

## Restoring the Balance Between Immigration Self-Reporting Requirements and the Fifth Amendment

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## RESTORING THE BALANCE BETWEEN IMMIGRATION SELF-REPORTING REQUIREMENTS AND THE FIFTH AMENDMENT

SHEENA KELLEY<sup>†</sup>

### INTRODUCTION<sup>1</sup>

The small boat raced the rising sun, straining to reach shore before losing the veil of the morning haze. The tension on board was as palpable as the muggy August air. Thirty-five people sat packed together on the floor of the boat, unable to move and too afraid to try. They watched the two men piloting the boat and anxiously awaited their signal. Finally, they were told to get ready. The boat jerked forward as it hit ground.<sup>2</sup> Cursing, the captain ordered them off the boat. They scurried over the side of the boat and ran ashore to conceal themselves in the bushes and await the next leg of their journey. As soon as the last passenger cleared the side, the boat sped away.

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<sup>1</sup> The following narration is based loosely on the facts of *United States v. Garcia-Cordero*, 595 F. Supp. 2d 1312 (S.D. Fla. 2009), *aff'd*, 610 F.3d 613 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 547.

<sup>2</sup> Disregard for human life and acts of violence are not uncommon in the business of alien smuggling. *See, e.g., Alien Smuggling*, U.S. IMMIGR. SUPPORT, <http://www.usimmigrationsupport.org/alien-smuggling.html> (last visited Sept. 16, 2012). All too often, aliens are injured or killed as a result of dangerous conditions during the journey or in an attempt to evade authorities. *See, e.g., id.*; Brian W. Robinson, *Smuggled Masses: The Need for a Maritime Alien Smuggling Law Enforcement Act*, ARMY LAW. at 20, 20–21, Aug. 2010, available at [www.loc.gov/rr/frd/Military\\_Law/pdf/08-2010.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/08-2010.pdf); Amanda Lee Myers, 'Major' Human Smuggling Cell Busted in Arizona, USATODAY.COM (Nov. 10, 2010), [http://www.usatoday.com/news/nation/states/arizona/2010-11-10-2156779578\\_x.htm](http://www.usatoday.com/news/nation/states/arizona/2010-11-10-2156779578_x.htm).

The journey had reached its end. Coast Guard Officers patrolling the area heard a boat run aground and arrived in time to see several people jump from the boat and run ashore. The officers searched the bushes and found thirty-five people whom they determined to be Cuban nationals. None of the Cuban nationals had immigration documents authorizing them to enter the United States. The boat and its two-man crew were also apprehended nearby. Officers found a satellite phone and a GPS on board. These devices revealed that the boat had left Pinar del Rio, Cuba on August 12, 2008 and traveled to Loggerhead Key, Florida, where it was apprehended on August 13, 2008. Loggerhead Key is not a designated port of entry.<sup>3</sup>

The two men who piloted the boat were charged with conspiracy, thirty-five counts of encouraging and inducing aliens to enter the United States in violation of 8 U.S.C. § 1324(a)(2)(A)(iv), and attempting to reenter the United States after removal.<sup>4</sup> These men were also charged with thirty-five counts of bringing unauthorized aliens to the United States and failing to immediately bring and present them to an immigration officer for inspection.<sup>5</sup> Not only did these men violate U.S. law by bringing undocumented Cuban nationals into the United States, they broke the law by not reporting their own illicit activities immediately to the government.

To facilitate information gathering, the government has increasingly relied upon statutes that create an affirmative duty for individuals to report information to the government.<sup>6</sup> These statutes allow the government to operate effectively in areas such as immigration law, where it would be inefficient, and likely impossible, to obtain this information through independent means.<sup>7</sup> However, the government's legitimate interest in enforcing these reporting provisions often is in tension with individuals' Fifth Amendment right to be free from compelled self-incrimination.<sup>8</sup> The Supreme Court has been called on to

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<sup>3</sup> *Garcia-Cordero*, 595 F. Supp. 2d at 1313–14.

<sup>4</sup> *Id.* at 1313.

<sup>5</sup> *Id.*

<sup>6</sup> Jeremy H. Temkin, "Hollow Ritual[s]": *The Fifth Amendment and Self-Reporting Schemes*, 34 UCLA L. REV. 467, 467–68 (1986).

<sup>7</sup> *California v. Byers*, 402 U.S. 424, 455 (Harlan, J., concurring) (1971) (noting that self-reporting requirements are essential to the government's ability to collect income taxes).

<sup>8</sup> Temkin, *supra* note 6, at 468.

examine several of these reporting provisions and has recognized the need to balance the competing interests of the government and of private individuals.<sup>9</sup>

In the field of immigration, self-reporting statutes are used to facilitate the screening and tracking of applicants seeking admission to the United States.<sup>10</sup> Violations of these statutes traditionally result in civil consequences, such as exclusion or deportation.<sup>11</sup> However, federal immigration law is becoming increasingly more criminalized<sup>12</sup> and, as a result, self-reporting requirements now appear in felony provisions of immigration law.<sup>13</sup> Notable among these is 8 U.S.C. § 1324(a)(2)(B)(iii),<sup>14</sup> which is a self-reporting provision that requires anyone bringing undocumented aliens to the United States to immediately bring those aliens to a designated port of entry<sup>15</sup> and present them to an immigration officer for inspection.<sup>16</sup> This is referred to as the “bring and present” requirement.<sup>17</sup>

The tension between government need and Fifth Amendment privilege created by the “bring and present” requirement is evident.<sup>18</sup> However, the Supreme Court has held that not all self-reporting statutes are unconstitutional—the privilege against self incrimination “may not be invoked to resist

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<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g.*, 8 U.S.C. § 1225(a)(5) (2006 & Supp. II 2008) (requiring applicants for admission to the United States to answer questions under oath regarding their intentions); 8 U.S.C. § 1305 (2006).

<sup>11</sup> *See, e.g.*, 8 U.S.C. § 1225(b)(1)(A)(i) (providing for the removal of applicants for admission that are deemed inadmissible); 8 U.S.C. § 1306(b) (2006) (making failure to notify the Attorney General of a change in address a misdemeanor and providing that the alien shall be removed regardless of whether the offense is prosecuted criminally); 8 U.S.C. § 1324d (2006) (prescribing civil penalties for failure to depart when so ordered).

<sup>12</sup> *See generally* Gia E. Barboza, *From the Legal Literature*, 45 CRIM. L. BULL. 511 (2009).

<sup>13</sup> *See, e.g.*, 8 U.S.C. § 1324(a)(2)(B)(iii) (2006) (making it a felony to not bring and present an alien to an immigration officer upon arrival).

<sup>14</sup> *Id.*

<sup>15</sup> A port of entry is a location, designated by statute, staffed by U.S. Customs and Border Protection personnel and used for processing individuals, agricultural products, and merchandise being imported into the United States. *See* 8 C.F.R. § 100.4(a) (2009); *Ports of Entry and User Fee Airports*, U.S. CUSTOMS & BORDER PROTECTION, [http://www.cbp.gov/xp/cgov/trade/trade\\_outreach/ports.xml](http://www.cbp.gov/xp/cgov/trade/trade_outreach/ports.xml) (last visited Sept. 16, 2012).

<sup>16</sup> 8 U.S.C. § 1324(a)(2)(B)(iii).

<sup>17</sup> *United States v. Garcia-Cordero*, 610 F.3d 613, 615 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 547.

<sup>18</sup> Temkin, *supra* note 6, at 468.

compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."<sup>19</sup>

To determine which reporting requirements fall within this regulatory regime exception, the Supreme Court established a three-factor test in *Albertson v. Subversive Activities Control Board*.<sup>20</sup> This test requires courts to evaluate whether the reporting requirement (1) is aimed at a highly selective group inherently suspect of criminal activity, (2) is asserted in an essentially regulatory area of inquiry, and (3) creates a substantial likelihood of prosecution.<sup>21</sup> While this test was adequate when established, its continued application has led to the inequitable denial of rights due to the increasingly criminal nature of areas of law that were traditionally regulatory, such as immigration law.<sup>22</sup> The need to balance regulatory reporting provisions, such as the "bring and present" requirement, and the privilege against compelled incrimination has been a tenuous one—more so in light of the increasing criminalization of regulatory law.<sup>23</sup>

This Note argues that the test currently relied on to maintain this balance is no longer effective and must be replaced. Part I analyzes the history of immigration law and limitations on Fifth Amendment protections.<sup>24</sup> Part I also examines the legislative history of 8 U.S.C. § 1324(a)(2)(B)(iii) and its intended use as an anti-smuggling statute.<sup>25</sup> Part II discusses the factors used by courts to evaluate Fifth Amendment claims and courts' treatment of various reporting provisions.<sup>26</sup> This Part also discusses how these factors, as they are currently applied by the courts, no longer adequately protect individuals' Fifth Amendment rights.<sup>27</sup> Part III illustrates the inadequacies in the current application of these factors by applying them to the

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<sup>19</sup> *Balt. City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 556 (1990).

<sup>20</sup> *See generally* *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965) (laying out the three-factor test for determining which reporting requirements fall within the exception).

<sup>21</sup> *See* *United States v. Adair*, No. 88-1264, 1988 WL 114791 (6th Cir. Oct. 31, 1988).

<sup>22</sup> *Infra*, Part II.

<sup>23</sup> *Infra*, Part I.

<sup>24</sup> *Infra*, Part I.

<sup>25</sup> *Infra*, Part I.

<sup>26</sup> *Infra*, Part II.

<sup>27</sup> *Infra*, Part II.

“bring and present” requirement of 8 U.S.C. § 1324(a)(2)(B)(iii).<sup>28</sup> Part IV suggests that the factors evaluated by courts must be fundamentally altered to guarantee the continued protection of the Fifth Amendment privilege to be free from compelled self-incrimination.<sup>29</sup> This Part suggests that a more effective test would restrict the evaluation of the nature of inquiry to the statute itself and would require courts to conduct a more structured evaluation of the group targeted by the statute.<sup>30</sup>

## I. IMMIGRATION LAW AND THE FIFTH AMENDMENT

### A. *The Evolution of Immigration Law*

Immigration law was traditionally a means of regulating the entry and naturalization process of aliens. In the beginning, the only intersect between criminal law and immigration law was in the denial of entry to those with an existing criminal record.<sup>31</sup> However, through the enactment of successive legislation, the two areas of law have become hopelessly intertwined. This merger between immigration law and criminal law has occurred in three general ways: (1) through the proliferation of criminal laws in the area of immigration, (2) harsher sentences for immigration violations, and (3) changes in immigration enforcement practices. The substantial changes in these three areas have resulted in immigration law that is irreparably intertwined with criminal law.

#### 1. The Proliferation of Criminal Offenses in Immigration Laws

The United States did very little to regulate immigration through most of the 19th century.<sup>32</sup> Initially, aliens were only deportable if, within a year of arrival, they became a public charge.<sup>33</sup> The grounds for deportation were expanded in 1917 to include any alien who, within five years of arrival, had been

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<sup>28</sup> *Infra*, Part III.

<sup>29</sup> *Infra*, Part IV.

<sup>30</sup> *Infra*, Part IV.

<sup>31</sup> See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006).

<sup>32</sup> See Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1924–1965*, 21 LAW & HIST. REV. 69, 73 (2003); Stumpf, *supra* note 31 (noting that originally only those with prior criminal histories were denied entry).

<sup>33</sup> See Ngai, *supra* note 32, at 74.

convicted of a felony, a crime involving moral turpitude,<sup>34</sup> or prostitution.<sup>35</sup> The first steps towards the criminalization of immigration law began in the 1920s with the enactment of legislation that set an annual cap on the number of aliens who would be allowed to immigrate legally.<sup>36</sup> This legislation created a divide between those aliens who were in the U.S. lawfully and those who entered illegally and greatly increased the need for deportation proceedings.<sup>37</sup> Shortly thereafter, Congress made it a crime for aliens to unlawfully enter the country.<sup>38</sup>

Since first criminalizing illegal entry, there has been a steady increase in both the number of criminal offenses and the scope of offenses covered under immigration law. Congress passed several immigration initiatives in the late 1980s<sup>39</sup> and the 1990s<sup>40</sup> that allowed for deportation of aliens for an expanded list

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<sup>34</sup> “Moral turpitude” is a vague phrase which, despite over 100 years of judicial application, has managed to evade any precise judicial or statutory definition. *See, e.g.*, *Johnson v. Holder*, 413 F. App’x 435, 437 (3d Cir. 2010) (defining moral turpitude as conduct which is “inherently base, vile, or depraved, contrary to the accepted rules of morality”), *vacated in part as moot*, No. 09-3478, 2011 U.S. App. LEXIS 2593 (3d Cir. Feb. 9, 2011); *United States v. Biggs*, 157 F. 264, 269 (D. Colo. 1907), *aff’d*, 211 U.S. 507 (1909) (defining crimes involving moral turpitude as acts which evince a “base, corrupt, and malevolent purpose”). In evaluating whether a crime is one of moral turpitude, courts look at the “inherent nature of the offense” rather than at the individual’s conduct. *Keungne v. U.S. Att’y Gen.*, 561 F.3d 1281, 1284 (11th Cir. 2009) (quoting *Vuksanovic v. U.S. Att’y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006)). Some crimes generally considered to be crimes of moral turpitude are homicide, aggravated assault, robbery, arson, embezzlement, bribery, larceny, various sex offenses, counterfeiting, and tax evasion. *What Constitutes “Crime Involving Moral Turpitude” Within Meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. § 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. FED. 480, §§ 10(a)–(c), 11(a), (c)–(d), (g), 12(b)–(j), 13(a)–(b) (2011).

<sup>35</sup> H.R. 10384, 64th Cong. § 19, 39 Stat. 874, 889 (1917).

<sup>36</sup> *See Ngai, supra* note 32, at 76 (“The 1929 law made illegal entry a separate criminal offense . . . [C]onviction also made future reentry impossible.”). The passage of these regulations coincided with the “Red Scare,” the end of World War I, and other anti-immigrant hostilities of the 1920’s. *Id.* at 74–76.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 76. An alien’s first unlawful entry was punishable as a misdemeanor by up to one year in jail; any subsequent unlawful re-entry was a felony offense punishable by two years. *Id.* Conviction of these offenses also made the alien inadmissible for subsequent legal entry. *Id.*

<sup>39</sup> *See, e.g.*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360 (1986) (codified at 8 U.S.C. § 1324a (2006)).

<sup>40</sup> *See* Immigration Act of 1990, Pub. L. No. 101-649, § 602, 104 Stat. 4978, 5077–81 (1990); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276–78 (1996); Illegal Immigration Reform and

of aggravated felonies as well as drug offenses and created criminal offenses for hiring illegal immigrants, marriage fraud, entrepreneurship fraud, attempted improper entry, and falsely claiming United States citizenship.<sup>41</sup> Many of these statutes have been applied retroactively, exposing lawful permanent residents to deportation for crimes that may not have been considered aggravated felonies at the time they were committed.<sup>42</sup> In 1986, under the Immigration Reform and Control Act of 1986 (“IRCA”) and the Immigration Marriage Fraud Amendments of 1986 (“IMFA”), felony offenses were created for marriage fraud<sup>43</sup> and immigration-related entrepreneurship fraud.<sup>44</sup> These offenses, applicable to both aliens and U.S. citizens, carry sentences of up to five years.<sup>45</sup> In 1996, Congress created several new criminal provisions to be included in immigration law,<sup>46</sup> including a felony offense for high-speed flight from an immigration checkpoint.<sup>47</sup> The body of U.S. immigration law that was once entirely civil now includes over twenty-five sections that expressly define criminal conduct or

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Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 101, 110 Stat. 3009-546, 3009-553 to 54 (1996).

<sup>41</sup> See Illegal Immigration Reform and Immigrant Responsibility Act § 321 (lowering required sentence for violent crimes to one year and adding rape and sexual abuse of minor to definition of aggravated felony); Anti-Terrorism and Effective Death Penalty Act §§ 440(e)(1), (3), (4) (adding gambling, alien smuggling, and passport fraud to definition of aggravated felony); Immigration Act of 1990 §§ 121, 501(a)(3), (6) (criminalizing attempted unlawful entry and entrepreneurship fraud and adding laundering, crimes of violence punishable by term of at least five years, and certain foreign convictions to definition of aggravated felony); Immigration Reform and Control Act of 1986 § 101 (criminalizing knowingly employing an alien who is unauthorized to work); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2, 100 Stat. 3537, 3537–38 (1986) (criminalizing marriage fraud); see also Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 84–85 (2005) [hereinafter Miller, *Blurring the Boundaries*].

<sup>42</sup> Amy Langenfeld, Comment, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1048–49 (1999).

<sup>43</sup> Immigration Marriage Fraud Amendments of 1986 § 2.

<sup>44</sup> 8 U.S.C. § 1325(c)–(d) (2006).

<sup>45</sup> *Id.*

<sup>46</sup> See Illegal Immigration Reform and Immigrant Responsibility Act §§ 203, 211–18, 307, 324, 333–334. The Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) included provisions creating four new criminal offenses in immigration law and increasing the penalties for a number of pre-existing criminal offenses. *Id.* §§ 108, 203, 211–18, 307, 324, 333–334.

<sup>47</sup> *Id.* § 108 (codified at 18 U.S.C. § 758 (2006)).

relate to criminal activity.<sup>48</sup> This expanding intersection between criminal law and immigration law is reflected in the increased number of aliens deported and the number of criminal aliens removed from the country annually.<sup>49</sup>

## 2. Increased Penalties for Immigration Violations

As the number of criminal immigration laws has increased so has the severity of penalties imposed for immigration violations. Prior to 1924, when unlawful entry was first criminalized, immigration violations were only punished civilly.<sup>50</sup> With the criminalization of unlawful entry, a first offense became a misdemeanor, which carried a sentence of up to one year in prison.<sup>51</sup> Subsequent unlawful re-entry was a felony offense punishable by up to two years in prison.<sup>52</sup> Immigrants were also subjected to deportation if they committed a crime shortly after arriving in the United States.<sup>53</sup> In the past few decades, the severity of criminal penalties imposed for immigration violations has increased drastically.<sup>54</sup>

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<sup>48</sup> Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 619 (2003) [hereinafter Miller, *Citizenship & Severity*].

<sup>49</sup> See U.S. DEP'T OF HOMELAND SECURITY, 2009 YEARBOOK OF IMMIGRATION STATISTICS 91 tbl.33 (2010), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois\\_yb\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf). "Criminal aliens" are those who have previously been convicted of a crime. Miller, *Citizenship & Severity*, *supra* note 48, at 632. As the number of deportable crimes increases, the number of criminal aliens removed will increase as well. *Id.*

<sup>50</sup> Stumpf, *supra* note 31, at 384.

<sup>51</sup> Ngai, *supra* note 32, at 76.

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

<sup>53</sup> Immigration Act of 1917, H.R. 10384, 64th Cong. § 19, 39 Stat. 874, 899 (1917).

<sup>54</sup> The severity of civil penalties imposed for immigration violations has also increased as a result of recent immigration reform acts. The five-year limitation on deportability for crimes involving moral turpitude, instituted by the Immigration Reform Act of 1917, was removed—making an alien deportable for a crime involving moral turpitude committed at any point after his admission to the United States. Compare Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 (1996), with H.R. 10384 § 19. While not directly criminalizing any behavior, this allows for the aliens who have committed a wide range of crimes to be punished criminally and subsequently deported. See Miller, *Blurring the Boundaries*, *supra* note 41, at 83-84. This act further increased the number of deportable aliens by allowing deportation as long as the requisite crime may have been punished by one year imprisonment, even if the actual sentence given was less. Miller, *Citizenship & Severity*, *supra* note 48, at 633. Prior to this amendment, an alien must have actually received a sentence of a year or longer. See *id.* Congress has also allowed for the imposition of steep civil fines to

The push towards increased criminal penalties for immigration violations began in the 1980s with a general national shift towards increased criminal sanctions.<sup>55</sup> The 1986 IRCA expanded the use of criminal penalties in immigration law, subjecting employers of aliens without work authorization to fines and incarceration.<sup>56</sup> Changes to the offense of unlawful entry at an “improper time or place,” also enacted at this time, made an initial violation a misdemeanor and allowed for felony sanctions for a subsequent “commission.”<sup>57</sup> Amendments made to this statute in 1990 also criminalized *attempted* unlawful entry, which was previously not punishable under the statute.<sup>58</sup> These amendments allowed an alien to be prosecuted as a felon even without a prior conviction for the offense.<sup>59</sup>

Congress continued this trend of increasing criminal penalties with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), provisions of which increased the penalties associated with roughly a dozen separate offenses.<sup>60</sup> One such provision increased criminal penalties for alien smuggling and allowed for the application of penalties on a per alien basis instead of per transaction.<sup>61</sup> Congress also requested that the U.S. Sentencing Commission amend existing guidelines pertaining to alien smuggling offenses to increase the base level for the offense by “at least 3 offense

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be imposed, in addition to any criminal penalties, for illegal entry or failure to depart. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 §§ 105, 334. While not criminal themselves, the imposition of these civil penalties creates financial hardships, furthers immigration disabilities for the alien, and is often imposed in addition to any criminal penalties. *See generally* Barboza, *supra* note 12.

<sup>55</sup> Miller, *Citizenship & Severity*, *supra* note 48, at 628–29. During the 1980s the nation was also shifting into gear with its war on drugs and implementing stiff criminal penalties, like three-strikes laws. *Id.* at 627 n.83, 629.

<sup>56</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 101, 100 Stat. 3359, 3360 (1986) (codified at 8 U.S.C. § 1324a (2006)); Miller, *Citizenship & Severity*, *supra* note 48, at 630.

<sup>57</sup> 8 U.S.C. § 1325(a) (2006).

<sup>58</sup> *See* United States v. Cardenas-Alvarez, 987 F.2d 1129, 1133 (5th Cir. 1993).

<sup>59</sup> *See* United States v. Arambula-Alvarado, 677 F.2d 51, 52 (9th Cir. 1982) (prosecution provided evidence of defendant’s prior conduct in violation of § 1325(a), which did not result in conviction; the Ninth Circuit did not impose felony sentence based on rule of lenity).

<sup>60</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 203, 211–18, 307, 324, 333–334, 110 Stat. 3009-546, 3009-566 to 67, 3009-569 to 74, 3009-612 to 14, 3009-629, 3009-634 to 35 (1996).

<sup>61</sup> *Id.* § 203.

levels,” “increase the sentencing enhancement by at least 50 percent,” and impose provisions for various sentence enhancement conditions.<sup>62</sup>

The increased reliance on criminal penalties in the enforcement of immigration law has significantly blurred the line between criminal offenses and traditionally civil immigration offenses. Immigration offenses that were once penalized by civil deportation or other civil penalties are now categorized as misdemeanor and felony offenses, which can earn the violator several years in prison.<sup>63</sup> Criminal penalties for immigration related offenses have, for some offenses, doubled.<sup>64</sup> These increasingly criminal penalties, coupled with increased enforcement, have resulted in the incarceration of an unprecedented number of aliens.<sup>65</sup>

### 3. Evolving Immigration Enforcement Practices

The changing role of immigration enforcement in the United States has also contributed significantly to the increased criminality in immigration law. Enforcement of immigration laws was virtually non-existent until the creation of the United States Border Patrol in 1924.<sup>66</sup> The creation of this “enforcement mechanism[] spurred a dramatic increase in the number of deportations,” but enforcement remained civil in nature and severely constrained by limited financial resources.<sup>67</sup> Those awaiting deportation were frequently granted relief from detention, allowing them to remain with their families and in their community throughout the duration of the proceedings.<sup>68</sup> Judicial review of deportation proceedings was broad, and judges had the authority to grant relief to those facing deportation in the form of a discretionary waiver.<sup>69</sup> The approach to enforcement continued to remain lax until encountering drastic reforms in the 1980s.<sup>70</sup>

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<sup>62</sup> *Id.* § 203(e)(2).

<sup>63</sup> *See* Stumpf, *supra* note 31, at 371.

<sup>64</sup> *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act § 203(e)(2).

<sup>65</sup> Miller, *Citizenship & Severity*, *supra* note 48, at 641.

<sup>66</sup> *See* Ngai, *supra* note 32, at 76; Stumpf, *supra* note 31, at 384.

<sup>67</sup> Ngai, *supra* note 32, at 76.

<sup>68</sup> Miller, *Citizenship & Severity*, *supra* note 48, at 622–23.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 623–24.

The immigration reforms that began to take effect in the 1980s, and which increased the number and severity of immigration offenses, were accompanied by an increase in immigration enforcement. To give effect to the employment restrictions it created, IRCA called for increased appropriations for enforcement activities and worksite inspections.<sup>71</sup> This act also called for increases in inspection and enforcement activities by the Border Patrol, and called for a fifty percent increase in Border Patrol personnel.<sup>72</sup> In 1996, Congress increased immigration enforcement efforts again with IIRIRA provisions that increased the number of Border Patrol agents by at least 1,000 agents per year for the subsequent five years.<sup>73</sup>

Recent legislation has done more than expand the ranks of immigration officers; it has expanded the authority of these officers as well. Immigration officers have the general authority to make arrests for any “offense against the United States” occurring in their presence or for any felony under United States law.<sup>74</sup> In performance of their duties, immigration officers function in a manner virtually indistinguishable from law enforcement officers. They carry firearms, execute warrants,<sup>75</sup> conduct vehicle stops,<sup>76</sup> and operate checkpoints.<sup>77</sup> In some respects, these immigration officers have broader enforcement authority than law enforcement officers. Immigration officers, unlike state law enforcement officers, have the statutory authority to board and search trains, aircraft, and vehicles for unauthorized aliens within “a reasonable distance” from the border without first obtaining a warrant.<sup>78</sup> Immigration officers may even patrol private lands within twenty-five miles of the border for the purpose of preventing aliens from illegally entering

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<sup>71</sup> *Id.* at 630.

<sup>72</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 111(b)(2), 100 Stat. 3359, 3381 (1986).

<sup>73</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 101(a), 110 Stat. 3009-546, 3009-553 (1996).

<sup>74</sup> 8 U.S.C. § 1357(a)(5) (2006). Border Patrol agents have the general authority to make arrests for any “offense against the United States” occurring in their presence or for any felony under United States law. *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

<sup>77</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 574 (1976).

<sup>78</sup> 8 U.S.C. § 1357(a)(3).

the United States.<sup>79</sup> Recently, the authority of immigration officers has been extended, granting them the authority to enforce federal drug laws and customs laws.<sup>80</sup>

This increased manpower and enforcement authority of federal immigration officers has been supplemented by the increasing authority of state law enforcement officers to perform the functions of an immigration officer.<sup>81</sup> The extent of state law enforcement officers' authority to enforce federal laws has long been a point of contention.<sup>82</sup> It has traditionally been held that the authority of state law enforcement officers was restricted to enforcing immigration laws that were criminal.<sup>83</sup> Attorney General John Ashcroft issued an opinion in 2002 that contradicted this widely held belief, stating that states had the inherent authority to enforce both criminal and civil federal immigration laws.<sup>84</sup> Moreover, the Attorney General may now enter into agreements with state agencies which allow properly trained state law enforcement officers to carry out immigration functions while acting under color of federal authority.<sup>85</sup> Certification by the Attorney General allows the state officer to

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<sup>79</sup> *Id.* Border Patrol agents may also conduct warrantless searches of individuals, and their personal effects, who are deemed to be applicants for admission for evidence which may lead to their exclusion from the United States. *Id.* § 1357(c).

<sup>80</sup> See *Enforcement Initiatives Against Drug Smuggling in Southern California: Hearing Before the Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Relations of the H. Comm. on Gov't Reform*, 107th Cong. 2–3 (2001) (statement of William T. Veal, Chief Patrol Agent, San Diego Border Patrol Sector, INS), available at <http://www.uscis.gov/files/pressrelease/testtrg.pdf>; see also U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., BORDER PATROL DRUG INTERDICTION ACTIVITIES ON THE SOUTHWEST BORDER, REPORT NO. I-98-20 (September 1998), available at <http://www.justice.gov/oig/reports/INS/e9820/>. Border Patrol Agents are cross-designated to enforce these laws under 19 U.S.C. § 1401(i) (2006) and 21 U.S.C.A. § 878(a) (2006 & Supp. IV 2010).

<sup>81</sup> 8 U.S.C. § 1357(g).

<sup>82</sup> See LISA M. SEGHETTI ET AL., CONG. RESEARCH SERV., RL 32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 6 (2009).

<sup>83</sup> See *id.* at 4. Some states expressly authorize state law enforcement officers to enforce federal criminal laws while others see it as within their inherent powers. *Id.*

<sup>84</sup> *Id.* at 7 (quoting John Ashcroft, Att'y Gen., Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002)); see also Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 ALB. L. REV. 179, 182 (2005) (stating that the inherent authority of state and local law enforcement to make arrests for criminal violations of the INA has "long been widely recognized" but that confusion exists relating to arrest authority under the INA's civil provisions).

<sup>85</sup> 8 U.S.C. § 1357(g).

perform “function[s] of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers).”<sup>86</sup>

Efforts to increase the efficacy of immigration enforcement snowballed in the wake of the September 11 terrorist attacks.<sup>87</sup> The Homeland Security Act of 2002 consolidated forty agencies, including the Border Patrol and several others dealing with immigration enforcement, under the umbrella of the Department of Homeland Security.<sup>88</sup> New federal agencies have also joined in the enforcement of immigration laws. Formed in 2003, U.S. Immigration and Customs Enforcement (“ICE”) joined the efforts of Border Patrol in enforcing, among other things, immigration laws.<sup>89</sup>

Under new regulations established since September 11, 2001, there has been a heightened application of both new and pre-existing immigration laws. These regulations call for the fingerprinting of all illegal or criminal aliens apprehended nationwide.<sup>90</sup> Furthermore, procedures were implemented to strengthen and enforce the application of the National Security Entry-Exit Registration System (“NSEERS”), which required all aliens remaining in the United States for more than thirty days to register and be fingerprinted.<sup>91</sup> Procedures were put in place for the enforcement of NSEERS requirements, which were

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<sup>86</sup> *Id.* § 1357(g)(1).

<sup>87</sup> *See, e.g.,* SEGHETTI ET AL., *supra* note 82; Miller, *Citizenship & Severity*, *supra* note 48, at 644.

<sup>88</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

<sup>89</sup> *Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview/> (last visited Sept. 16, 2012) (“ICE’s primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration.”). In carrying out its mission, ICE agents have been given the authority to enforce over 400 federal statutes. *U.S. Immigration and Customs Enforcement*, EMBASSY OF THE UNITED STATES MANILA, PHILIPPINES, <http://manila.usembassy.gov/us-agencies2/u.s.-immigration-and-customs-enforcement.html> (last visited Sept. 16, 2012).

<sup>90</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 112, 110 Stat. 3009-546, 3009-559 (1996).

<sup>91</sup> John Ashcroft, U.S. Attorney Gen., Announcing the National Security Entrance and Exit Registration System (June 5, 2002), *available at* <http://www.justice.gov/archive/ag/speeches/2002/natlsecentryexittrackingsys.htm>.

regularly waived by agency regulations prior to the September 11 attacks, with regard to aliens deemed to be a high risk or a national security threat.<sup>92</sup>

The increased authority of immigration enforcement officers and enhanced enforcement strategies being implemented in the recent attempt to curb the flow of illegal immigrants into the United States and secure the nation's borders has resulted in the rapid evolution of immigration enforcement. Immigration officers no longer enforce purely civil laws but a myriad of criminal laws as well.<sup>93</sup> Their enforcement activities mirror those performed by law enforcement agencies and their authority often overlaps that of law enforcement agencies.<sup>94</sup> The current enforcement practices of an immigration officer differ little from those of a state or local law enforcement officer who can enforce criminal drug laws and make a mental health arrest.<sup>95</sup>

Immigration enforcement is no longer the distinct, predominantly civil, regulatory system that it traditionally was. Criminal statutes and stiff criminal sanctions have now comprehensively reshaped immigration law. The overlapping enforcement authority of federal immigration officers and state law enforcement officers has eliminated any appreciable distinction between civil immigration laws and criminal immigration laws.<sup>96</sup> This increasing criminalization of immigration law merits the extension of Fifth Amendment protections to immigration law, at least for criminal statutes like 8 U.S.C. § 1324.

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<sup>92</sup> *Id.*

<sup>93</sup> *See* Stumpf, *supra* note 31, at 371.

<sup>94</sup> *See* 8 U.S.C. § 1357 (2006) (detailing the powers of federal immigration officers and employees).

<sup>95</sup> *See id.* § 1357(a)(5) (authorizing federal immigration officers to, in the course of their duties, make arrests for the violation of any laws of the United States).

<sup>96</sup> *See id.*

*B. An Exception to the Fifth Amendment Protection Against Self-Incrimination*

1. The Regulatory Regime Exception Defined in *Albertson v. Subversive Activities Control Board*

The Fifth Amendment to the U.S. Constitution provides, in relevant part, that no individual “shall be compelled in any criminal case to be a witness against himself.”<sup>97</sup> This protection has been found to apply “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding.”<sup>98</sup> However, this protection against providing potentially incriminating testimony is not without limitations. The Fifth Amendment protection against self-incrimination does not justify making false statements or withholding required business records and documents and cannot be claimed on behalf of a corporation.<sup>99</sup> In some situations, Congress may require potentially incriminating information to be reported to the government without violating the privilege against self-incrimination.<sup>100</sup>

The Supreme Court has repeatedly held that this Fifth Amendment privilege “may not be invoked to resist compliance with a regulatory regime constructed to effect the State’s public purposes *unrelated to the enforcement of its criminal laws*.”<sup>101</sup> The constitutional safeguards provided by the Fifth Amendment may be limited with regard to statutory self-reporting regulations in areas of inquiry deemed to be regulatory. In assessing the constitutionality of a self-reporting statute, courts look at: (1) if it was directed at a highly selective group

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<sup>97</sup> U.S. CONST. amend. V.

<sup>98</sup> *United States v. Balsys*, 524 U.S. 666, 672 (1998) (quoting *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972)) (internal quotation marks omitted). The compelled production of objects has been found to be sufficiently testimonial to trigger the Fifth Amendment protection against self-incrimination where the demanded object “might be used as evidence in or at least supply investigatory leads to a criminal prosecution.” *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 78 (1965).

<sup>99</sup> *See, e.g.*, *United States v. White*, 322 U.S. 694, 699 (1944).

<sup>100</sup> *United States v. Garcia-Cordero*, 610 F.3d 613, 616 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 547.

<sup>101</sup> *Balt. City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 556 (1990) (emphasis added).

inherently suspect of criminal activities, (2) if it was asserted in an essentially non-criminal and regulatory area of inquiry, and (3) if compliance would create a substantial likelihood of prosecution.<sup>102</sup>

Under this evaluation, self-reporting statutes found to violate the Fifth Amendment right to be free from self-incrimination were in areas of inquiry “permeated with criminal statutes”<sup>103</sup> and where the divulgence would “prove a significant ‘link in a chain’ of evidence tending to establish . . . guilt.”<sup>104</sup> For example, in *Albertson v. Subversive Activities Control Board*, the Supreme Court set aside an administrative order that required members of the Communist Party of the United States to register as such because this admission could be used to prosecute them under various laws.<sup>105</sup> The Court found that the Fifth Amendment right against self-incrimination was rightfully asserted because the statute was directed at only Communist Party members rather than the public at large and because the inquiries were in an inherently criminal area.<sup>106</sup>

Similarly, in *Marchetti v. United States*, the Supreme Court set aside the petitioner’s conviction for failure to register and pay occupational taxes on his gambling business in violation of federal wagering tax statutes.<sup>107</sup> In reaching this decision, the Court found that the statute targeted a group inherently suspect of criminal activity, gambling, and that “every portion of [the] requirements had the direct and unmistakable consequence of incriminating petitioner.”<sup>108</sup> Furthermore, in *Leary v. United States*, the Court afforded protection against self-incrimination to a defendant convicted under a similar statute which required marijuana dealers to register and pay a transfer tax.<sup>109</sup> The

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<sup>102</sup> *United States v. Adair*, No. 88-1264, 1988 WL 114791, at \*2 (6th Cir. Oct. 31, 1988).

<sup>103</sup> *Albertson*, 382 U.S. at 79.

<sup>104</sup> *Leary v. United States*, 395 U.S. 6, 16 (1969) (reversing conviction under Marijuana Tax Act); *see also* *Marchetti v. United States*, 390 U.S. 39, 60–61 (1968) (struck down statute criminalizing willful failure to pay occupational tax on wagering); *Albertson*, 382 U.S. at 81 (setting aside administrative order compelling individuals to admit membership in the Communist Party of the United States as admission could be used for prosecution under various statutes).

<sup>105</sup> *Albertson*, 382 U.S. at 79–80.

<sup>106</sup> *Id.* at 79.

<sup>107</sup> *Marchetti*, 390 U.S. at 41.

<sup>108</sup> *Id.* at 49.

<sup>109</sup> *Leary*, 395 U.S. at 14–15.

Court found that the statute “compelled [the] petitioner to expose himself to a ‘real and appreciable’ risk of self-incrimination”<sup>110</sup> and “would surely prove a significant ‘link in a chain’ of evidence tending to establish his guilt.”<sup>111</sup>

Alternatively, self-reporting statutes that have been found not to violate individuals’ Fifth Amendment rights tend to be in areas that are mostly regulatory, where the statute itself is aimed at a broad range of individuals, and where compliance is not likely to result in prosecution.<sup>112</sup> For example, in *California v. Byers*, a challenge was raised as to the constitutionality of a California “hit and run” statute that required any driver involved in an automobile accident to “stop at the scene and give his name and address.”<sup>113</sup> The Supreme Court held that the mere possibility of incrimination created by this compelled disclosure did not conflict with the Fifth Amendment because most persons involved in accidents are not subject to criminal prosecution.<sup>114</sup> Furthermore, the Court found that the statute in question was aimed at the public as a whole and was part of the essentially regulatory California Vehicle Code.<sup>115</sup>

## 2. The *Albertson* Test Has Been Inconsistently Applied

While the three-factor assessment in *Albertson v. Subversive Activities Control Board*—examining the size of the group, the regulatory nature of the law, and the likelihood of prosecution—appears to lay out a structured framework for courts to assess self-reporting statutes, in fact, courts have wide latitude in applying the test. This has resulted in inconsistent interpretations.

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<sup>110</sup> *Id.* at 16.

<sup>111</sup> *Id.* (quoting *Marchetti*, 390 U.S. at 48).

<sup>112</sup> See *United States v. Dichne*, 612 F.2d 632, 641 (2d Cir. 1979) (denying application of Fifth Amendment and affirming conviction for failure to report export of currency as required under Bank Security Act); *United States v. Stirling*, 571 F.2d 708, 728 (2d Cir. 1978) (denying application of Fifth Amendment and affirming conviction for defrauding company shareholders by inflating reported company earnings and withholding material information regarding sale of stocks); *Garner v. United States*, 501 F.2d 228, 234 (9th Cir. 1972) (denying application of Fifth Amendment and affirming conviction for failure to report source of income on federal income tax return).

<sup>113</sup> *California v. Byers*, 402 U.S. 424, 425 (1971).

<sup>114</sup> *Id.* at 431.

<sup>115</sup> *Id.* at 430.

In applying the *Albertson* factors, courts have little guidance in determining how broadly or narrowly to frame the target group affected by the law. For example, in *United States v. Flores*, the Ninth Circuit assessed a statute requiring certain individuals shipping firearms to notify the air carrier of their presence and found that it was inconsistent with the Fifth Amendment protections against self-incrimination.<sup>116</sup> In reaching this decision, the court noted that the statute in question was directed only at firearms dealers who were themselves unlicensed or shipping to unlicensed individuals.<sup>117</sup> That same statute was found to be constitutional by the Fourth Circuit, in *United States v. Wilson*.<sup>118</sup> While acknowledging that there were more rigorous reporting requirements for persons delivering weapons illegally, the Fourth Circuit found that this statute was not directed at a highly selective group but at all passengers.<sup>119</sup>

Similarly, when assessing whether the area of inquiry is non-criminal and regulatory, courts may choose to focus on either the specific statute or the general area of law. In *Byers*, the Court focused primarily on the specific hit-and-run statute in question, noting that “[a]lthough the California Vehicle Code defines some criminal offenses, the statute [was] essentially regulatory, not criminal.”<sup>120</sup> The Court took the opposite approach in *Baltimore City Department of Social Services v. Bouknight* when called upon to assess the validity of a contempt order issued by a juvenile court when a mother, being investigated for the murder of her child, failed to produce the same child before the court as ordered.<sup>121</sup> In determining that the order fell within the regulatory regime exception, the Court

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<sup>116</sup> *United States v. Flores*, 729 F.2d 593, 595–96 (9th Cir. 1983) (assessing the reporting requirement of 18 U.S.C. § 922(e)), *vacated*, 753 F.2d 1499 (9th Cir. 1985).

<sup>117</sup> *Id.* at 596 (quoting *Haynes v. United States*, 390 U.S. 85, 98 (1968)) (“Because any dealing in firearms by an unlicensed person is illegal, 18 U.S.C. § 922(a)(1), and because any shipment to an unlicensed person is also illegal, 18 U.S.C. § 922(a)(2), the statute is directed at ‘a highly selective group inherently suspect of criminal activities.’”).

<sup>118</sup> *United States v. Wilson*, 721 F.2d 967, 973–74 (4th Cir. 1983).

<sup>119</sup> *Id.* (“[A]ll passengers on a common carrier are required by [18 U.S.C.] § 922(e) to give some form of notice if they possess firearms.”).

<sup>120</sup> *Byers*, 402 U.S. at 430.

<sup>121</sup> 493 U.S. 549, 552–53 (1990).

noted that the order was enforced as “part of a broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders.”<sup>122</sup>

The final factor assessed by courts, whether compliance would create a substantial likelihood of prosecution, has also been applied with some degree of variation. The Court in *Marchetti* placed great emphasis on this factor, noting that “[t]he central standard for the privilege’s application has been whether the claimant is confronted by substantial and ‘real,’ and not merely [t]rifling or imaginary, hazards of incrimination.”<sup>123</sup> In holding that the federal wagering tax statute in question violated the protection against self-incrimination, the Court found that registrants could reasonably expect compliance to “significantly enhance the likelihood of their prosecution . . . [and] provide evidence which will facilitate their convictions.”<sup>124</sup> While the Court in *Marchetti* found that a mere trifling risk of incrimination was not enough to invoke the protection, they noted that the rule must be flexible enough to ensure that the constitutional privilege was not easily evaded.<sup>125</sup> However, the Court took a more restrictive view of this factor in both *Byer* and *Bouknight*, and denied the Fifth Amendment protection where the reporting requirement did not “focu[s] *almost exclusively* on conduct which was criminal.”<sup>126</sup> Unlike *Marchetti*, these two cases suggest that only reporting requirements that demand “disclosure of inherently illegal activity” will be found to violate the constitutional privilege.<sup>127</sup>

The inconsistent interpretation and application of these factors has left courts with little clarity on how to apply these factors when determining whether a statute falls within this “regulatory regime” exception to the Fifth Amendment. Under the current formula, a court could determine that “every statute not naming the persons or organizations to whom it applies is directed at the public at large.”<sup>128</sup> Similarly, “[v]irtually any civil

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<sup>122</sup> *Id.* at 559.

<sup>123</sup> *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (quoting *Rogers v. United States*, 340 U.S. 367, 374 (1951)).

<sup>124</sup> *Id.* at 54.

<sup>125</sup> *Id.*

<sup>126</sup> *Bouknight*, 493 U.S. at 560 (Harlan, J., concurring) (alteration in original) (emphasis added) (quoting *California v. Byers*, 402 U.S. 424, 454 (1971)).

<sup>127</sup> *Byers*, 402 U.S. at 431.

<sup>128</sup> *Id.* at 470 n.6 (Brennan, J., dissenting).

regulatory scheme could be characterized as essentially noncriminal by looking narrowly . . . to the avowed noncriminal purpose of the regulations.<sup>129</sup> This inconsistency has left lower courts with little guidance on which approach they should take in any given case and has resulted in the inconsistent application of the Fifth Amendment.<sup>130</sup> The increasing number of criminal statutes in regulatory areas of law, like immigration, has created an urgent need to remedy the unpredictability of the *Albertson* test and establish a more consistent rule which will protect the constitutional guarantee against self-incrimination.

## II. ALBERTSON HAS LED TO THE ARBITRARY APPLICATION OF CONSTITUTIONAL RIGHTS

Recently, in the *United States v. Garcia-Cordero*,<sup>131</sup> the Eleventh Circuit Court of Appeals ruled that an immigration law requiring all those transporting undocumented aliens into the United States to immediately bring the aliens to U.S. immigration officials did not violate the Fifth Amendment protection against self-incrimination.<sup>132</sup> The court found that the statute at issue, 8 U.S.C. § 1324(a)(2)(B)(iii), did not violate the defendant's Fifth Amendment right because the law fell within the regulatory regime exception.<sup>133</sup> In making this decision, the court applied the test laid out in *Albertson* by assessing whether the statute: (1) was directed at a group inherently suspect of criminal activities; (2) was asserted in an essentially non-criminal and regulatory area of inquiry; and (3) would create a substantial likelihood of prosecution were one to comply with it.<sup>134</sup> This Section will first discuss the "bring and present" requirement of 8 U.S.C. § 1324(a)(2)(B)(iii) and its legislative history. Second, it will discuss how the regulatory regime test was applied to this statute in *Garcia-Cordero*.

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<sup>129</sup> *Bouknight*, 493 U.S. at 568 (Marshall, J., dissenting).

<sup>130</sup> Compare *United States v. Flores*, 729 F.2d 593, 596–97 (9th Cir. 1983), *vacated*, 753 F.2d 1499 (9th Cir. 1985), with *United States v. Wilson*, 721 F.2d 967, 973 (4th Cir. 1983).

<sup>131</sup> 610 F.3d 613 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 547.

<sup>132</sup> *Id.* at 618–19.

<sup>133</sup> *Id.*

<sup>134</sup> *See id.* at 617.

A. *The History and Application of the “Bring and Present” Requirement*

An analysis of 8 U.S.C. § 1324(a)(2)(B)(iii) at the statute level would necessarily lead the court to conclude that it violates the rights protected by the Fifth Amendment. There are five separate smuggling offenses criminalized by § 1324(a).<sup>135</sup> Section 1324(a)(2) was added to the statute in 1986 in response to the Mariel Boatlift crisis of 1980, the mass exodus of some 125,000 Cuban aliens to Florida—many of whom were criminals.<sup>136</sup> This statute provides criminal sanctions for:

Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien . . . .<sup>137</sup>

This offense is similar to the alien smuggling offense chargeable under 8 U.S.C. § 1324(a)(1)(A)(i),<sup>138</sup> which was in effect prior to the Mariel Boatlift crisis. However, this provision extends to smuggling attempts at designated ports of entry as well.<sup>139</sup> Section 1324(a)(2) also has a slightly relaxed knowledge

<sup>135</sup> 8 U.S.C. § 1324(a) (2006).

<sup>136</sup> *Palma v. Verdeyen*, 676 F.2d 100, 101 (1982); Miller, *Citizenship & Severity*, *supra* note 48, at 627–28. It is rumored that many of the Cubans who arrived as part of the Mariel Boatlift were inmates and mental patients sent at Castro’s behest. Miller, *Citizenship & Severity*, *supra* note 48, at 628.

<sup>137</sup> 8 U.S.C. § 1324(a)(2).

<sup>138</sup> 8 U.S.C. § 1324(a)(1)(i) provides criminal penalties for:

(1)(A) Any person who--

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien . . . .

To prove this offense, it must be established that the defendant had actual knowledge that the person brought to the U.S. was an alien. *United States v. Aslam*, 936 F.2d 751, 754–55 (2d Cir. 1991). Some courts have taken a stricter interpretation of this statute and required the prosecutor to establish that the defendant had acted with the intent to commit a crime. *See United States v. Nguyen*, 73 F.3d 887, 895 (9th Cir. 1995).

<sup>139</sup> The alien smuggling offense in existence at the time of the Mariel Boatlift was found not to apply to the individuals who transported the Cubans to the United States via boat as they lacked the intent to commit a crime and they did not bring

element, as the prosecutor may prove reckless disregard for the alien's status instead of actual knowledge.<sup>140</sup> Under § 1324(a)(2), the defendant need not have any surreptitious intent, only a reckless disregard of the fact that an alien did not receive prior approval to come to the United States.<sup>141</sup>

Subsection B of § 1324(a)(2) provides for "sentence enhancements" in various circumstances,<sup>142</sup> which are treated as additional elements of the offense to be proven.<sup>143</sup> The third of these provisions, which was at issue in *Garcia-Cordero*, provides that in the case of:

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry, [the defendant shall] be fined under Title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years . . . .<sup>144</sup>

The addition of this element creates an offense different in nature than the smuggling offense under § 1324(a)(2); it adds an intent to evade inspection. This provision also includes a self-reporting requirement. In order to avoid charges, and up to ten years in prison, under § 1324(a)(2)(B)(iii), the individual transporting unauthorized aliens must immediately bring and present them to an immigration officer for inspection.<sup>145</sup>

In enacting this statute, Congress intended to extend the reach of the existing anti-alien smuggling statutes by criminalizing the mere act of bringing undocumented aliens to the United States; even if those aliens were brought to a

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the aliens to the country in a surreptitious manner intended to evade inspection. See, e.g., *United States v. Anaya*, 509 F. Supp. 289, 300 (S.D. Fla. 1980).

<sup>140</sup> Compare 8 U.S.C. § 1324(a)(1)(A)(i), with 8 U.S.C. § 1324(a)(2).

<sup>141</sup> *Id.* § 1324(a)(2).

<sup>142</sup> *Id.* § 1324(a)(2)(B).

<sup>143</sup> See *Jones v. United States*, 526 U.S. 227, 258 (1999). The Supreme Court found, in analyzing a different statute, that "a fact is an element of an offense rather than a sentencing consideration, [when those] elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Id.* at 232. The Court held that where a sentence enhancement included facts that could be in dispute it would be a denial of due process to treat them as sentencing factors. *Id.* at 241-42.

<sup>144</sup> 8 U.S.C. § 1324(a)(2)(B)(iii).

<sup>145</sup> See *id.*

designated port of entry for inspection.<sup>146</sup> This statute increased the range of criminal conduct chargeable as alien smuggling and eliminated the general criminal intent requirement that courts had read into the previously existing statute.<sup>147</sup> The criminal nature of this statute is also evident in that Congress made violations of this statute a felony, punishable by up to ten years in prison.

*B. The Application of the Albertson Test to United States v. Garcia-Cordero*

Garcia-Cordero moved to dismiss the charges against him for failure to present the aliens to an immigration officer, under 8 U.S.C. § 1324(a)(2)(B)(iii), claiming they violated his Fifth Amendment privilege against self-incrimination.<sup>148</sup> *Garcia-Cordero* claimed that, “This presentment requirement imposes an affirmative duty on an accused smuggler to come forward (immediately) and provide the government with evidence that will be used against him to prove the smuggling charges.”<sup>149</sup> This motion to dismiss was denied and Garcia-Cordero was subsequently tried and convicted on all counts.<sup>150</sup> Following trial, Garcia-Cordero’s constitutional challenge was renewed and addressed by the district court.

Analyzing 8 U.S.C. § 1324(a)(2)(B)(iii) in light of the factors set forth in *Albertson*, the district court determined that the “bring and present” requirement did not offend the Fifth Amendment protection against self-incrimination as it fell within the regulatory regime exception. The court first noted that the “bring and present requirement is part of an extensive scheme of statutes and regulations through which the government exercises its control over the nation’s borders.”<sup>151</sup> The court determined, after evaluating other immigration statutes, that § 1324(a)(2)(B)(iii) imposed no additional requirements on

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<sup>146</sup> See *United States v. Garcia-Cordero*, 610 F.3d 613, 619 (11th Cir. 2010) (Korman, J., concurring) (citing H.R. Rep. No. 99-682, pt. 1, at 20 (1986)), *cert. denied*, 131 S. Ct. 547.

<sup>147</sup> *Id.* at 618 (majority opinion).

<sup>148</sup> *United States v. Garcia-Cordero*, 595 F. Supp. 2d 1312, 1313 (S.D. Fla. 2009), *aff’d*, 610 F.3d 613.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 1319.

<sup>151</sup> *Id.* at 1317.

individuals who were in violation of § 1324(a)(2).<sup>152</sup> Because of this, the court viewed the reporting requirement as being a “routine procedure universally employed” rather than imposed on a highly selective group inherently suspect of criminal activities.<sup>153</sup> Further, the court determined that the statute in question was “more analogous to *Sullivan, Byers*, and *Bouknight*, where the disclosure requirements were part of civil regulatory regimes.”<sup>154</sup> In drawing this conclusion, the court relied upon precedent that found immigration law to be generally regulatory and to serve a substantial non-prosecutorial government interest.<sup>155</sup> Based on this analysis, the district court found that the “bring and present” requirement, although potentially incriminating, fell within the regulatory regime exception and did not offend the Fifth Amendment.<sup>156</sup>

Garcia-Cordero appealed, and this determination was reviewed de novo by the Eleventh Circuit, which also concluded that the “bring and present” requirement fell within the regulatory regime exception. In its brief analysis, the court found § 1324(a)(2)(B)(iii) to be “part of the federal regulatory scheme through which the government controls our national borders” that imposes a reporting requirement on everyone

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<sup>152</sup> In reaching this determination, the court noted the requirements found in 8 U.S.C. § 1321(a) (2006), 8 U.S.C. § 1221 (2006), and 8 C.F.R. § 235.1(a) (2009). *Id.* at 1317–18. Section 1321(a) makes it the duty of “every person, including the owners, masters, officers, and agents of vessels, aircraft, transportation lines, or international bridges” who brings aliens to the United States “to prevent the landing of such alien in the United States at a port of entry other than as designated.” Section 1221 requires commercial vessels transporting persons from outside the United States to a port therein to provide a manifest listing each passenger and crew member to immigration officers at that port. Finally, 8 C.F.R. § 235.1(a) (2009) provides that individuals applying for entry into the United States must do so in person at a designated port of entry.

<sup>153</sup> *Garcia-Cordero*, 595 F. Supp. 2d at 1317.

<sup>154</sup> *Id.* at 1318.

<sup>155</sup> *Id.* at 1318–19. The court, in reaching this decision, cited to the Second Circuit’s assertion in *Rajah v. Mukasey* that immigration law is generally regulatory and that immigration crimes are “almost of a different order from that which governs those areas where reporting requirements have been struck down.” *Rajah v. Mukasey*, 544 F.3d 427, 442 (2d Cir. 2008). The court in *Garcia-Cordero* went on to note that, as a result of the government’s non-prosecutorial national security interest, “Fifth Amendment rights are generally diminished in the context of border crossings.” *Garcia-Cordero*, 595 F. Supp. 2d at 1318 (citing *United States v. McDowell*, 250 F.3d 1354, 1362 (11th Cir. 2001)).

<sup>156</sup> *See Garcia-Cordero*, 595 F. Supp. 2d at 1319.

transporting aliens into the country.<sup>157</sup> The Eleventh Circuit differentiated the “bring and present” requirement from the reporting requirements in *Albertson*, *Marchetti*, *Haynes*, and *Leary*, which were aimed at “highly selective groups.”<sup>158</sup> Comparing Garcia-Cordero’s case to those like *Byers* and *Bouknight*, the court noted that “the activity required to be disclosed was not inherently illegal” and that the fact that incrimination may result does not trigger the protection against self-incrimination.<sup>159</sup>

As the concurring opinion of Judge Korman makes clear, the determination of the Eleventh Circuit that this statute is regulatory contrasts sharply with the purpose of the statute intended by Congress.<sup>160</sup> Judge Korman points out that “the purpose of [§ 1324(a)(2)(B)(iii)] was not to enforce compliance with the presentment requirement . . . . Instead, it was intended to deter the smuggling of aliens into the United States and to punish those who engaged in that activity.”<sup>161</sup> The determination reached by the Eleventh Circuit in applying the *Albertson* test and the intended purpose of the “bring and present” requirement are irreconcilable.

### III. THE ALBERTSON TEST IS INADEQUATE FOR ANALYZING REPORTING REQUIREMENTS

While the Supreme Court has repeatedly acknowledged that the Fifth Amendment privilege “may not be invoked to resist compliance with a regulatory regime constructed to effect the State’s public purposes unrelated to the enforcement of its

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<sup>157</sup> *United States v. Garcia-Cordero*, 610 F.3d 613, 618 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 547.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (citing *United States v. Hubbell*, 530 U.S. 27, 35 (2000)). The challenged disclosure in *Byers* related to individuals involved in motor vehicle accidents; in *Bouknight*, it was a court order to a mother to produce her child, believed to be dead, before the court. See *California v. Byers*, 402 U.S. 424, 425 (1971); *Balt. City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 551 (1990).

<sup>160</sup> *Garcia-Cordero*, 610 F.3d at 619 (Korman, J., concurring) (concurring in judgment without reaching the merits of the self-incrimination claim). Judge Korman, a United States District Judge for the Eastern District of New York sitting by designation, lays out in detail the history behind the current statute, as amended in 1986, and the “concern that, [w]ithout the threat of criminal prosecution, there is no effective way to deter potential transporters from inundating U.S. ports of entry with undocumented aliens.” *Id.* (alteration in original) (quoting H.R. REP. NO. 99-682, pt. 1, at 66 (1986)) (internal quotation marks omitted).

<sup>161</sup> *Id.* at 620.

criminal laws,”<sup>162</sup> the Eleventh Circuit’s conclusion that the “bring and present” requirement of 8 U.S.C. § 1324(a)(2)(B)(iii) fell within this exception is inequitable. This section argues that the problem with the Eleventh Circuit’s holding is two-fold. First, the Eleventh Circuit erred in its application of the current *Albertson* test. Second, the Court applied an antiquated test to assess the constitutionality of the “bring and present” requirement. This test, established by *Albertson* almost half a century ago, has proven to be outdated and too unstructured to provide adequate and consistent protection of individuals’ constitutional rights. The “bring and present” requirement is unconstitutional, even under *Albertson*, as it targets individuals inherently suspect of criminal activity and requires disclosures which create a substantial likelihood of prosecution.

A. *The Application of the Albertson Test in Garcia-Cordero Was Flawed*

Under the rule currently applied by the courts, the “bring and present” requirement of 8 U.S.C. § 1324 should not fall under the regulatory regime exception to the Fifth Amendment because the statute is aimed at a group inherently suspect of criminal activity and because compliance creates a substantial likelihood of prosecution.

1. Section 1324(a)(2)(B)(iii) Is Directed at a Group Inherently Suspect of Criminal Activity

In looking at § 1324(a)(2)(B)(iii), the Eleventh Circuit determined that the statute “applies to all persons transporting aliens to the United States—irrespective of whether those aliens have received prior authorization, and irrespective of the transporters’ knowledge regarding such authorization.”<sup>163</sup> The court came to this conclusion based on the fact that a separate statute, 8 U.S.C. § 1321(a), requires that “every person bringing an alien to, or providing a means for an alien to come to, the United States prevent the alien from entering the country at any port of entry not designated by the Attorney General or

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<sup>162</sup> *Bouknight*, 493 U.S. at 556.

<sup>163</sup> *Garcia-Cordero*, 610 F.3d at 618. This statement was adopted in whole from the opinion of the district court. *See United States v. Garcia-Cordero*, 595 F. Supp. 2d 1312, 1317 (S.D. Fla. 2009), *aff’d*, 610 F.3d 613.

immigration officers.”<sup>164</sup> However, when compared to § 1321(a), and other immigration statutes, the text of § 1324(a)(2)(B)(iii) appears to be directed at a much more specific group of individuals than the court, or the text in isolation, suggests. The language used in the two sections make the groups targeted by the statutes strikingly different in three ways: (1) only § 1324(a)(2)(B)(iii) contains a reporting requirement, (2) § 1324(a)(2)(B)(iii) applies to a narrower range of people, and (3) § 1324(a)(2)(B)(iii) applies specifically to individuals transporting undocumented aliens.

First, the court erroneously suggests that § 1324(a)(2)(B)(iii) “does not impose any additional requirements” beyond those required under § 1321(a)(2).<sup>165</sup> This is not the case. Section 1321(a)(2) establishes a duty to prevent an alien brought to the United States from landing at any place other than a designated port of entry.<sup>166</sup> This statute, which is punishable by fine, makes those transporting aliens to the United States financially liable for their compliance with United States law.<sup>167</sup> Section 1324(a)(2)(B)(iii) goes a step further and requires that any alien brought to the United States must be *immediately brought and presented* to immigration officers at a designated port of entry for inspection.<sup>168</sup> While one statute requires aliens to be brought to a designated port of entry, the other requires the transporter to personally *deliver* the alien to an immigration officer for inspection.

Second, § 1321(a), in its entirety, makes it “the duty of every person, including the owners, masters, officers, and agents of vessels, aircraft, transportation lines, or international bridges or toll roads, other than [certain] transportation lines” bringing aliens to the United States to ensure that they do not enter anywhere other than a designated port of entry.<sup>169</sup> Because statutes should generally be construed so as to avoid superfluous language,<sup>170</sup> the explicit mention of these specific transportation

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<sup>164</sup> *Garcia-Cordero*, 610 F.3d at 618.

<sup>165</sup> *Garcia-Cordero*, 595 F. Supp. 2d at 1317.

<sup>166</sup> 8 U.S.C. § 1321(a) (2006).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* § 1324(a)(2)(B)(iii).

<sup>169</sup> *Id.* § 1321(a). Similar language is used in § 1323(a)(1) which proscribes bringing “any alien who does not have a valid passport and an unexpired visa” to the United States. *Compare id.*, with 8 U.S.C. § 1323(a)(1).

<sup>170</sup> *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

providers in one section must bear some meaning. This intentional disregard for the various transportation providers in § 1324(a)(2) suggests that Congress intended this statute to apply solely to private individuals. As it is written, § 1324(a)(2)(B)(iii) does not apply to the public at large but only to those involved in the transportation of aliens to the United States.

Third, the language in § 1324(a)(2) further restricts the applicability of subsection (B)(iii) to individuals bringing “an alien [who] has not received prior official authorization” to come to the U.S.<sup>171</sup> When compared to the unrestricted language used in § 1321(a), which refers only to “an alien,”<sup>172</sup> the group of individuals targeted by the statute shrinks significantly, further distinguishing it from generally applicable statutes such as the hit-and-run law at issue in *Byers*.

At first blush, the use of the phrase “any person” in § 1324(a)(2) suggests that the statute is directed at the public at large. However, when viewed in light of other immigration statutes, the actual target group is much narrower. When read in its entirety, the plain meaning of § 1324(a)(B)(iii) limits its application only to individuals bringing unauthorized aliens to the United States.<sup>173</sup> Considering that this specific behavior is criminalized by § 1324(a)(2),<sup>174</sup> the reporting requirement established by § 1324(a)(2)(B)(iii) necessarily applies to a group inherently suspect of criminal activity.

## 2. Compliance with § 1324(a)(2)(B)(iii) Creates a Substantial Likelihood of Prosecution

In assessing whether § 1324(a)(2)(B)(iii) falls within the regulatory regime exception, the Eleventh Circuit made no assessment of whether compliance with the statute would create a substantial likelihood of prosecution.<sup>175</sup> The court, instead,

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<sup>171</sup> 8 U.S.C. § 1324(a)(2).

<sup>172</sup> *Id.* § 1321(a).

<sup>173</sup> *See* § 1324(a)(2)(B)(iii). Section 1321(a) proscribes similar conduct for companies and transportation agents and provides for a monetary penalty of \$3,000 per violation. 8 U.S.C. § 1321(a).

<sup>174</sup> The act of bringing an alien who lacks “a valid passport and an unexpired visa” (which would mean the alien lacked official authorization to come to the U.S.) is also made unlawful, and punishable civilly by fine. 8 U.S.C. § 1323(a)(1).

<sup>175</sup> *See generally* *United States v. Garcia-Cordero*, 610 F.3d 613 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 547. Likewise, the district court failed to make any analysis

dismissed Garcia-Cordero's claim that the statute in question is analogous to other statutes determined to be invalid by distinguishing those cases as not relating to regulatory regimes.<sup>176</sup> Comparing the "bring and present" requirement to the hit-and-run statute in *Byers*, the court held that the privilege does not excuse compliance with a regulatory regime. This reasoning is completely circular and inadequate. Unlike the statute in *Byers*, the "bring and present" requirement of 8 U.S.C. § 1324(a)(2)(B)(iii) targets an activity that is inherently illegal—alien smuggling.<sup>177</sup> When the practical effects of compliance with the "bring and present" requirement are considered, it is apparent that compliance would, in the very least, "furnish a link in the chain of evidence that would be used to prosecute him for alien smuggling."<sup>178</sup> Reporting that you have brought undocumented aliens to the country by delivering them to an immigration officer would likely subject you to prosecution under 8 U.S.C. § 1324(a)(2)(A), a misdemeanor offense.<sup>179</sup>

When given the proper statutory construction, an individual would be subject to the reporting requirement in § 1324(a)(2)(B)(iii) only when bringing an unauthorized alien to the United States. In order to comply with this reporting requirement, that individual would need to "bring" the alien to a designated port of entry and "present" him to an immigration officer for inspection.<sup>180</sup> This act would be all that is required to prosecute the individual for misdemeanor alien smuggling under § 1324(a)(2)(A) and would furnish evidence required for felony prosecution under § 1324(a)(2)(B)(i) or (ii).<sup>181</sup> The elements required for prosecution under § 1324(a)(2)(B)(iii) also overlap those required under § 1324(a)(1)(A), which also pertains to alien

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of the practical implications of compliance with the "bring and present" requirement. See generally *United States v. Garcia-Cordero*, 595 F. Supp. 2d 1312 (S.D. Fla. 2009), *aff'd*, 610 F.3d 613.

<sup>176</sup> *Garcia-Cordero*, 610 F.3d at 617. These statutes previously found to be invalid by the Supreme Court include the required registration of marijuana dealers, wagering activities, certain firearms, and Communist Party membership. See generally *Leary v. United States*, 395 U.S. 6 (1969); *Marchetti v. United States*, 390 U.S. 39 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965).

<sup>177</sup> 8 U.S.C. § 1324(a)(2).

<sup>178</sup> *Garcia-Cordero*, 610 F.3d at 617.

<sup>179</sup> See 8 U.S.C. § 1324(a)(2)(A).

<sup>180</sup> See *id.* § 1324(a)(2)(B)(iii).

<sup>181</sup> See *id.* § 1324(a)(2).

smuggling, as evidenced by the fact that these charges are frequently brought simultaneously.<sup>182</sup> A scenario in which an individual could comply with the requirements of § 1324(a)(2)(B)(iii) without exposing himself to criminal liability under another statute is hard to imagine. As a result, the self-reporting requirements in § 1324(a)(2)(B)(iii) create a substantial, and almost certain, likelihood of prosecution.

When the reporting requirements of § 1324(a)(2)(B)(iii) are adequately evaluated under the test currently in use, it is clear that it does not fall within the regulatory regime exception. Even assuming that immigration law is generally regulatory in nature, the reporting requirement in question is directed at a selective group inherently suspect of criminal activity such that complying with the requirements would furnish virtually all evidence needed for prosecution for other offenses.

#### B. *The Test Established by *Albertson* Is No Longer Adequate*

The test established by *Albertson*, decided forty-five years ago, for the application of the regulatory regime exception to the Fifth Amendment protection against self-incrimination is no longer adequate. Decades of application have revealed two major flaws with the *Albertson* test. First, the test fails to account for the criminalization of formerly regulatory areas of law. Second, the test does not provide guidance on how to determine the statute's target group. Because the *Albertson* test is so fundamentally flawed, it should be replaced with a new, more functional test, which is discussed in Part IV of this Note.

##### 1. *Albertson* Fails To Account for the Criminalization of Regulatory Laws

The *Albertson* test does not account for changes in the legal landscape since 1965, specifically the criminalization of traditionally civil areas of law like immigration. Since the 1980s, crime control efforts and legal policy in the United States have taken a "tough on crime" approach that emphasizes criminal

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<sup>182</sup> See, e.g., *United States v. Garcia-Cordero*, 595 F. Supp. 2d 1312, 1313 (S.D. Fla. 2009), *aff'd*, 610 F.3d 613 (2010); *United States v. Almeida*, 379 F. App'x 919, 921–22 (11th Cir. 2010); *United States v. Chirino-Alvarez*, 615 F.3d 1344, 1345–46 (11th Cir. 2010) (defendant charged under 8 U.S.C. §§ 1324(a)(1)(A)(iv), 1324(B)(ii)–(iii), and 18 U.S.C. § 2).

penalties and enforcement.<sup>183</sup> This approach is highlighted by the nation's "war on drugs," "war on poverty," "war on immigration," and the more recent "war on terror."<sup>184</sup> However, this criminalization has apparently gone unnoticed by courts. Courts, like the Eleventh Circuit, continue to treat these areas of law as regulatory in nature and rely on precedent in applying the "area of inquiry" factor of the *Albertson* test instead of undertaking an independent analysis.<sup>185</sup>

The problem with this "area of inquiry" analysis has become clear from the holdings in several recent cases, but is most clearly illuminated by *Garcia-Cordero*. Applying the *Albertson* factors to the "bring and present" requirement of 8 U.S.C. § 1324(a)(2)(B)(iii), the Eleventh Circuit defined the relevant area of inquiry as the entire "federal regulatory scheme through which the government controls our national borders."<sup>186</sup> This is consistent with the findings of previous courts that self-reporting requirements in immigration statutes fell within the regulatory regime exception. These statutes, previously examined, dealt with alien registration under the National Security Entry-Exit Registration System ("NSEERS")<sup>187</sup> or the questioning of aliens by immigration officers to determine

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<sup>183</sup> Miller, *Citizenship & Severity*, *supra* note 48, at 627.

<sup>184</sup> See Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 437 n.19 (2010) (discussing various domestic "wars" engaged in by the United States in recent years).

<sup>185</sup> For other arguments about the growth of criminal law into regulation, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001).

<sup>186</sup> *United States v. Garcia-Cordero*, 610 F.3d 613, 618 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 547.

<sup>187</sup> *Rajah v. Mukasey*, 544 F.3d 427, 432–33 (2d Cir. 2008). The NSEERS program was initiated in the wake of the September 11, 2001 terrorist attacks to address deficiencies in the immigration system and was designed to allow the government to track international visitors to the United States. John Ashcroft, Att'y Gen., Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002) [hereinafter *Remarks on NSEERS*], available at <http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>. The NSEERS program consisted of three components: (1) fingerprinting and photographing at the border, (2) periodic registration of aliens from high risk nations, and (3) exit controls informing the government of which visitors do not leave on time. *Id.* Part of this program, challenged in *Rajah*, required "alien males from certain designated countries who were over the age of 16 and who had not qualified for permanent residence to appear for registration and fingerprinting and to present immigration related documents." *Rajah*, 544 F.3d at 433.

admissibility to the United States.<sup>188</sup> In deciding *Garcia-Cordero*, the Eleventh Circuit adopted the Second Circuit's conclusion from its evaluation of NSEERS in *Rajah v. Mukasey* that immigration is generally regulatory and not criminal.<sup>189</sup> Neither court provides any independent analysis or reasoning to support its conclusion regarding the nature of immigration law. At first blush, *Rajah* appears to provide some guidance for evaluating the Fifth Amendment implications of the "bring and present" requirement of 8 U.S.C. § 1324(a)(2)(B)(iii); however, the statutes are dissimilar. The self-reporting requirement in NSEERS was a condition for "the continued receipt of an immigration benefit," which served substantial, non-prosecutorial, government interests.<sup>190</sup> In contrast, the "bring and present" requirement is a criminal offense, unrelated to the maintenance of an immigration benefit and applicable to aliens and citizens alike, enacted to facilitate prosecutions for alien smuggling.<sup>191</sup> The Eleventh Circuit's reliance on the reasoning in *Rajah* is further misplaced as the court in *Rajah* was assessing a reporting requirement with strictly civil penalties—deportation.<sup>192</sup> While the conclusion that a statute that is punishable by deportation is "of a different order"<sup>193</sup> than a criminal statute is logical, it is laughable to make the same statement with regard to § 1324(a)(2)(B)(iii), which is punishable by up to ten years in prison.

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<sup>188</sup> *United States v. McDowell*, 250 F.3d 1354, 1362 (11th Cir. 2001) (quoting *United States v. Lueck*, 678 F.2d 895, 899 (11th Cir. 1982) ("Because of the overriding power and responsibility of the sovereign to police national borders, the [F]ifth [A]mendment guarantee against self-incrimination is not offended by routine questioning of those seeking entry to the United States.")).

<sup>189</sup> *Garcia-Cordero*, 610 F.2d at 618 (citing *Rajah*, 544 F.3d at 442). The Eleventh Circuit again borrowed from the court in *Rajah*, quoting in its opinion that while there are "some crimes related to immigration violations . . . the level of criminal regulation in immigration matters is far less, and almost of a different order from that which governs those areas where reporting requirements have been struck down." *Id.* (quoting *Rajah*, 544 F.3d at 442).

<sup>190</sup> *Rajah*, 544 F.3d at 442. The court went on to note that the Fifth Amendment also did not apply because aliens were not compelled to comply with this reporting requirement: "Any alien who did not wish to register could avoid doing so because the notices requiring registration applied only to those who remained in the United States after a certain date." *Id.* at 443.

<sup>191</sup> See 8 U.S.C. § 1324(a)(2)(B)(iii) (2006); *Garcia-Cordero*, 610 F.3d at 620 (Korman, J., concurring).

<sup>192</sup> *Rajah*, 544 F.3d at 442.

<sup>193</sup> *Id.*

*Garcia-Cordero* is not the first case in which this “area of inquiry” analysis has led to questionable constitutional determinations under *Albertson*. In *Byers*, the Supreme Court addressed the constitutionality of California’s hit-and-run statute,<sup>194</sup> finding that the statute did not violate the protection against self incrimination as California’s interest in enforcing its vehicle code was essentially regulatory.<sup>195</sup> This conclusion was contrary to the holding of the California State Supreme Court who, in evaluating the same case, found that the defendant had rightly invoked his Fifth Amendment protections in light of the “widespread prevalence of criminal sanctions” regulating driver conduct.<sup>196</sup> The judgment of the United States Supreme Court fails to acknowledge the “hundreds of state criminal statutes regulating automobiles [sic]” in its conclusion, focusing only on the regulatory, non-prosecutorial interests of the state.<sup>197</sup>

Similarly, the Court in *Bouknight* found that the protection against self-incrimination did not apply where a juvenile court imprisoned a mother, being investigated for homicide, on civil contempt charges for failure to produce her child before the court. In assessing the area of inquiry, the Court emphasized that the order to produce the child was made in the interest of the child as part of a broad regulatory scheme.<sup>198</sup> As noted by the dissent in *Bouknight*, “[v]irtually any civil regulatory scheme could be characterized as essentially noncriminal by looking narrowly or, as in this case, *solely* to the avowed noncriminal purpose of the regulations.”<sup>199</sup> The Court, instead of looking at the order in question, looked only to the purpose of the underlying civil regime.

As seen in cases such as *Garcia-Cordero*, *Byers*, and *Bouknight*, the “area of inquiry” factor used under the *Albertson* test severely restricts the Fifth Amendment protection against

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<sup>194</sup> *California v. Byers*, 402 U.S. 424, 425 (1971). The judgment in this case was issued by a split court; Justice Harlan joined in the judgment and wrote a concurring opinion with Justices Black, Brennan, Douglas, and Marshall dissenting. *Id.* at 434, 459.

<sup>195</sup> *Id.* at 430.

<sup>196</sup> *Id.* at 438 (Harlan, J., concurring); see *Byers v. Justice Court for the Ukiah Judicial Dist. of Mendocino Cnty.*, 71 Cal. 2d 1039, 1046 (1969), *vacated*, *Byers*, 402 U.S. 424.

<sup>197</sup> *Byers*, 402 U.S. at 460 (Black, J., dissenting).

<sup>198</sup> *Balt. City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 561 (1990).

<sup>199</sup> *Id.* at 568 (Marshall, J., dissenting).

self-incrimination. Courts, in looking at the area of inquiry, may determine that individuals must comply with virtually any self-reporting requirement that falls within a generally regulatory scheme no matter how great the risk of self-incrimination.

2. *Albertson* Does Not Guide Courts in Evaluating a Statute's Target Group

The *Albertson* test is flawed in that it does not appropriately structure a court's analysis of the group targeted by a reporting requirement. *Albertson* held that a reporting requirement that was aimed at a "highly selective group inherently suspect of criminal activit[y]" was unconstitutional.<sup>200</sup> In applying this factor, courts have no guidance regarding the level at which they should frame their analysis; some courts look to the target of the specific reporting requirement while others look to the group targeted by the general area of law. This has lead different courts to reach different conclusions regarding the same statute, resulting in the unequal availability of the constitutional protection against self-incrimination.<sup>201</sup> Depending on the level at which courts evaluate this target group, any reporting statute can be deemed valid.

The result of this flaw in assessing a reporting requirement's target group is most clearly seen in the Supreme Court's decision in *Bouknight*.<sup>202</sup> In *Bouknight*, the Court determined that the Fifth Amendment protection against self-incrimination did not shield Bouknight from complying with a court order compelling the production of her child, as the juvenile protection scheme governed all persons caring for children under custodial order.<sup>203</sup> Based on this broad view of the target group—that affected by the entire civil regime—the Court determined that it did not target an inherently suspect group.<sup>204</sup> The group targeted by the juvenile protection scheme in question is more specific and

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<sup>200</sup> *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965).

<sup>201</sup> *Compare* *United States v. Flores*, 729 F.2d 593, 596–97 (9th Cir. 1983), *reh'g granted*, 732 F.2d 1438, (9th Cir. 1984), *vacated*, 753 F.2d 1499 (9th Cir. 1985) (holding 18 U.S.C. § 922(e) unconstitutional because directed only at shippers engaged in criminal conduct), *with* *United States v. Wilson*, 721 F.2d 967, 973–74 (4th Cir. 1983) (holding 18 U.S.C. § 922(e) to be a valid reporting requirement because it applied to all passengers).

<sup>202</sup> 493 U.S. at 561.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 559.

inherently suspect of criminal activity than the Court suggests. As Justice Marshall notes in his dissent, the juvenile protection scheme is “closely intertwined with the criminal regime prohibiting child abuse and applies only to parents whose abuse or neglect is serious enough to warrant state intervention.”<sup>205</sup> However, what was being challenged in *Bouknight* was not the whole juvenile protection scheme; it was compliance with a specific court order—aimed only at Bouknight—demanding the production of a specific child who the government suspected was already dead.<sup>206</sup>

The cases decided under the regulatory regime test in the forty-five years since *Albertson* have exposed two major flaws in its application. First, it fails to account for the criminalization of regulatory areas of law and, second, it does not provide guidance on how to determine the statute’s target group. A test which is so unstructured in its application that it leads to such inconsistent and illogical results is an ineffective means of protecting constitutional rights.

#### IV. COURTS NEED TO FUNDAMENTALLY ALTER THE *ALBERTSON* TEST

The *Albertson* test has proven to be an inadequate means of protecting individuals from compelled self-incrimination as it fails to provide enough structure to be applied consistently. Therefore, it must be refined to account for the criminalization of regulatory areas of law. A new test must be adopted under which courts are required to evaluate the nature of the reporting requirement and the population directly affected by the requirement. These factors would provide courts with a more focused, structured basis for analyzing self-reporting requirements and protecting individuals’ Fifth Amendment right to be free from compelled self-incrimination.

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<sup>205</sup> *Id.* at 571 (Marshall, J., dissenting).

<sup>206</sup> *Id.* at 553–54 (majority opinion). The Court notes in its opinion that Baltimore City Department of Social Services had already referred the case to police homicide investigators and that the juvenile court judge had expressed concern that the child, Maurice, was dead. *Id.* at 553.

A. *The Nature of the Reporting Requirement*

Courts must assess whether the particular statute being challenged, rather than the entire area of law, is non-criminal and regulatory in nature. In assessing the nature of the statute, courts should look to the legislative intent and the function actually served by the statute as it is applied. This statute-level analysis will allow courts to distinguish reporting requirements in criminal statutes within regulatory regimes from those that are truly regulatory.

Examining reporting requirements at the statute level would preserve decisions previously reached by courts in truly regulatory areas while protecting constitutional rights in areas where the line between civil and criminal has become blurred. For instance, the determination made by the Second Circuit in *Rajah* would not be affected by analyzing the nature of the statute. The registration of aliens under the NSEERS program was required as a means of increasing the accountability of aliens and allowing the government to identify and deport those who overstayed their visas.<sup>207</sup> The consequence imposed upon the defendants—the consequence explicitly intended by Congress—was the civil deportation of those who abused the immigration privileges they had been granted.<sup>208</sup>

A test which focuses on the statute in question would allow courts to make better determinations regarding statutes in regulatory areas which are becoming increasingly criminalized. Had the Court in *Bouknight* focused on the court order in question, rather than the “broadly directed, noncriminal regulatory regime”<sup>209</sup> of the state child protection regulations, they would have had to reconcile the “overlapping purposes underlying that statute and Maryland’s criminal child abuse statutes.”<sup>210</sup> If the Court had evaluated the application of this civil statute, which serves the same purpose as a related criminal statute, under the recommended test, it probably would have found that the application of Fifth Amendment protections was necessary.

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<sup>207</sup> See *Rajah v. Mukasey*, 544 F.3d 427, 433 (2d Cir. 2008); *Remarks on NSEERS*, *supra* note 186.

<sup>208</sup> See *Rajah*, 544 F.3d at 448.

<sup>209</sup> *Bouknight*, 493 U.S. at 559.

<sup>210</sup> *Id.* at 568 (Marshall, J., dissenting).

*B. The Population Affected by the Reporting Requirement*

Courts must evaluate the population affected by the reporting requirement by looking at the text of the statute, agency interpretations, and actual application. By looking not only at the general text of the requirement, but beyond—to applicable agency interpretations or the application of the reporting requirement, courts can adequately and consistently assess the requirement's target.

This structured approach to analyzing the target population would provide more consistent outcomes. The benefits of this approach could be seen by applying it to 18 U.S.C. § 922(e), the statute in question in both *Flores*<sup>211</sup> and *Wilson*.<sup>212</sup> This statute makes it a crime for any person to ship firearms via a common carrier, such as an airplane, to unlicensed individuals without notifying the carrier.<sup>213</sup> Looking at this requirement and others in the same section—specifically § 922(f)—the Fourth Circuit determined that the reporting requirement applied to all passengers on the common carrier.<sup>214</sup> In support of its interpretation, the Fourth Circuit noted that passengers who legally possessed weapons could turn them over to the carrier for the duration of the flight.<sup>215</sup> However, common carriers also have a statutory duty not to ship weapons that would violate gun control law and would “likely act to protect itself by notifying authorities” of any illegal weapons they were notified of.<sup>216</sup> While this statute would likely still be found valid after evaluating the

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<sup>211</sup> *United States v. Flores*, 729 F.2d 593, 596–97 (9th Cir. 1983), *reh'g granted*, 732 F.2d 1438 (9th Cir. 1984), *vacated*, 753 F.2d 1499 (9th Cir. 1985). Although the Ninth Circuit eventually reversed its decision in this case, it did not provide any detailed explanation or analysis of why it changed its view of the target group. *United States v. Flores*, 753 F.2d 1499, 1500 (9th Cir. 1985). While this flip-flop brought the Ninth Circuit in line with the rest of the courts that analyzed this statute, its lack of explanation provides little guidance for later decisions. *Id.* at 1501–02.

<sup>212</sup> *United States v. Wilson*, 721 F.2d 967, 973 (4th Cir. 1983) (holding that 18 U.S.C. § 922(e) was not unconstitutional as it applied to all airline passengers, not a group inherently suspect of criminal activity).

<sup>213</sup> 18 U.S.C. § 922(e) (2006).

<sup>214</sup> *Wilson*, 721 F.2d at 973–74. The court further noted that the statute did not require individuals to report information to the government, but to a third party. *Id.* at 974. This statement appears, as noted by *Flores*, to merge the relevant Fifth Amendment analysis with the analysis of a Fourth Amendment issue which should remain separate. *Flores*, 729 F.2d at 598.

<sup>215</sup> *Wilson*, 721 F.2d at 973 n.7 (citing 18 U.S.C. § 922(e)).

<sup>216</sup> *Flores*, 729 F.2d at 596.

factors and balancing the governmental and constitutional interests, it is important for courts to reach that conclusion based on analysis and not conjecture.

Providing courts with a more structured framework for analyzing the reporting requirement's target group will also help prevent hard cases from making bad constitutional law. With no guidance to follow in their analysis, courts may inadvertently mold their analysis to the desired outcome in difficult cases, like *Bouknight*. Bouknight was incarcerated on contempt charges for non-compliance with a court order to produce her son, whom the government suspected she had killed.<sup>217</sup> The Supreme Court found that she was not entitled to the protection of the Fifth Amendment because the Baltimore juvenile protection scheme did not apply to a group inherently suspect of criminal activity.<sup>218</sup> Requiring the Court to evaluate the target of the court order, or even similar orders, would force it to reconcile this conclusion with the fact that the juvenile court supervises parents suspected of the abuse and neglect of their children.<sup>219</sup>

Under these refined factors the "bring and present" requirement in 8 U.S.C. § 1324(a)(2)(B)(iii) belongs within the Fifth Amendment's protection against self-incrimination. The "bring and present" requirement creates an affirmative duty for individuals bringing undocumented aliens into the country to present these aliens to an immigration officer for inspection.<sup>220</sup> The statute was enacted for the purpose of criminalizing the act of bringing undocumented aliens to the country with this reporting requirement intentionally targeting alien smugglers.<sup>221</sup> Compliance with this reporting requirement would equate to admitting all necessary elements of a misdemeanor offense and providing evidence which could be used to prosecute or investigate other offenses.<sup>222</sup> An analysis of the statute's text suggests that it targets only individuals transporting undocumented aliens, which is a crime.

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<sup>217</sup> Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 553 (1990).

<sup>218</sup> *Id.* at 559.

<sup>219</sup> *Id.* at 571 (Marshall, J., dissenting).

<sup>220</sup> 8 U.S.C. § 1324(a)(2)(B)(iii) (2006).

<sup>221</sup> United States v. Garcia-Cordero, 610 F.3d 613, 619 (11th Cir. 2010) (Korman, J., concurring), *cert. denied*, 131 S. Ct. 547.

<sup>222</sup> *See, e.g.*, 8 U.S.C. § 1324(a)(2)–(4).

Evaluating reporting requirements using the factors currently evaluated under *Albertson* has led courts to illogical and inconsistent determinations regarding the protection against self-incrimination. Requiring courts to conduct a more structured analysis focused at the statutory level would allow them to adequately distinguish reporting requirements in regulatory areas of law that serve criminal purposes from those that are truly regulatory, allowing courts to maintain the tenuous balance between governmental needs and individual protections.

#### CONCLUSION

Self-reporting schemes are a necessary aspect of many areas of government regulation and allow the government to gather pertinent information. However, these reporting requirements risk compelling individuals to provide the government with incriminating information. In balancing these needs, the courts created a regulatory regime exception to the Fifth Amendment—prohibiting individuals from using the Fifth Amendment to shield them from regulatory reporting requirements. To determine whether a reporting requirement fell within this exception, the Supreme Court, in *Albertson v. Subversive Activities Control Board*, developed a test that evaluates whether the requirement was aimed at a selective group inherently suspect of criminal activities, asserted in an essentially non-criminal and regulatory area of inquiry, and if compliance created a substantial likelihood of prosecution. This test no longer adequately protects individuals from compelled self-incrimination. The *Albertson* test's focus on the area of inquiry fails to account for the recent criminalization of traditionally regulatory areas of law, such as immigration law. Furthermore, the test does not provide courts with guidance on how to evaluate the population targeted by the reporting requirement. As a result, the court in *United States v. Garcia-Cordero* mistakenly found that the statute in question, 8 U.S.C. § 1324(a)(2)(B)(iii), fell within the regulatory regime exception.

To continue to maintain the balance between the government's need for efficient information gathering and individuals' protection from self-incrimination, the Court must adopt a new standard for evaluating reporting requirements. First, courts must assess the nature of the reporting requirement

rather than the entire area of law. Looking to the purpose of a statute and the function it serves will allow courts to adequately separate criminal statutes from those that are truly regulatory in nature. Second, courts must focus on the population affected by the specific reporting requirement. Courts must look deeper than the text on the face of the statute to the agency regulations and the real world application of the requirement as well. Courts must diligently maintain the balance between governmental need for information and the constitutional right to be free from self-incrimination.