested, and suffering harassment from collection agencies.167 Furthermore, the terrorists involved in the 1994 bombing of the World Trade Center and those connected with the September 11, 2001 attacks utilized identity theft.168

With respect to illegal immigration, however, the modern intersection with identity theft was the Immigration Reform and Control Act of 1986 (IRCA), which introduced sanctions for employers who hire and exploit illegal immigrants.169 Relatively well-paying employment is the primary formation from "inside" sources, illegally obtaining tax information or credit reports by claiming to have a legal right of access to these records, or posing as telemarketers to obtain personal information. See MARGARET C. JASPER, OCEANA'S LAW FOR THE LAYPERSON: IDENTITY THEFT AND HOW TO PROTECT YOURSELF 1-2 (2002) (presenting ways identity thieves obtain peoples' identities for exploitation). For a further discussion of how identity thieves obtain personal information, see supra note 116.


165. See SYNOVATE, FEDERAL TRADE COMMISSION—2006 IDENTITY THEFT SURVEY REPORT 4 (2007), available at http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf (reporting that 8.3 million United States adults discovered that they were victims of some form of identity theft in 2005). Of that group, 3.2 million reported that their victimization was limited to one or more of their existing credit accounts, 3.3 million reported misuse of a non-credit card account, and 1.8 million reported that their personal information had been used to open a new financial account. See id. (categorizing victims of identity theft).

166. See id. at 5 (providing chart on costs of identity theft). According to the report, the median value of goods and services stolen by identity thieves was $500, but for 5% the amount was $13,000. See id. (same). Also, while most victims paid little or no out-of-pocket expenses, for 5% of victims that amount was $2,000. See id. (same). Out-of-pocket expenses for victims included any lost wages, legal fees, payment of fraudulent debts, and miscellaneous expenses such as those from notarization, copying, and postage. See id. at 6 (explaining findings related to out-of-pocket expenses). For victims, the median amount of hours spent resolving their problem was four hours, but for 5% of all victims it was 130 hours. See id. at 4 (detailing time spent solving issues arising out of identity theft).

167. See id. at 7 (noting problems that victims reported other than direct or out-of-pocket damages).


incentive for illegal immigrants to enter the United States and expose themselves to criminal consequences because the countries they leave behind typically have weak economies with high levels of unemployment.\footnote{170} For example, in 2007, the United States’ gross domestic product per capita was $45,800 and its unemployment was about 4.6%, but Mexico’s gross domestic product per capita was only $12,400 and, while its unemployment was 3.7%, 40% of the population suffered from asset-based poverty.\footnote{171} Under IRCA, for the first time, illegal immigrants needed to provide documentation in order to obtain or maintain their employment, which generated an ever-increasing demand for fraudulent identification because employers had to verify the eligibility of their employees.\footnote{172} Regrettably, that demand has been easily met, as demonstrated by Mr.


In 2005, identity theft for the purposes of obtaining employment accounted for 1% of the total incidents. See SYNOVATE, supra note 165, at 21 (providing statistics on identity theft). That number may change, however, given the increase in the number of Immigration and Customs Enforcement raids targeted at employers of illegal immigrants. See Anna Gorman, Theft of Identity Compounds the Crime, L.A. TIMES., July 9, 2007, at B3 (reporting that “[u]nder pressure from federal authorities to verify their workers’ legal status, more employers are checking the validity of Social Security numbers, and that has caused many illegal immigrants to use stolen rather than made-up numbers to get jobs, immigration officials said”); Jean Hopfensperger, Agents Intensify Hunt for Illegal Immigrants, STAR TRIBUNE, Apr. 22, 2007, at B1 (reporting increase in raids against illegal immigrants resulting from increase in Immigration and Customs Enforcement funding). For example, around the start of 2008, federal agents in Dallas, Texas arrested at least twenty-eight people in an identity theft ring designed to provide illegal immigrants with employable identifications. See Underground Crime Ring: Immigrants Steal Identities; Employers Look Away, DALLAS MORNING NEWS, Jan. 9, 2008, at 12A (editorializing busted identity theft crime ring in Dallas). Employers, such as Wal-Mart and Swift, were involved in the raids. See id. (same).


Montejo, who simply walked into the United States and purchased the false Alien Registration and Social Security cards for $60.\textsuperscript{173}

It is currently unknown how many of the at least 11.8 million illegal immigrants in the United States are utilizing fraudulent identification, let alone how many are involved in identity theft.\textsuperscript{174} Regardless of their number, those involved in identity theft possess a great deal of power over their unsuspecting victims, whether or not the thieves are aware of their victims’ existence.\textsuperscript{175} The victims, however, are not always who you would expect.\textsuperscript{176} For example, one day Camber Lybbert, a mother living in Utah, received a call from her bank questioning why it had Mrs. Lybbert’s three-year-old daughter’s social security number on its files for two credit cards and two auto loans, with an outstanding balance exceeding $25,000.\textsuperscript{177} An investigation revealed that Joe Tinoco, an illegal immigrant living in the United States, had been using Mrs. Lybbert’s daughter’s social security number to obtain “a job, to get a car, and provide for his family.”\textsuperscript{178} Unfortunately, despite the absence of malicious intent by Mr. Tinoco, it took the Lybberts five months to remedy their three-year-old daughter’s credit, as Mrs. Lybbert “spent 30 hours or more a week making telephone calls, feeling passed from one agency or voice-mail system to another.”\textsuperscript{179}

Identity theft creates the potential for countless additional victims.\textsuperscript{180} An illegal immigrant can also cause harm by utilizing someone else’s identity for employment purposes when the victim is unable to work and receiving social security benefits from the government.\textsuperscript{181} If the illegal immigrant is using that victim’s social security number to work, eventually

\textsuperscript{173.} See United States v. Montejo, 442 F.3d 213, 214 (4th Cir. 2006) (reciting case facts). For a discussion of Montejo, see supra notes 2-8 and accompanying text.


\textsuperscript{175.} See JASPER, supra note 163, at ix (explaining that victims of identity theft “bear the tremendous emotional burden that identity theft causes, including loss of reputation, damage to their credit rating, and the time, expense and nuisance of trying to clear their name”); see also H.R. Rep. No. 108-528, at 4-6 (2004), reprinted in 2004 U.S.C.C.A.N. 779, 780-82 (presenting impact of identity theft on national security and economy).

\textsuperscript{176.} See John Leland, Stolen Lives: Some ID Theft Is Not for Profit, but to Get a Job, N.Y. TIMES, Sept. 4, 2006, at Al (presenting story of Camber Lybbert whose three-year-old daughter had her identity stolen by illegal immigrant).

\textsuperscript{177.} See id. (recalling phone call from bank).

\textsuperscript{178.} See id. (describing immigrants’ motivation for stealing three-year-old’s identity).

\textsuperscript{179.} See id. (explaining actions taken by Lybbert’s to solve problem).


\textsuperscript{181.} See id. (same).
the Social Security Administration may inquire into whether the victim is defrauding the government.182 This could lead to many problems for the victim, including the potential loss of necessary disability benefits.183 Additionally, if an illegal immigrant commits a crime and gives a victim's identification to authorities when arrested, a later arrest warrant may be issued in the victim's name and the victim's information will be entered in the National Crime Information database, which can have serious repercussions.184 Furthermore, once an illegal immigrant possesses someone else's identity, the immigrant can use the identity to open a bank account, obtain credit, apply for a bank or department store credit card, or lease an apartment or car.185 The illegal immigrant could then obtain money, goods, or services in the victim's name, which could destroy the victim's credit.186 These examples illustrate that illegal immigration is absolutely not a victimless crime, as some assert.187

182. See id. (discussing action Social Security Administration will take when investigating fraud claims).
184. See Kurt M. Saunders & Bruce Zucker, Counteracting Identity Fraud in the Information Age: The Identity Theft and Assumption Deterrence Act, 8 CORNELL J. L. & PUB. POL'Y 661, 666-67 (1999) (citing Rogan v. City of Los Angeles, 668 F. Supp. 1384 (C.D. Cal. 1987)) (recounting story of Terry Rogan, who had his identity stolen by criminal). In 1981, a criminal escaped from an Alabama prison, obtained a copy of Rogan's birth certificate and began using Rogan's identity in California after obtaining a driver's license and identification in his name. See id. at 666 (discussing how criminal stole Rogan's identity). In 1982, the criminal was arrested by Los Angeles Police on suspicion of murder, released, and later had an arrest warrant issued against him in Rogan's name for two robbery-murders. See id. (explaining why warrant was issued in Rogan's name). Subsequently, the police entered the warrant into the National Crime Information Center (NCIC) database, which alerts all police officers across the country to the existence of the warrant. See id. (describing why Rogan's name was in NCIC). Over the next year, Terry Rogan was arrested four times, twice at gunpoint, in Michigan and Texas by police responding to the outstanding warrant. See id. at 666-67 (recounting Rogan's arrests stemming from warrant information on NCIC).
186. See id. at 91 (detailing what thief can do with stolen identity). The commentator noted that under this scenario, identity theft has two victims: (1) the person who is impersonated; and (2) the firm that extends credit to the impersonator because it will not recover that credit. See id. (noting victims of identity theft). Typically, impersonated victims do not need to repay for the goods and services, but may suffer secondary effects, such as harassment by a collection agency. See id. (explaining secondary effects to impersonated victims). A collection agency can initiate collection against the victim, which will involve phone calls, written demands for payment, refusal to extend credit, legal action, credit reporting and, in extreme cases, may render the victim unemployable or subject to imprisonment. See id. (listing potential damage to identity theft victims).
If the Supreme Court adopts a broad interpretation of the scienter requirement, as this Comment advises against, illegal immigrants will be able to “use the identification of another person fraudulently in the commission of another enumerated felony so long as [they remain] ignorant of whether [the] other person is real.”188 In other words, illegal immigrants, as well as analogous identity thieves, could ultimately escape the penalty enhancement’s stern punishment, despite illegally entering the United States, knowingly obtaining false documents, being aware that the identities could actually belong to someone, and using those identities to further their illegal residency.189 In the words of one circuit court judge, this presents the government with an “often impossible burden” of “proving beyond a reasonable doubt that each of the thousands, if not millions, of holders of false green cards knows that the false means of identification he possesses is that ‘of another person.’”190 Even the First Circuit, which held in favor of the expansive scienter requirement, acknowledged that “Congress arguably intended ‘aggravated identity theft’ to cover both the


188. See United States v. Hurtado, 508 F.3d. 603, 609 (11th Cir. 2007) (discussing impact of narrow scienter requirement), cert. denied, 128 S.Ct. 2903 (2008). Currently, the Supreme Court has not granted certiorari in order to resolve the circuit split. See United States v. Mendoza-Gonzalez, 520 F.3d 912, 915 (8th Cir. 2008) (interpreting scienter requirement expansively), petition for cert. filed, (U.S. July 15, 2008) (No. 08-5316); Hurtado, 508 F.3d at 609 (same); United States v. Montejo, 442 F.3d 213, 217 (4th Cir. 2006) (same).

Identity theft by illegal immigrants is not the only type of identity theft that will be more difficult to prosecute under the narrow scienter requirement. See generally United States v. Godin, 534 F.3d 51 (1st Cir. 2008) (involving bank fraud). For example, in Godin, Ms. Cori A. Godin successfully used the narrow scienter requirement to avoid punishment under ITPEA for defrauding eight banks credit unions. See id. at 54 (recounting facts of case). Ms. Godin altered her own social security number to fabricate seven different numbers, one of which actually belonged to someone else. See id. (describing fraudulent actions taken by Godin). With that number, Ms. Godin opened a bank account. See id. (explaining identity theft). The First Circuit reversed Ms. Godin’s conviction under ITPEA because the government failed to prove that she knew the number belonged to a real person. See id. at 53-54 (providing roadmap for opinion).

189. See generally Hurtado, 508 F.3d at 609 (discussing impact of narrow scienter requirement).

190. See United States v. Villanueva-Sotelo, 515 F.3d 1234, 1255 (D.C. Cir. 2008) (Henderson, J., dissenting) (“Except for the forger himself, proving beyond a reasonable doubt that each of the thousands, if not millions, of holders of false green cards knows that the false means of identification he possesses is that of another person would place on the prosecution [a]n often impossible burden” (citing United States v. Chin, 981 F.2d 1275, 1280 (D.C. Cir. 1992))), petition for cert. filed, 77 U.S.L.W. 3308 (U.S. Nov. 7, 2008) (No. 08-622).
crime committed by" the forger/seller of the fraudulent identification "and [the crime] committed by the undocumented immigrant." 191

Consequently, ITPEA presents an opportunity for immigration reform because of identity theft's victimization and ITPEA's adverse impact. 192 Senator David Vitter of Louisiana, who is credited with leading the opposition that killed the Immigration Reform Act of 2007 (IRA2007), stated that "the American people want [Congress] to start with enforcement, both at the border and at the workplace, and don't want promises. They want action, they want results, they want proof, because they've heard all the promises before." 193 In a government that relies on compromises and coalitions, a revision to ITPEA could appease those calling for stricter enforcement and enable a revised version of IRA2007, with its earned-citizenship, to finally achieve the requisite support. 194

This argument is bolstered by the success of ITPEA in combating the more common forms of identity theft. 195 The FTC reported that from

191. See Godin, 534 F.3d at 60 ("Congress arguably intended 'aggravated identity theft' to cover both the crime committed by the third party and that committed by the undocumented immigrant").

192. Bash & Koppel, supra note 70 (reporting Senate's failure to pass Immigration Reform Act of 2007 (IRA2007)). The vote was forty-six to fifty-three, fourteen shy of the requisite amount to pass the bill onto the House of Representatives. See id. (describing voting results). Senator Charles Schumer of New York, a supporter of IRA, noted that "[e]veryone knows that our immigration laws are broken and a country loses some of its greatness when it can't fix a problem that everyone knows is broken. And that's what happened today." See id. (providing Senator Schumer's analysis of failed vote). For a discussion of IRA2007, see supra notes 74-75 and accompanying text.

193. See id. (quoting Senator Vitter's analysis of defeat of IRA2007); Bruce Alpert, Immigration Bill Fades Away; Vitter Has Key Role in Defeat of Measure, TIMES-PICAYUNE, June 29, 2007, at 1 (reporting on Senator Vitter's role in defeat of Immigration Reform Act of 2007).

194. See id. (noting senators' optimism that future comprehensive immigration bill would pass). In the wake of the bill's demise, supporters of IRA2007 called on their colleagues to next time pass legislation that would work. See id. (describing future wishes of IRA2007 supporters). Senator Edward Kennedy optimistically explained that "[y]ou cannot stop the march for progress in the United States, and on this issue, I have every hope and every expectation that we'll be ultimately successful." See id. (presenting Senator Kennedy's optimism "that the fight over immigration was a step forward that could ultimately lead to new laws within the next few years").

2003 to 2005 the percentage of the population experiencing identity theft dropped from 4.6% to 3.7%, the average amount obtained by a thief dropped from $4,789 in 2003 to $1,882 in 2005, and total losses from identity theft dropped from $47.6 billion in 2003 to $15.6 billion in 2005.\textsuperscript{196} Therefore, clarifying the circuit split in support of the narrow scienter requirement, which might be achieved by moving the underlying immigration felonies to the broader § 1028A(a)(2), could be equally effective in reducing the identity theft related to immigration violations.\textsuperscript{197}

Insufficient punishment leaves perpetrators free to quickly reenter the United States illegally, as demonstrated by Mr. Villanueva-Sotelo, who entered the United States three times.\textsuperscript{198} Under the narrow scienter requirement, however, illegal immigration would no longer be a low-risk, high-reward game, where, if caught, the illegal immigrant can avoid ITPEA's penalty enhancement by claiming ignorance of the victimization of a real person.\textsuperscript{199} The narrow scienter requirement would essentially

\begin{itemize}
  \item U.S.C. § 1030 (2008) (prohibiting computer intrusion, damages, and access beyond authorization);
  \item Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 (2008) (prohibiting unauthorized interception and disclosure of electronic communications transmitted or stored on covered networks);
\end{itemize}


\textsuperscript{197.} Compare 18 U.S.C. § 1028A(a)(1) (2008) ("In general. Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years."). with 18 U.S.C. § 1028A(a)(2) (2008) ("Terrorism offense. Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years." (emphasis added)).

\textsuperscript{198.} See United States v. Villanueva-Sotelo, 515 F.3d 1234, 1236 (D.C. Cir. 2008) (recounting facts of case), \textit{petition for cert. filed}, 77 U.S.L.W. 3308 (U.S. Nov. 7, 2008) (No. 08-622). Mr. Villanueva-Sotelo pleaded guilty to the charge that he committed fraud and misuse of a visa, permit, or other document, but under that charge the judge has discretion on sentencing and Mr. Villanueva-Sotelo will be eligible for parole, despite his identity theft. See \textit{id.} at 1250 (noting that Mr. Villanueva-Sotelo did not totally escape punishment under expansive scienter requirement); see also 18 U.S.C. § 1546(a) (2008) (criminalizing fraud related to and misuse of visas, permits, and other documents). ITPEA, a penalty enhancement, however, was enacted in response to other criminal statutes offering insufficient retribution because judges failed to grasp the gravity of the crime and provided nominal sentences to identity thieves. See H.R. Rep. No. 108-528, at 5 (2004), \textit{reprinted in} 2004 U.S.C.C.A.N. 779, 781 (presenting "examples of instances in which persons involved in identity theft received little or no prison time" in order to demonstrate need for penalty enhancement).

\textsuperscript{199.} See 18 U.S.C. § 1028A(a)(1), (b) (2008) (providing for mandatory two year term of imprisonment to run consecutively to underlying offense and denying any opportunity for probation).
make identity theft a dangerous game where all that matters is that the illegal immigrant used someone else's identity; knowledge of that fact would be irrelevant. See United States v. Mendoza-Gonzalez, 520 F.3d 912, 915 (8th Cir. 2008) (holding that "§ 1028A(a)(1) is unambiguous and that the Government [is] not required to prove that [the defendant] knew that [the victim] was a real person to prove that he violated § 1028A(a)(1)"); petition for cert. filed, United States v. Hurtado, 508 F.3d 603, 609 (11th Cir. 2007) (concluding that "[the defendant] did not need to know that [the victim] was a real person to violate § 1028A(a)(1)"); cert. denied, 128 S.Ct. 2903 (2008); United States v. Montejo, 442 F.3d 213, 217 (4th Cir. 2006) (finding that "the defendant need not be aware of the actual assignment of the numbers to an individual to have violated [§ 1028A(a)(1)]").

Although the penalty enhancement may not dissuade everyone, this could become a strong deterrent for many because a conviction under ITPEA mandates a two-year term of imprisonment that must run consecutively to the underlying offense, without opportunity for parole. That penalty enhancement, although requiring one of the underlying convictions, is a powerful disincentive for illegal immigrants seeking employment in the United States because they would be cut off from their families and livelihood, and face deportation immediately following their extended imprisonment. Consequently, by increasing the risk of a conviction and the severity of the subsequent punishment for employment related identity theft, ITPEA can decrease the attractiveness of seeking employment in the United States, which is the chief incentive for illegal immigration, as well as protect unaware, innocent victims. Thus, the easier it is to penalize identity thieves under ITPEA, the more effective it should be at curbing illegal immigration.

V. Conclusion

Citizens of the United States have called for comprehensive immigration reform in response to the continuous tide of illegal immigrants flood-
Regrettably, over the last decade, Congress has repeatedly failed to sufficiently answer the demands and concerns of its constituents, who are calling for stiffer legislation responsive to the problem of illegal immigration. Fortunately, the recent circuit split over ITPEA, a penalty enhancement, which criminalizes aggravated identity theft, provides an opportunity for Congress to finally provide sufficient and comprehensive immigration reform. ITPEA requires that a defendant has been convicted of both an underlying felony enumerated in ITPEA and aggravated identity theft under ITPEA before the penalty enhancement is triggered. Once triggered, ITPEA is not only fair, but powerful because those subject to the penalty enhancement face a mandatory two-year term of imprisonment, which must be served consecutively to the underlying felony, without parole.

The recent circuit split, however, is over whether the government needs to prove that the defendant, when committing an identity theft, knew the fraudulent identity belonged to an actual person. In 2009 the Supreme Court will resolve this split regarding the inherent ambiguity in ITPEA. Unfortunately, a synthesis of the circuit courts' opinions indicates that the Court will likely need to rely on the rule of lenity to resolve the ambiguity. A resolution that relies on the rule of lenity will be unfavorable to United States' citizens and legitimate immigrants because it perpetuates illegal immigrants' ability to commit identity theft.

206. For a discussion of public sentiment towards illegal immigration and the tide of illegal immigration into the United States, see supra notes 65-69, 76-82 and accompanying text.

207. For a discussion of contemporary legislative reaction to the negative public sentiment regarding illegal immigration and its rejection by the United States, see supra notes 70-82 and accompanying text.

208. See United States v. Godin, 534 F.3d 51, 55-56 (1st Cir. 2008) (explaining that “the circuits are divided on the issue of whether the “knowingly” scienter requirement in § 1028A(a)(1) extends to “of another person”). For a discussion of the opportunity ITPEA presents for immigration reform in the United States, see supra notes 192-205 and accompanying text.


211. For a discussion of the circuit split related to ITPEA, see supra notes 91-151 and accompanying text.

212. See Supreme Court to Decide, supra note 27 (reporting on Supreme Court granting certiorari on identity theft issue); see also United States v. Flores-Figueroa, 274 Fed. Appx. 501 (8th Cir. 2008) (upholding narrow scienter requirement), cert. granted, 129 S.Ct. 457 (2008).

213. For a synthesis of the circuit courts' opinions and the likely holding of the Supreme Court, see supra notes 91-151 and accompanying text.

214. For a discussion of the impact of the expansive scienter requirement, see supra notes 188-201 and accompanying text.
If Congress intervenes, however, as this Comment recommends, and resolves the circuit split in favor of a narrow scienter requirement by clearly not requiring the government to prove that the defendant knew the identification belonged to a real person, then Congress would effectively increase the likelihood that illegal immigrants utilizing false identification to obtain work and government benefits would face substantial punishment. This is important because illegal immigrants often purchase a fraudulent identification document or select a random social security number to further their illegal residency without ever knowing whether the identification belongs to a real person. Despite the absence of malicious intent by an illegal immigrant in this common scenario, United States citizens and legitimate immigrants are increasingly victimized by this form of identity theft. The narrow scienter requirement in ITPEA would curb illegal immigration by ending the low-risk, high-reward scenario illegal immigrants currently face when they enter the United States seeking employment.

According to government statistics, since ITPEA’s implementation, identity theft has decreased in the United States. A correlation exists and therefore, when viewed through a deterrence theory lens, the argument can be made that ITPEA has proven to be effective at reducing identity theft generally. As a result, a strengthened, or favorably clarified, ITPEA may be further effective at reducing illegal immigration into the United States because illegal immigrants rely on identity theft in order to gain employment. Their need for identity theft is the result of the Immigration Reform and Control Act, passed by Congress in 1986, which introduced sanctions for employers who hire and exploit illegal immi-

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215. See, e.g., United States v. Mendoza-Gonzalez, 520 F.3d 912, 915 (8th Cir. 2008) (holding that “§ 1028A(a)(1) is unambiguous and that the Government was not required to prove that [the defendant] knew that [the victim] was a real person to prove that he violated § 1028A(a)(1)”), petition for cert. filed, (U.S. July 15, 2008) (No. 08-5316); United States v. Hurtado, 508 F.3d 603, 609 (11th Cir. 2007) (same), cert. denied, 128 S.Ct. 2903 (2008); United States v. Montejo, 442 F.3d 213, 217 (4th Cir. 2006) (same).

216. For examples of illegal immigrants utilizing random identification, which actually belonged to real people, see supra notes 2-16 and accompanying text.

217. For a discussion of the victimization of identity theft and the harm to which illegal immigrants expose their victims, see supra notes 174-87 and accompanying text.

218. For a discussion of the impact of the narrow scienter requirement on illegal immigration, see supra notes 195-205 and accompanying text.

219. For a discussion of the current state of identity theft in the United States, see supra notes 195-96 and accompanying text.

220. For a discussion of the current state of identity theft in the United States and its relation to ITPEA and other federal statutes that directly or indirectly address identity theft, see supra notes 163-87 and accompanying text. For a discussion of deterrence theory, see supra note 129.

221. For a further discussion of how illegal immigrants utilize identity theft in the United States, see supra notes 163-87 and accompanying text.
grants. The legislation was impactful because the primary incentive for illegal immigrants to enter the United States is the hope of obtaining relatively well-paid employment.

Furthermore, after the demise of IRA2007, opponents of the bill called for stricter enforcement mechanisms to be included in any illegal immigration reform legislation. A revised ITPEA could serve that function because it has already proven successful in other contexts and likely fulfills Congress's original intent for ITPEA. Also, if ITPEA satisfies the opponents of IRA2007 in Congress, then ITPEA could be vital in the future passage of a revived IRA2007, which originally included powerful tools for illegal immigrants who have long resided in and contributed to the United States to gain citizenship or legal immigrant status.

Therefore, Congress has the opportunity to provide a significant response to the demands for immigration reform by proactively resolving any ambiguity in ITPEA before the Supreme Court has the opportunity to reach an unfavorable resolution. If Congress acts quickly and effectively by updating ITPEA and resolving the circuit split in favor of the narrow scienter requirement, then Congress can impact the chief incentive for illegal immigrants entering the United States and stem the tide of illegal immigration. This legislation will be viewed favorably by vast segments of society, increase our national security and economic stability, and restore public confidence in the government's ability to respond to concerns over continued illegal immigration.

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223. See Noriega-Perez v. United States, 179 F.3d 1166, 1170 (9th Cir. 1999) (citing H.R. REP. No. 101-723(i), at 46 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5649-50) (noting that "employment is the magnet that attracts aliens here illegally").

224. See Bash & Koppel, supra note 70. For a discussion of the opposition to IRA2007, see supra notes 192-93 and accompanying text.

225. For discussion of the success of ITPEA, see supra notes 195-96 and accompanying text.

226. For a discussion of IRA2007, see supra notes 74-75 and accompanying text.

227. For a discussion of Congress's opportunity to reform immigration, see supra notes 188-205 and accompanying text.

228. For a discussion of how a narrow scienter requirement in ITPEA can effect employment of illegal immigrants, see supra notes 195-205 and accompanying text.

229. For a discussion of the positive impact of the narrow scienter requirement, see supra note 197 and accompanying text.