



GETTY IMAGES/MARIO ANNA



Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System

By Tom Jawetz

July 2019

Center for American Progress



Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System

By Tom Jawetz

July 2019

Contents

- 1 Introduction and summary**
- 5 What does 'rule of law' mean?**
- 9 Today's problems are long-standing**
- 13 Understanding the extralegal immigration system**
- 17 Continued legislative inertia leaves only two flawed options**
- 23 Guiding principles and policy proposals: Building a fair and humane immigration system that works**
- 31 Conclusion**
- 32 About the author and acknowledgments**
- 33 Endnotes**

Introduction and summary

The immigration debate in America today is nearly as broken as the country's immigration system itself. For too many years, the conversation has been predicated on a false dichotomy that says America can either honor its history and traditions as a nation of immigrants¹ or live up to its ideals as a nation of laws by enforcing the current immigration system.² Presented with this choice,³ supporters of immigration—people who recognize the value that immigrants bring to American society, its culture, and its economy, as well as the important role that immigrants play in the nation's continued prosperity—have traditionally seized the mantle of defending America as a nation of immigrants.⁴ By doing this, however, rather than challenging the dichotomy itself, supporters have ceded powerful rhetorical ground to immigration restrictionists, who are happy to masquerade as the sole defenders of America as a nation of laws.⁵ The fundamental problem with this debate is that America is, and has always been, both a nation of immigrants and a nation of laws. Debates over a liberal immigration policy actually predate the start of the nation itself; they infused the drafting of the U.S. Constitution, America's founding document.⁶

Indeed, it is precisely because these two visions of the country are intertwined that America cannot be a nation of laws if those laws are antithetical to its history and ideals as a nation of immigrants. Put another way, the U.S. immigration system can, and must, recognize both the need for movement and the need for defined borders; it must have clear guidelines but also clear guardrails; and it must live up to the best of the nation's past while working for its present and future.

This report sets out a framework for immigration policymaking that brings together the two visions of America, with the goal of building a fair, humane, and well-functioning immigration system in which the rule of law is restored. Additionally, it makes the case for why immigration proponents can and should reclaim the rule of law narrative frame from immigration restrictionists who frequently misappropriate the term to drive law and order policies that demonize immigrant communities and communities of color and only worsen the dysfunctionality and cruelty of the current system.

The report begins by laying out what the rule of law is, how it has been distorted by opponents of immigration, and the degree to which the current immigration system makes a mockery of American history and ideals—of an America that is both a nation of laws and a nation of immigrants. The report then outlines the emergence over a period of years of the extralegal immigration system that exists today. Next, it illustrates that under this broken system, immigration policy has fluctuated between two poles: on the one hand, relying increasingly upon administrative discretion alone to save the system from itself, and on the other, relying on maximum enforcement of “the laws on the books without apology,” as former U.S. Immigration and Customs Enforcement (ICE) Acting Director Thomas Homan said.⁷

The inadequacies of the former, and the abject cruelty of the latter, have contributed to a growing sense among some policymakers, as well as many in the pro-immigrant advocacy community, that the entire enforcement apparatus must be unwound.⁸ Certainly, enforcement reforms are necessary, as the following sections of this report explain. But the move to reject enforcement entirely—even in theory—only fuels louder calls for maximum enforcement, which then strengthen calls for abolition, ad infinitum. It is time to break this cycle of extremes and build an immigration system that is workable and humane and that the public broadly believes can—and should—be enforced through rules that are fair and just.

This report is not intended to provide all the answers. Rather, it builds a framework for analysis within which additional publications will follow. In particular, this report calls for a vision for immigration policymaking that includes, at a minimum, the following guiding principles and policy recommendations:

- **Build a generous and well-functioning legal immigration system that can be responsive to the nation’s changing needs.** This would include realistic and independent evidence-based avenues for immigration that allow families to stay together and businesses to get the workers they need, while enhancing all workers’ rights to fair and increasing wages, safe working conditions, and the opportunity to thrive together. The rules of such a system would be designed to recognize the fact that the only way to have an immigration system that works is to more closely align supply and demand, rather than force the system to adhere to artificial caps, untethered from reality and revisited only once in a generation at best. Importantly, if immigration were successfully channeled through a functioning regulatory system,

enforcement resources could instead be dedicated to preventing individuals from entering the country outside of that system and to appropriate enforcement actions necessary to maintain the integrity of that system and U.S. borders, which remain central to the very notion of national sovereignty.

- **Establish a humane asylum and refugee system** that honors the nation’s historic commitment to be a place of refuge, as well as ensures that those in need of humanitarian protection receive fair and efficient adjudication of their claims without sacrificing due process.
- **Commit to proportionality, accountability, and due process in immigration enforcement.** This would do away with the current one-size-fits-all approach, in which banishment from the country is the only sanction on the table and opportunities for relief are few, and instead allow for a range of potential penalties to fit the offense and the individual. Likewise, such a system would have real due process; be administered through independent immigration courts that consider cases with the ultimate goal of rendering fair and just outcomes;⁹ and incorporate important aspects of the rule of law long found in the U.S. criminal justice system, including the notion that sanctions should be subject to statutes of limitations.
- **Create a path to citizenship for undocumented immigrants and other individuals long residing in the country.** This would allow people to come forward, register with the government, pass a background check, and be put on a path to permanent residence and eventual citizenship. Building a functioning immigration system, as described above, will go a long way toward ensuring that people no longer have to come into the country outside the law—or remain outside the law—in the future. However, this will do nothing to address the 10.5 million people already here without status who have, on average, lived in the United States for nearly 15 years.¹⁰ It will not help the more than 1 million individuals now protected by Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS), or Deferred Enforced Departure (DED) who have no path to permanent residence and are living in fear that their temporary reprieve may soon be ripped away. If our collective goal is to create policy that upholds the rule of law in the U.S. immigration system—where we all live by a fair and humane system of rules that is transparent, consistent, and aligned with everyday realities—there can be no question that the nation must provide a path to permanent legal status for those already here. They are full and contributing members of U.S. communities—raising families, paying taxes, and enriching society in myriad ways.¹¹

The goal of those who support and recognize the value of immigration and immigrants must be to build an immigration system in which the rules are clear; there are legal, accessible pathways for people to enter into and remain in the United States; and punishments for violating the rules—when applicable—are fair and just. Such a system would uphold the rule of law by honoring America’s long history as both a nation of immigrants and a nation of laws, and it would be humane and functional. In short, it would be a system of which all Americans could be proud—and a system that all Americans could see the value of defending and enforcing.

What does ‘rule of law’ mean?

As the term is popularly used, “rule of law” refers to a sense that the nation is governed by a set of laws that people understand, that work, that are fundamentally fair, and that people believe can and should be followed. The idea that the United States should be ruled by a “government of laws and not of men,” in John Adams’ formulation, lies at the heart of the nation’s constitutional tradition.¹² This concept, which traces originally to Aristotle, was first popularly called the rule of law by the 19th-century English law professor A.V. Dicey. As explained by more modern legal scholars, a system that adheres to the rule of law must, at a minimum, be:

- **Prospective:** Punishment or other legal consequences must follow from a properly and previously enacted law; ex post facto punishments for conduct predating the law are forbidden.
- **Public:** Laws are created through a regular public process, and the public knows what the laws are and can conform their conduct to them; adjudication of alleged violations also are made in public, not completed before a special or partial tribunal.
- **General:** No one is, by virtue of wealth or political position, above the law or subject to a different law.
- **Stable:** Changes in law, particularly in the courts, develop over time by a system of precedent, not arbitrary departures.¹³

Richer definitions of the rule of law additionally incorporate concepts pertaining to “fundamental rights, democracy, and/or criteria of justice or right.”¹⁴

It is important to distinguish between the rule of law, which is a normative ideal that incorporates values such as fundamental fairness, equality, and decency, and “law and order,” which is an enforcement-heavy vision of social control that is generally used as a racially coded dog whistle. As law professor Michael C. Dorf puts it, when President Donald Trump calls himself “the law-and-order candidate,” what he really means is that he “will use the law to impose order on ‘them’ (undocumented immigrants,

African Americans protesting racially biased policing, Muslims) in order to protect ‘us’ (white Americans).”¹⁵ That is the polar opposite of what this report is proposing when it discusses restoring the rule of law in the immigration system and reclaiming the rule of law narrative from restrictionists who have misappropriated it to serve their anti-immigrant agenda.¹⁶

As illustrated in the following subsections, the United States’ immigration system has long fallen far short of rule of law principles. During the Trump administration in particular, policies have been adopted that violate the letter and spirit of the law, often without opportunity for public scrutiny or comment,¹⁷ and frequently visiting serious legal consequences on immigrants as a result of conduct that long predated the reversal of course ushered in by the new guard.

The Trump administration is undermining the rule of law by breaking the law

One primary goal of this report is to explore the ways in which failing to substantially reform the U.S. immigration system—and simply continuing to escalate enforcement of that broken system—undermines the rule of law. But because restrictionists have long been motivated not by fidelity to the rule of law but rather by the desire to severely restrict immigration into the country and maximize deportations, in working toward their goals, they frequently undermine the rule of law by breaking the law. A few recent examples of such efforts from the Trump administration include:

- **Separating families:** In June 2018, a federal court preliminarily ruled unconstitutional the administration’s separation of thousands of migrant children from their parents at the border. Nothing in the law required the Trump administration to separate families—that was a deliberate policy choice. The court described the government’s conduct as likely “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience” and “so ‘brutal’ and ‘offensive’ that it [does] not comport with traditional ideas of fair play and decency.”¹⁸ Upon learning that the government failed to inform the court and counsel for the plaintiffs that thousands of additional children may have been separated from their parents before the period covered by the court’s previous orders, the court expanded the class of children covered in the suit. It also rejected the government’s argument that it would be too burdensome if the court required the government to account for still more children forcibly separated.¹⁹

- **Gutting asylum laws:** In 2018, then-U.S. Attorney General Jeff Sessions directed immigration judges and the Board of Immigration Appeals to deny asylum protections in nearly all cases involving persecution based on domestic violence or gang activity.²⁰ In December, a federal judge permanently enjoined this directive as an “arbitrary and capricious” violation of multiple immigration laws.²¹ Two months later, in defiance of clear statutory language requiring that a person be allowed to apply for asylum “whether or not” the migrant arrives at “a designated port of arrival,”²² the Trump administration issued an interim final rule and a presidential proclamation that together attempted to make asylum unavailable to anyone who entered between designated ports.²³ A separate district court promptly issued a restraining order to block this clearly illegal prohibition, and both the U.S. Court of Appeals for the 9th Circuit and the U.S. Supreme Court refused to reinstate it on the grounds that the policy likely violates both substantive immigration law and the Administrative Procedure Act.²⁴ The union representing the nation’s asylum officers recently filed an amicus brief in support of litigation challenging yet another effort to illegally make protections unavailable to asylum-seekers. The brief, which challenges the so-called Migrant Protection Protocols that have forced thousands of asylum-seekers to wait for months in desperate and dangerous conditions in Mexico, calls the policy “fundamentally contrary to the moral fabric of our Nation” and a “violation of international treaty and domestic legal obligations.”²⁵ And as this report went to print, the administration was pursuing still another interim final rule designed to effectively eviscerate the entire asylum system along the southwest border, once again in violation of clear congressional commands.²⁶
- **Ending Deferred Action for Childhood Arrivals:** Every court that has ruled on whether the administration likely broke the law when it terminated DACA—including two in the U.S. Court of Appeals system and three U.S. District Courts—has entered a preliminary injunction blocking the administration from ending the initiative. These courts have ruled that the administration likely violated the Administrative Procedure Act by ending the initiative in an “arbitrary and capricious” manner, at least in part because the administration failed to acknowledge or consider the great extent to which DACA recipients have come to rely upon the continuation of these protections. Though multiple district and circuit courts have yet to rule on pending cases addressing the issues at stake and, presently, no lower court split exists, the Supreme Court in June agreed to review and consolidate three lower court rulings.²⁷
- **Attacking so-called sanctuary cities:** At least five federal courts have enjoined the Trump administration’s efforts to withhold federal law enforcement grants from local jurisdictions that refuse to fall in line with the administration’s unlawful immigration enforcement practices or go beyond what the law requires in the way of cooperation.²⁸

- **Ignoring the facts and law to end Temporary Protected Status:** In October, a district court preliminarily enjoined the administration’s efforts to terminate certain TPS designations that protect approximately 300,000 nationals of four countries. Recognizing the hardship that an illegal termination of status would pose for these immigrants and their families, the court found that the U.S. Department of Homeland Security (DHS) likely violated the Administrative Procedure Act—and may have violated the Immigration and Nationality Act as well—when it adopted a “substantial and consequential change in practice ... in order to implement and justify a pre-ordained result,” namely the deportation of those immigrants.²⁹

The immigration debate in this country is deeply distorted by the fact that the people who most consistently cloak themselves in rule of law rhetoric regularly break the law themselves. Restoring the rule of law in the U.S. immigration system in the wake of Trump administration policies begins with ending these lawless actions, but that must be just one step toward putting in place an immigration system that is fair and humane and that works as designed.

Today's problems are long-standing

Large parts of America's immigration system have long failed to embody any of the features of a fair, humane, and well-functioning system that responsibly manages migration and upholds the rule of law. Incredibly, policymakers have not modified the legal pathways available to immigrate to the United States in nearly 30 years.³⁰ Going back even further, American policymakers have grappled with neither the realistic demand for immigrant labor nor the lived realities of immigrants themselves. For decades, the nation has relied on immigrants to fill labor shortages, particularly in industries such as agriculture. But by failing to create legal pathways for such immigrants to enter the country and have the opportunity to remain, policymakers—and society more generally—have built unauthorized immigration and unauthorized employment into the system itself.³¹ As Richard Land, former president of the Southern Baptist Convention's Ethics and Religious Liberty Commission, aptly puts it, for decades “we’ve had two signs up at the border. ... No trespassing and help wanted.”³²

Likewise, as Congress in the Immigration and Nationality Act of 1965 worked to promote equality and end the explicit discrimination of the national origins quota system, it also laid the foundation for new inequities. Because per-country caps included in that law allocate no more than a certain number of visas each year to nationals from any given country, U.S. citizens and lawful permanent residents are regularly forced to endure impossibly long waiting periods to reunite with family members from countries such as China, Mexico, India, and the Philippines simply because of their place of birth.³³

In short, the immigration system has long failed to reflect the realistic needs of American society, American businesses, and American families. Predictably, an extralegal immigration system has emerged to fill the holes—one that everyone in the United States relies upon or participates in, whether directly or indirectly. Clearly, there is a tension between the laws on the books and reality on the ground.

Importantly, this tension has only increased over time, exacerbated by policymakers' failure for years to enact a modernized and right-sized approach to immigration that captures and amplifies its benefits. Policymakers have also failed to provide a path to permanent legal status and eventual citizenship for the estimated 10.5 million people who are living in the country today without lawful status largely because the immigration system has been so dysfunctional for so long.³⁴ Congress and various administrations have repeatedly layered upon this broken system additional enforcement tools and resources that have led to heightened arrests, detentions, and deportations, frequently of longtime residents and treasured members of families and communities.³⁵

Today's immigration enforcement apparatus is overfunded. Congress in fiscal year 2018 appropriated 34 percent more for the immigration enforcement bureaucracy—\$24 billion—than it did for all other federal criminal law enforcement agencies combined, including the FBI, the Drug Enforcement Administration, the Secret Service, the U.S. Marshals Service, and the Bureau of Alcohol, Tobacco, Firearms and Explosives.³⁶ This has developed in large part as a reaction to major events, most notably the September 11 attacks that continue to hover over immigration policy debates.³⁷ Perhaps relatedly, overfunding and the often singular focus on enforcement are also attributable to policymakers—and the American public—underappreciating the fact that the immigration system is broken not because the laws are insufficiently enforced, but because they cannot be fully enforced without doing serious damage to the country itself.

Of course, discretion is an essential element in the administration and enforcement of any functioning legal system; exercises of discretion large and small in the U.S. immigration system can be found throughout history. But faced with perpetual congressional inaction, previous administrations have, at times, exercised their discretion in increasingly expansive ways in attempting to partially address the enormous shortcomings of the outdated immigration system. The Obama administration's efforts to shape policy through discretion began with a 2011 prosecutorial discretion guidance that in 2014 was replaced with new guidance focused on people convicted of serious offenses and recent border crossers.³⁸ In 2012, the Obama administration created the DACA initiative—in part because of Congress' failure to deal with an issue for which the American public had already expressed overwhelming support³⁹—and in 2014, it attempted to expand DACA and simultaneously create the Deferred Action for Parents of Americans (DAPA) initiative. DACA and DAPA were designed to allow certain nonenforcement-priority individuals to come forward and request temporary protection.⁴⁰

But discretion, though a lawful and essential part of any enforcement regime, has its limits. While it can, and at times has, ameliorated some of the harms that flow from the United States' broken immigration system, it cannot fix the system itself. Moreover, discretionary acts are, by their very nature, ephemeral, subject to the whims of politicians and public opinion.⁴¹ Perhaps one of the clearest examples of this shortcoming, as well as of how the Trump administration has broken from previous administrations of both parties when it comes to the use of discretion, is the executive order issued by President Trump just days after taking office that renders every person who is undocumented or otherwise potentially deportable an equal and high priority for removal from the country.⁴² Other examples include the decisions to systematically eliminate many prior policy-level exercises of discretion—most prominently DACA⁴³ and the protections for hundreds of thousands of longtime residents with TPS and Deferred Enforced Departure.⁴⁴

Moreover, it is important to acknowledge that some exercises of discretion are—inaccurately, but just the same—cast by some as nonenforcement of the laws as written. For this reason, relying for years upon increasingly robust exercises of discretion to effectively save the broken immigration system from itself has fed the anti-immigrant narrative that only maximum enforcement demonstrates respect for the rule of law. Opponents of DACA and DAPA held multiple congressional hearings⁴⁵ and filed lawsuits⁴⁶ raising the highly implausible claim that both initiatives violated the constitutional duty of the president to “take Care that the Laws be faithfully executed.”⁴⁷ In the early days of the Trump administration, former White House Press Secretary Sean Spicer referred to the elimination of prosecutorial discretion guidance as “tak[ing] the shackles off” ICE personnel,⁴⁸ and then-Acting Director of ICE Thomas Homan, who is now rumored to be President Trump's pick to serve as a “border czar,”⁴⁹ months later similarly praised Trump for taking “the handcuffs off law enforcement.”⁵⁰

For too long, we in the pro-immigrant community have allowed restrictionists to dictate the distorted terms of the debate. And today we are at risk of allowing them to wrongly define us as supporting an open-border policy rather than a system of rules that is tailored to meet the needs and interests of the country and that can realistically and humanely be followed and enforced. We have failed both to call out the fundamental flaws in their claims that they are honoring the rule of law, as well as to state clearly that the rule of law can be restored in the immigration system only if policy-makers build a well-functioning system that reflects America's traditions as a nation of laws and a nation of immigrants.⁵¹ By not engaging in the debate on these terms, and not aggressively and justifiably reclaiming the rule of law narrative in the immigration debate, we have allowed the rule of law argument to be made exclusively by restrictionists—Donald Trump, in particular—who are themselves largely responsible for the degradation of the rule of law in the immigration system today.⁵²

Through demands to maximally and cruelly enforce existing law and to further restrict opportunities for legal immigration into the country, restrictionists have consistently blocked bipartisan and popular efforts to reform and fix the United States' immigration laws. Gallup polling over the years has found that three-fifths to two-thirds of Americans support allowing those in the country without status to become citizens.⁵³ In effect, restrictionists have actually perpetuated the current extralegal immigration system.⁵⁴ Moreover, as their influence has hit a crescendo during the current administration, it has become clear that their own policy prescriptions routinely violate the law, even as they claim to be upholding it, as well as common understandings of fairness and decency. Such prescriptions include family separation and various iterations of a ban on the right to request asylum or to enter the United States from a majority-Muslim country.⁵⁵

Understanding the extralegal immigration system

It is little secret that the immigration laws on the books do not work. Because of numerical limits set in place decades ago, there are unrealistically large and long backlogs for most categories of immigrants to enter the United States. Currently, 3.7 million individuals are awaiting a family-based immigrant visa; many of them already have been waiting 10 to 20 years and can expect to wait far longer before a visa number becomes available.⁵⁶ To take an extreme—but real—example, a U.S. citizen petitioning for an immigrant visa on behalf of their brother or sister in Mexico today can expect to wait upwards of 160 years for a visa to become available.⁵⁷

Similar problems exist on the employment-based side. Industries across the United States employ millions of undocumented workers in jobs that are traditionally considered low skill,⁵⁸ and they frequently have challenges finding labor to fill positions and grow their businesses, particularly at a time of historically low unemployment.⁵⁹ Despite this reality, the current immigration system makes only 5,000⁶⁰ permanent visas available annually to these “other workers.”⁶¹ It also provides limited to no opportunities—and inadequate protections, at best⁶²—for individuals who wish to enter the United States temporarily for such work.

Even for those commonly referred to as higher-skilled workers, extensive and unevenly distributed waits for immigrant visas leave individuals with little job mobility and great uncertainty for themselves and their family members.⁶³ Because of the arbitrary per-country caps that limit overall immigration from any single country in a given year, an Indian national currently applying for a green card from within the United States under an employment-based category typically available to them can expect to wait an estimated 119 years before a green card becomes available.⁶⁴ Earlier this month, the U.S. House of Representatives passed, on a strongly bipartisan basis, H.R. 1044, the Fairness for High-Skilled Immigrants Act of 2019, which would eliminate the per-country cap for employment-based immigrant visas and raise the cap from 7 percent to 15 percent for family-based immigrant visas.⁶⁵

The problems with the United States' outdated immigration system help explain why immigrants will, in the absence of the reforms described in this paper, no doubt continue to enter the country outside of legal channels and remain outside those channels, as well as why millions of immigrants already in the country today have lived and worked here without status for so long.⁶⁶ Contrary to popular belief, there is no one "line" that a prospective immigrant can get in to wait their turn for an immigrant visa. The vast majority of undocumented immigrants who are here now had no realistic way to come to the United States lawfully, have no way to obtain lawful status from within the country, and have few, if any, defenses to deportation if they are apprehended.⁶⁷ They are trapped in a Kafkaesque system that simultaneously counts upon their contributions to the country's shared prosperity and refuses to provide an opportunity for them to do so within the confines of the law and that inconsistently and unpredictably threatens to turn their entire lives upside down and eject them from the country in which they live, frequently to serve political ends.

To students of history, none of this is new. In its 1982 decision in *Plyler v. Doe*, the Supreme Court recognized the constitutional right of all children, regardless of immigration status, to a free public education, observing that "the confluence of Government policies has resulted in 'the existence of a large number of employed illegal aliens ... whose presence is tolerated, whose employment is perhaps even welcomed.'"⁶⁸ Restrictions and extralegal workarounds—which all too often have benefited only immigrants of European descent while further disadvantaging immigrants of color⁶⁹—are an important part of the story of immigration in America. Just a few examples of such policies include:

- **Chinese exclusion:** Starting in 1875, Congress began to construct the system of Chinese exclusion. Far from ending Chinese immigration into the United States or somehow redirecting the economy's demand for labor, however, the exclusion laws predictably led to the first wave of extralegal immigration. Chinese migrants who had entered the United States prior to the laws' enactment remained in the country, even though they were barred from citizenship, and fostered subsequent rounds of extralegal migration: Tens of thousands of Chinese nationals continued to enter, meeting labor market needs through a loophole that allowed previously arrived Chinese men to travel home and return with their sons and daughters.⁷⁰
- **The bracero program:** From 1942 to 1964, the United States permitted roughly 5 million Mexican agricultural workers to enter as part of the bracero program. In addition, the Immigration and Naturalization Service (INS) took steps during this period to permit growers in the southwest to retain many of their undocumented workers by allowing them to simply touch one foot back over the Mexican border and reenter as braceros, or contract laborers—a bureaucratic fiction at best.

However, the INS also substantially increased efforts to crack down on perceived undocumented immigrants. This ramped-up enforcement took the form of widescale raids on undocumented workers, as well as a series of enforcement actions under the name Operation Wetback, which began in 1954 and saw more than a million people deported in slightly more than a year.⁷¹ Reviewing the evidence, Michael Clemens and his colleagues at the Center for Global Development concluded last year that the combination of “new and ample legal migration pathways, paired with incentives against unauthorized migration through enhanced enforcement,” resulted in the replacement of unauthorized migration with authorized migration.⁷² But when the bracero program ended and the labor market demand did not, the absence of adequate legal channels for migrant workers to enter the country led once more to a predictable increase in unauthorized migration and a decrease in enforcement.⁷³

- **The Texas Proviso:** With the Immigration and Nationality Act of 1952, policymakers further entrenched the national origins quota system, which privileged northern and western European immigrants while severely limiting southern and eastern Europeans, and effectively shutting out immigration from most of Asia and Africa.⁷⁴ Policymakers also attempted to create a system of penalties against anyone bringing undocumented immigrants into the United States or otherwise harboring them, but in the final bill, lead sponsor Sen. Pat McCarran (D-NV) helped insert a provision known as the Texas Proviso, making it clear that employing undocumented immigrants did not run afoul of the law. As scholars such as Daniel Tichenor have pointed out, this duality—of staunch immigration restrictionists such as McCarran also working to keep the door open to undocumented migration—says a lot about the foundations of the modern, or extralegal, immigration system.⁷⁵

Contemplating what the United States would look like without this extralegal immigration system—both the system that predictably attracts unauthorized immigrants to enter and remain in the country as well as the network of policies and practices, formal and informal, that have long dealt with this reality, often by looking the other way in the face of such conduct—makes it clear why the system has been necessary in the absence of a well-functioning legal immigration system.

First, undocumented workers are fully integrated into the economic prosperity of the country. In 2016, the Center for American Progress published a study finding that removing all undocumented workers from the workforce “would immediately reduce the nation’s GDP by 1.4 percent, and ultimately by 2.6 percent, and reduce cumulative GDP over 10 years by \$4.7 trillion.”⁷⁶ Some industries would see workforce reductions of nearly 20 percent, with long-run annual gross domestic product losses in the tens of billions of dollars.

Immigrants, both documented and undocumented, are also breathing new life into rural communities around the country, some of which have been experiencing population decline for more than two decades. A recent CAP study found that in nearly 4 in 5 rural places that experienced population decline between 1990 and 2012–2016, immigrants helped ameliorate those losses.⁷⁷ And in those rural places that experienced population growth over that same period, immigrants were entirely responsible for the growth in more than 1 in 5 places. In these areas, immigrants are opening small businesses, providing essential health care services, preventing school closures, and filling and creating jobs that drive the local economy. They are also contributing their foods, music, cultures, and languages, and are increasingly becoming involved in local government.⁷⁸

Second, not only is the country's present tied to immigrants, but so is its future. Most immigrants come to the United States during their prime working and reproductive years.⁷⁹ And as more Baby Boomers retire in the years ahead, immigrants will not only disproportionately work as their doctors, nurses, and home health aides,⁸⁰ but immigrants and their children also will do the lion's share of the work in filling the enormous holes in the workforce. According to a recent study by the National Academies of Sciences, Engineering, and Medicine, immigrants and their children will have accounted for virtually all of the growth in the U.S. working-age population during the current decade; without immigrants and their children, this age group would decrease by more than 7 million people in the coming decade.⁸¹ The contributions of foreign-born workers through payroll taxes are also shoring up the country's social safety net for years to come and helping ensure that the nation can honor the commitment it made to older Americans now turning to those programs for support.⁸²

The losses to the country in the absence of this extralegal immigration system would extend beyond these economic impacts. As law professor Hiroshi Motomura observes in his book *Immigration Outside the Law*, the “broad, if controversial, acquiescence in unauthorized migration” may be principally attributable to the important role that undocumented immigrants play in the U.S. workforce, but “over time they make lives, families, and communities.”⁸³ According to Motomura, the fact that America has long had a de facto “national policy of acquiescence means that unauthorized migrants come to the United States as part of a tacit arrangement that is mutually beneficial.”⁸⁴ But while mutually beneficial in many ways, living outside the law at the mercy of the durability of a tacit—not formal—arrangement carries significant risks for the individual and society at large. Americans must not be satisfied with a decrepit legal system that is only kept from doing maximum harm to their country through the broad use of enforcement discretion and the general agreement to largely look the other way.

Continued legislative inertia leaves only two flawed options

The current U.S. immigration system is fundamentally unable to operate on its own terms. It has long depended on the extralegal immigration system continuing to exist and be tolerated, on workarounds and safety valves. In the absence of substantial legislative reforms to this system, there are only two options left, both of which are deeply flawed: counting on discretion alone to save the system, or maximizing enforcement and disappearing discretion.

Counting on discretion alone to save the system from itself

As with any enforcement system, prosecutorial discretion exercised in both individual instances and across categories of cases to reflect shifting priorities has long played an important role in the administration of U.S. immigration laws.⁸⁵ But in the face of protracted congressional inaction to address major deficiencies in the immigration system, the Obama administration made significant use of discretion—particularly in its latter years—by adopting a series of policies to rationalize the safety valves and workarounds and, in some instances, to create new workarounds for intractable challenges.⁸⁶ The most prominent of these policies pertained to a series of prosecutorial discretion memoranda, which provided general guidance regarding the prioritization of limited resources in the enforcement of civil immigration laws, as well as specific guidance deprioritizing enforcement against defined classes of people. Memoranda issued in 2011⁸⁷ and 2014⁸⁸ by ICE and DHS, respectively, are clear examples of the former, and they built upon a long history of agency guidance on the use of prosecutorial discretion dating back to at least 1976.⁸⁹

In part because of the inability of relatively small-bore efforts to address the magnitude of dysfunction in the system, however, DHS created DACA in 2012, which has today allowed more than 800,000 young immigrants to remain in the country and lawfully work for renewable, two-year periods of time. In 2014, DHS attempted to expand DACA to apply to individuals within a broader class of people that came to the United States as children; it also tried to create the DAPA initiative to provide similar protections to an estimated 3.7 million undocumented parents of U.S. citizens and lawful permanent residents who had themselves long resided in the United States.⁹⁰

But neither of the 2014 efforts ever went into effect, as Texas led a number of states in filing suit in the U.S. District Court for the Southern District of Texas to block them. The states obtained a preliminary injunction that was upheld by a divided U.S. Court of Appeals for the 5th Circuit panel and left undisturbed by a 4-4 split in the U.S. Supreme Court.⁹¹ While Texas did not challenge the legal authority of the administration to create DACA at the time, the state has since filed such a suit, which is currently pending before the same federal judge that blocked DAPA and the expansion of DACA.⁹² In its challenges to both DACA and DAPA, Texas has argued that the Obama administration violated the Administrative Procedure Act in two ways: by creating the initiatives without going through the notice-and-comment rule-making process and by allegedly exceeding the statutory and constitutional authority of the executive. The state also has argued that the broad use of deferred action under the initiatives constitutes a dereliction of the president's duty under Article 2, Section 3 of the Constitution to "take Care that the Laws be faithfully executed."⁹³ Similar arguments were raised frequently in Congress during hearings on DACA and DAPA⁹⁴ and as part of legislative efforts to end DACA and block DAPA that passed the Republican-controlled House of Representatives.⁹⁵ While it is true that both initiatives, though not unprecedented, were robust exercises of prosecutorial discretion, the substantial magnitude of the deferred action initiatives can only be understood as a function of the scope of the problem faced today by immigrant communities, immigration enforcement agencies, and the country.⁹⁶

Importantly, as right and significant as both DACA and DAPA were, neither was intended to be a permanent solution, and legalization paired with legislative reforms to build a functioning immigration system clearly would be far preferable.⁹⁷ That is not to say that prosecutorial discretion can or should be eliminated; in all enforcement settings, it is critical that prosecutorial discretion be maintained to avoid manifest injustices and to set sensible priorities. But prosecutorial discretion always will be dependent on the prosecutor. The fragility of Obama-era programs, when left in the hands of the Trump administration, has made it perfectly clear that such an approach to address inherent statutory failings is insufficient and necessarily impermanent. By building a legal immigration system that can bring immigration that has long existed outside the law within a well-functioning legal framework, and by making necessary reforms to the enforcement mechanisms of that system that are required to maintain its integrity, the appearance—though unwarranted—of lawlessness from robust uses of prosecutorial discretion could better be avoided.⁹⁸

Maximizing enforcement and disappearing discretion

The Trump administration has adopted a dramatically different approach to the immigration system, which has long been favored by restrictionists who mask their mass deportation, nativist agenda behind calls to simply enforce the laws as written.⁹⁹ One of President Trump’s first acts in office was to issue an executive order calling for the “faithful execution of the immigration laws of the United States against all removable aliens” and directing immigration officers to treat virtually everyone as a priority for removal.¹⁰⁰ By eliminating policy-level prosecutorial discretion guidance, as well as protections for more than 1 million people with DACA, TPS, and DED, the administration has decentralized discretionary decisions to individual ICE, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services (USCIS) line officers and agents. Not only has this move made exercises of discretion less transparent, consistent, reliable, and accessible—key factors in a system that upholds the rule of law—but it has also effectively shielded discretion from public scrutiny and allowed the administration to maintain its false but clear message that it is honoring the rule of law by once more enforcing the laws on the books.

As a result of this approach, under the Trump administration, more than one-third of all arrests by ICE have been of undocumented immigrants who have no criminal histories;¹⁰¹ indeed, the civil immigration detention of people with no criminal history has increased by nearly 40 percent. At the same time, the detention of people with the most serious criminal convictions has decreased by 17 percent.¹⁰² In 2017, ICE’s then-acting director, Thomas Homan, explained to Congress why the agency as a matter of policy has moved away from a focus on apprehending people convicted of serious crimes, saying that every undocumented immigrant “should look over [their] shoulder,” as the agency “shouldn’t wait for them to become a criminal.”¹⁰³

An important explanation of why this sudden shift in enforcement policy has been met with such fierce popular resistance is that it signaled a dramatic change in the tacit agreement that had long held, more or less. In *Immigration Outside the Law*, Motomura speaks of this in terms of fairness: “[W]hen a government changes laws or policies, fairness requires that it consider how those changes adversely affect anyone who acted in reliance on the prior state of things.”¹⁰⁴ That notion of reliance and predictability is equally central to the rule of law, a core tenet of which is that individuals should not be punished after the fact for conduct that was permitted previously.

According to Gallup, as far back as 2006, three-fifths to two-thirds of adults in the nation have consistently supported creating a path to citizenship for undocumented immigrants then residing in the country.¹⁰⁵ And according to CAP analysis, the average undocumented immigrant in the country today has lived in the United States for nearly 15 years.¹⁰⁶ Considering these two data points, it is clear that many of the individuals with no or relatively minor or old criminal convictions who have been arrested or deported in recent years are likely the same people whom the public believed more than a decade ago should be given the chance to gain legal status and remain here permanently. In the intervening years, these individuals only increased their ties to this country and to their communities—buying homes, building families, starting businesses—gaining greater equities to remain.

Previous sections of this report reviewed some ways in which the Trump administration has undermined the rule of law by so frequently breaking the law. However, a more important point may be that by increasingly threatening the arrest and deportation of long-residing and well-settled individuals that many in society simply do not think should be deported, the Trump administration is jeopardizing the normative content that gives laws their power in a society that values the rule of law. In doing so, even when the law is not violated, one can observe a degradation of respect for the law itself, as well as for the institutions and individuals charged with administering and enforcing laws.¹⁰⁷ Similarly, by replacing clear and transparent policy-level exercises of discretion that are tailored to address obvious holes in the current system with ad hoc, private, and largely inaccessible exercises of discretion by line personnel, the administration is no longer exercising discretion in a manner that comports with rule of law principles or that helps maintain fairness and functionality in the system as a whole.¹⁰⁸

In many ways, the call to “Abolish ICE” last year emerged both as a response to and as a result of this growing degradation of the rule of law by the Trump administration. For a period of months in 2018, Abolish ICE seemingly came out of nowhere and suddenly was everywhere.¹⁰⁹ But it is worth noting that this movement bears similarities to previous campaigns more grounded in traditional grassroots advocacy communities. For instance, the #Not1More campaign—which began as a project of the National Day Laborer Organizing Network in 2013 and became independent in 2015—calls for “not one more family destroyed, not one more person left behind, not one more indifferent reaction to suffering, not one more deportation.”¹¹⁰

Some of the so-called sanctuary policies promoted through campaigns such as #Not1More have secured some genuine protection from deportation for many longtime residents of certain states and communities.¹¹¹ They have also successfully combated unlawful efforts by the federal government to coerce state and local jurisdictions into participating in civil immigration enforcement efforts. Interestingly, the notion of sanctuary itself grew out of a similar period of time in the 1980s, when federal authorities were bending and breaking laws to deny protections to individuals seeking asylum.¹¹²

The growth of an effort such as #Not1More—even after the Obama administration’s executive action efforts on immigration, which included the creation of DACA and the promulgation of an initial memorandum on the exercise of enforcement discretion—illustrates the inadequacies of such prosecutorial discretion in the face of a much larger system of dysfunction. It should therefore come as no surprise that during the Trump era, when many people view U.S. immigration enforcement practices as increasingly characterized by senseless cruelty, the cries to end deportations and “Abolish ICE” have become louder.¹¹³

Degrading the rule of law through official acts of cruelty

In furtherance of the administration's campaign of fear over the past 2 1/2 years, immigrants have been arrested when they:

- **Faithfully appear for a regularly scheduled check-in with ICE.**¹¹⁴

For five years, Jose Escobar and his wife, Rose, regularly checked in with ICE's Houston office as part of the agency's previous decision to stay his deportation. Although Jose complied with the agency's requirements and should have been a low priority for removal—he came to the country years ago as a child and had no criminal history—he was arrested at a check-in weeks into the Trump administration, separated from his wife, and deported to El Salvador soon thereafter.

- **Attend a routine green card marriage interview with USCIS.**¹¹⁵

Oscar Hernández and his wife, María Eugenia Hernández, a U.S. citizen, went to a USCIS office in Miami for a standard marriage interview as part of the process of obtaining a green card. But partway through the interview, María was asked to leave the room and only learned later that ICE officers had arrested her husband on a 14-year-old deportation order. Oscar is the family's breadwinner, supporting his wife and their son, both of whom suffer from multiple sclerosis.

- **Go to court to request a protective order as a domestic violence survivor.**¹¹⁶

Irvin González, a transgender woman, went to the El Paso County Courthouse to request a protective order against her abusive ex-boyfriend. But shortly after the hearing ended, Irvin was arrested just outside the courtroom by an immigration enforcement officer who had sat through her hearing and who may have been tipped off to her whereabouts by her abuser.

- **Travel through a Border Patrol checkpoint in an ambulance en route to a hospital for emergency surgery.**¹¹⁷

Rosa Maria Hernandez, age 10, was in the back of an ambulance en route to Driscoll Children's Hospital in Corpus Christi, Texas, for emergency gallbladder surgery when her ambulance was stopped at a Border Patrol checkpoint. After concluding that Rosa Maria, who has cerebral palsy, was undocumented, agents followed the ambulance to the hospital, waited outside of her room, and arrested her after just two days of recovery.

- **Seek shelter from dangerously cold temperatures.**¹¹⁸

At the end of a dangerously cold night, Oscar Ramirez was leaving a hypothermia shelter located at Rising Hope United Methodist Mission Church in Alexandria, Virginia, when ICE agents surrounded him and a group of other Latino men. Although Oscar, a green card holder, was allowed to leave, several other men who had sought refuge in the church shelter were arrested.

- **Speak out publicly against efforts to rescind DACA.**¹¹⁹

Minutes after speaking at a news conference in Jackson, Mississippi, about her fear of being deported, Daniela Vargas, a DACA recipient who came to the United States 15 years earlier at the age of 7, was arrested by ICE officers. Just two weeks before that, Daniela's father and brother were arrested at their home by ICE, but Daniela was permitted to remain free because of the pendency of her DACA renewal application.

- **Bring their children to school.**¹²⁰

As Syed Ahmed Jamal, a chemistry instructor at several Kansas City-area colleges, prepared to take his daughter to school, ICE agents arrived at his home and arrested him. Syed's three children—ages 14, 12, and 7—are all U.S. citizens, and he is an active member of his community who had been checking in regularly with ICE for more than five years.

News stories are written regularly about communities that are shocked when one of their own—certainly not one of the “bad hombres” then-candidate Trump talked about¹²¹—is arrested and deported, ripped away from family and the community that they helped build and sustain.¹²² While a number of these enforcement actions may not themselves be illegal, there is no question that they have been harmful and corrosive to America's social fabric and ideals.¹²³ The same is true of the emerging reports of children and families being forced to endure dangerous and unsanitary conditions in Border Patrol facilities, which appears to have contributed to the deaths of multiple children.¹²⁴ There is a reason that so much of Adam Serwer's influential essay on the cultural and rhetorical significance of the Trump administration's policies, “The Cruelty Is the Point,” centers around the cruelty at the heart of the Trump's administration's anti-immigrant agenda.¹²⁵

Guiding principles and policy proposals: Building a fair and humane immigration system that works

It is long past time to recognize that the dysfunction of the current immigration system only begets further dysfunction. The intolerable cruelty of today’s immigration enforcement policy choices and machinery lay bare just how wide the gap is between the law on the books and the reality that exists in communities, workplaces, schools, and households all over the country. But the formal and informal workarounds used by the Obama administration and previous administrations to paper over that gap—while themselves largely insufficient for the task—now have been shredded. This is a problem yearning for a real solution.

The nation must move to a system that meets the actual needs of Americans and that can meet those needs by operating as designed. Recognizing that legislative reforms of immigration laws appear to be generational affairs at best, the system must be generous in anticipation of a growing need to welcome more immigrants into the country. It also must be responsive to the nation’s needs as they change. Such a reform would include four parts: changes to the legal pathways for entry into the United States; a return to sensible and humane refugee and asylum policies; a restoration of due process in the immigration enforcement system to achieve fair and just outcomes; and legalization of those here without status.

Changes to the legal pathways to enter the United States

The United States should have realistic, evidence-based avenues for legal immigration that allow families to reunite and businesses to get the workers they need while protecting all workers’ rights. The U.S. immigration system should recognize and reward the kind of entrepreneurial spirit that has long helped build this country—what Rep. Zoe Lofgren (D-CA) frequently refers to when she talks about immigrants as people who “have enough ‘get-up-and-go’ to get-up-and-go.”¹²⁶

Although the latest White House plan for a so-called merit-based immigration system is short on details, one virtue is its call for a dramatic increase in the number of green cards available each year for certain people looking to come to—or permanently remain in—the United States for work or to start a business.¹²⁷ Unfortunately, the plan achieves these increases only by slashing or eliminating entirely other existing avenues for people to enter the country lawfully, including those that allow U.S. citizens to reunite with close family members abroad. It also appears to do nothing to expand migration opportunities for traditionally considered lesser-skilled individuals who nonetheless play an essential role in the U.S. workforce. Additionally, the plan fails to acknowledge that many skilled and highly educated immigrants already come to the country through both family-based and diversity channels.¹²⁸

Rather than be beholden to an artificial and inflexible position that rules out numerical increases in immigration and opens new avenues only when existing ones are closed, policymakers should adopt a plan sufficiently robust and flexible to meet the actual needs of the country and the economy—one that recognizes that merit comes in many forms. More than 10 years ago, the Migration Policy Institute (MPI) recommended that Congress create an independent and permanent Standing Commission on Labor Markets, Economic Competitiveness, and Immigration to make recommendations about adjusting employment-based immigration pathways based upon real data and analysis.¹²⁹ In 2009, an Independent Task Force on U.S. Immigration Policy—convened by the Council on Foreign Relations and chaired by Jeb Bush and Thomas F. McLarty III—endorsed the MPI proposal and praised the idea that the president be authorized to make adjustments based upon the recommendations of the standing commission, subject to the possibility of congressional override.¹³⁰ That year, Ray Marshall at the Economic Policy Institute proposed a similar idea to create an independent Foreign Worker Adjustment Commission.¹³¹ Beyond flexibility to respond to the types of workers needed in the labor market, a recent study finds that family networks promote successful integration and the economic and social well-being of new immigrants, bringing their own inherent merit.¹³² The central role that family unity has long played in the immigration system both sets America apart in the world and connects it to the global community, strengthening the country through diversity. Given ample evidence that Congress is incapable of making timely changes to immigration policy in response to the changing needs of the country, serious consideration should be given to the creation of an independent and data-driven entity to help guide evidence-based policymaking regarding the U.S. immigration system.¹³³

Creating a functioning legal immigration system would uphold the rule of law both by channeling future immigration through an effective regulatory system and by allowing enforcement resources at the nation's borders and in the interior to be used to maintain the integrity of that system and U.S. borders. They would also be better able to focus their efforts on promoting national security and enhancing public safety. Testifying before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Judiciary Committee in 2007, then-Border Patrol Chief David Aguilar explained that fixing the U.S. legal immigration system to reduce irregular migration across the country's borders would "allow our enforcement officers to concentrate on the threats coming at this country from the perspective of people wishing to do us harm ... [and] be a tremendous force multiplier for the men and women of the Border Patrol to continue protecting this country."¹³⁴

Sensible and humane refugee and asylum policies

America, both as a country and as an idea, has long played an outsized role on the global stage. For years, the country stood as a leader in the protection of refugees worldwide, partnering successfully with nonprofit organizations around the country to successfully resettle refugees and integrate them into U.S. communities.¹³⁵ The refugee admissions target, which exceeded 100,000 each year throughout the first half of the 1990s and averaged 76,000 from fiscal years 1999 through 2016,¹³⁶ grew by the end of the Obama administration to 110,000 for fiscal year 2017.¹³⁷ The Trump administration's decision to slash refugee admissions—lowering the fiscal year 2018 target to 45,000 but falling more than 50 percent short of that in terms of actual admissions and lowering the fiscal year 2019 target still further to 30,000¹³⁸—has eviscerated much of the refugee reception infrastructure around the country,¹³⁹ harmed communities that have flourished by offering safe haven to refugees,¹⁴⁰ and failed to encourage other countries to resettle more refugees themselves.¹⁴¹ America's retreat from the world stage places a strain on its allies and countries of first reception, only increasing the risk of greater instability around the world. America must once again lead by example and increase refugee admission targets in response to the growing need for resettlement around the world.¹⁴²

The country similarly needs to restore its commitment to protecting refugees who arrive at its doorstep to request asylum. A mainstay of congressional debates dating back to at least 2014—when the number of unaccompanied migrant children arriving at the southwest border markedly increased—and a constant refrain of the current administration, is that the asylum laws are merely a "loophole."¹⁴³ But far from

being loopholes, the country's system of asylum protections is essential in order to meet legal obligations under U.S. and international law to offer protection to those facing the threat of torture, persecution, and death.

This is not to say that every person who requests protection must be allowed to remain in the United States indefinitely, nor does it mean that the country's sole response to the extreme violence, poverty, and climate dislocation happening in the Americas—most notably, in the Central American countries of Guatemala, Honduras, and El Salvador—should be through the immigration system.¹⁴⁴ But a basic premise of U.S. asylum laws should be that people in need of humanitarian protection must receive fair and efficient adjudication of their claims without sacrificing due process. And while a discussion about what an adequate and durable response to the migration challenges in the Americas would look like is beyond the scope of this report, it has been discussed in greater detail elsewhere.¹⁴⁵ One proposal that could uphold America's commitment to protect refugees and ease much of the burden currently being felt along the southwest border would be to create a Central American Refugee Program, such as the one described in H.R. 3524, the Northern Triangle and Border Stabilization Act, introduced last month in the House.¹⁴⁶ Another recommendation would be to consider complementary humanitarian protections that could be offered to individuals fleeing life-threatening dangers who would not qualify for protection under U.S. asylum law, such as severe food insecurity resulting from climate change.¹⁴⁷

Due process, proportionality, and accountability in enforcement

An important goal in reforming the U.S. immigration system—and a key aspect of restoring the rule of law in such a system—should be to design a system that people widely believe can and should be followed. But that is not enough. In order to build a system that reflects rule of law principles, the rules that defend that system must support clear, consistent, and fair enforcement. It can be challenging in the current social and political environment to have a rich discussion about what immigration enforcement should look like, largely because the current system is one that many people think is not worthy of defense. Moreover, the mechanisms for enforcement that exist today frequently provide little due process and no consideration of proportionality in the imposition of a sanction. Nevertheless, enforcement is essential to defending the integrity of any system. The following paragraphs lay out some initial steps to reform enforcement and increase accountability in agencies such as ICE and Customs and Border Protection that are on the front lines of this enforcement.

First, U.S. immigration laws must make available a range of possible sanctions that can be doled out to people who run afoul of the law. In the immigration system today, there is no opportunity to consider the concept of proportionality—that is, whether the punishment fits the offense.¹⁴⁸ In every immigration court hearing, the first question an immigration judge must resolve is whether or not an individual is removable from the country. If the judge finds this to be the case, banishment, and all of the consequences that flow from that, is the only option on the table despite being the harshest, most existential punishment conceivable in such a proceeding. Only after the finding of removability can an individual request whatever form of relief from removal may be available to them. Over the years—and especially as a result of the 1996 immigration laws—the circumstances in which an individual might have grounds for relief from removal have narrowed considerably.¹⁴⁹

Because the stakes for immigrants in removal proceedings—which are, essentially, deportation proceedings—are so high and the opportunities for immigration judges to mete out just and proportionate outcomes are so low, the system places an unsustainable amount of pressure on discretionary decisions by immigration enforcement personnel about whether to place a person in removal proceedings in the first place and, when a final removal order is issued, whether to execute it.¹⁵⁰ Again, discretion is necessary at each stage of every law enforcement system, but when the system routinely relies upon discretion to mitigate its obvious failings, unjust, unpredictable, and inconsistent outcomes will proliferate, and public confidence in that system will dissipate.

Immigration courts should be given a range of sanctions that they can issue short of removal from the country. Where removal may be an appropriate—though harsh—sanction, immigration judges should be empowered to do justice by considering the individual equities of each case. A decade ago, professor Juliet Stumpf wrote on this topic in a law review article titled “Fitting Punishment.” She argued that:

[A] proportionate system of sanctions for immigration violations should consider: (1) the gravity of the violation, taking into account the nature of the violation and any consequences, (2) the benefit to the United States of imposing the proposed sanction and, conversely, any harm to the United States, the noncitizen, or others resulting from its imposition, and (3) the stake that the noncitizen has in remaining in this country.¹⁵¹

While deportation would remain a potential sanction in such a system—particularly for criminal convictions evidencing a disregard for the general public order or repeat or flagrant violations of U.S. rules—the government’s interest in promoting lawful conduct and preserving the integrity of the immigration system often could be served

through more well-tailored punishments. To name just a few, laws should empower immigration judges to impose terms of probation or supervision; monetary fines; or penalties that suspend or delay privileges afforded under immigration laws, such as forcing a lawful permanent resident to restart the clock on continuous residence before filing a naturalization application or temporarily suspending an individual's ability to file immigrant visa petitions for a family member.

Second, much like in the U.S. criminal justice system, in which legislatures regularly impose statutes of limitations to promote justice, finality, and clear expectations and as a check against unreasonable prosecutorial delays, immigration laws generally should be subject to statutes of limitations. Because these are almost entirely absent from U.S. immigration law,¹⁵² ICE last year was able to arrest, detain, and nearly deport Dane Foster—a 36-year-old father of four who is married to a disabled U.S. Army veteran and who received his green card at the age of 11—based upon two simple marijuana possession convictions from the 2000s and one from four years earlier in 2014.¹⁵³

This idea is not new in immigration law: In the Registry Act of 1929, Congress created a provision known as registry, which allowed immigrants who have been in the country for a certain number of years—originally those “honest law-abiding alien[s] who may be in the country under some merely technical irregularity” since 1921—to come forward, pass a background check, and adjust to lawful permanent residence.¹⁵⁴ Congress has advanced the registry date—that is, the date before which an individual has to have lived in the country in order to be able to adjust their status under the provision—multiple times over the years, though it has been stuck at January 1, 1972, since the passage of the Immigration Reform and Control Act of 1986.¹⁵⁵ It is time to update the registry date and modify the provision so that it can serve the salutary functions that statutes of limitations serve in the criminal justice system.¹⁵⁶ It is also time to create proper statutes of limitations for potentially deportable offenses, such as those arising out of old or lower-level criminal convictions.¹⁵⁷

Finally, in order to restore respect for the rule of law in the U.S. immigration system, which necessarily must involve restoring respect for the enforcement of the rules of that system, the immigration court system must be reformed to operate more like a true court and imbue immigration judges with the same kind of independence and commitment to delivering justice as true judges.¹⁵⁸ At present, when people go to immigration court, they appear before immigration judges who answer directly to the U.S. attorney general, thus lacking the most basic elements of impartiality and judicial independence. Under the current administration, immigration judges face the constant threat of disciplinary action if they do not maintain unrealistic case completion goals that necessitate giving short shrift to the due process rights of individuals who appear before them.¹⁵⁹

Additionally, though every person in immigration court is entitled to due process under the Fifth Amendment to the U.S. Constitution, current law allows even a 3-year-old child to appear without counsel unless that child can secure an attorney—by him or herself—at no expense to the government.¹⁶⁰ Of immigrants who have never been in detention, one-third have no representation—despite the fact that those with attorneys are five times more likely than those without to win their cases.¹⁶¹ Just 14 percent of immigrants in detention obtain legal representation, even though immigrants with representation are four times more likely than those without representation to be released from detention following a custody hearing, as well as more than twice as likely to secure relief from deportation.¹⁶²

Indeed, the way in which counsel is now secured by many people in immigration court is an example of the workarounds currently employed to shield the public, policymakers, and the system itself from the fundamental unfairness at the heart of the immigration court system. Today, counsel is frequently provided to immigrants in removal proceedings only by virtue of nonprofit providers; extensive pro bono and so-called low bono networks; and representation initiatives funded by state and local governments.¹⁶³ These initiatives and networks do their work in order to ensure that when an individual appears in a federal immigration court before a federal immigration judge and against a federal ICE trial attorney, that person has a trained attorney by their side, prepared to defend their basic legal rights and ensure they are not torn away from their family or returned to face persecution, torture, or even death. But civil society should not be required to shoulder the burdens of due process in a just society governed by the rule of law. All immigrants appearing in immigration court should be guaranteed the right to counsel—appointed at the government’s expense, if necessary. And given the important liberty interests at stake, the system also should rely far less heavily on final orders of removal issued by enforcement personnel without meaningful court involvement.¹⁶⁴

A path to citizenship for those in the country without status

There are today an estimated 10.5 million undocumented immigrants in the country who have been here, on average, for nearly 15 years; are themselves the parents of 6.7 million U.S.-citizen children; and pay, together with other members of their households, \$125.5 billion annually in federal, state, and local taxes.¹⁶⁵ For the many reasons discussed above, because the legal immigration system for many years has provided inadequate opportunities for people looking to come to the United States or remain here, an extralegal system has evolved that consists of both unauthorized migration itself and formal and informal policies to not disrupt a generally mutually beneficial arrangement.

Replacing this extralegal immigration system with a legal system that truly works as designed is necessary to restore respect for the rule of law, but it will never be sufficient if it leaves millions of American residents in a second-class status. Undocumented immigrants in the country today must be given the opportunity to come forward, register with the government, pass a background check, and be put on a path to permanent residence and eventual citizenship. Passing H.R. 6, the American Dream and Promise Act—which would put 2.5 million Dreamers and holders of TPS and DED on a path to citizenship—would be a good first step,¹⁶⁶ but restoring the rule of law requires extending a path to citizenship for the broader undocumented population.

Conclusion

America is a nation of immigrants and a nation of laws, and it needs a system that reflects that reality. It is not sustainable to have a legal immigration system that is not well tailored to the country's needs and values and that predictably drives people to come to the country, or remain here, in violation of the law. It is not sustainable to have an immigration enforcement apparatus that lacks popular support; operates without the most basic features of fairness, accountability, and proportionality; and increasingly exposes to the threat of detention and deportation people who have been part of U.S. communities for decades and who the large majority of Americans have long believed should be afforded the opportunity to remain here permanently.

Because of the significant and protracted failings in the U.S. immigration system, policymakers have long been forced to rely exclusively on exercises of discretion to address the worst injustices and to avoid disrupting the tacit understanding that the extralegal immigration system strengthens the country, even though it comes at considerable expense to immigrant families, communities, and society at large. But it is also not sustainable—after decades of legislative inaction—to continue to rely on enforcement discretion alone as the magnitude of the challenges grow and people on all sides of the issue become increasingly distrustful of the system. The country cannot wait any longer to reform America's immigration laws, because only through reform can faith in the system be rebuilt and respect for the rule of law be restored.

About the author

Tom Jawetz is vice president of Immigration Policy at the Center for American Progress. Prior to joining the Center, he served as chief counsel on the Immigration Subcommittee of the House Judiciary Committee. In that capacity, Jawetz devised and executed strategies for immigration-related hearings and markups before the House Judiciary Committee as well as legislation on the House floor. Prior to his time at the Judiciary Committee, Jawetz worked as the immigration detention staff attorney at the National Prison Project, a part of the American Civil Liberties Union. He previously represented asylum-seekers in judicial and administrative proceedings with the Washington Lawyers' Committee for Civil Rights and Urban Affairs and served as a law clerk to U.S. District Judge Kimba M. Wood of the U.S. District Court for the Southern District of New York.

Acknowledgments

The author thanks Philip E. Wolgin and Scott Shuchart for their help in drafting and editing this report. In addition, he thanks Ahilan Arulanantham, Sam Berger, Theresa Cardinal Brown, Ruthie Epstein, Claudia Flores, Lucas Guttentag, Donald Kerwin, Andrea LaRue, Jesse Lee, Steve Legomsky, Hiroshi Motomura, Cecilia Muñoz, Navin Nayak, Chris Newman, Lia Parada, Lorella Praeli, Angelica Salas, Frank Sharry, Nicole Prchal Svajlenka, Neera Tanden, and Shoba Sivaprasad Wadhia for their helpful review and comments throughout the process.

Endnotes

- 1 While immigrants have always been an essential part of America—86.4 million people in the country today are foreign born or are the children of immigrants—it is equally important to recognize the sacrifices and contributions made by enslaved people and Native peoples to the nation's founding. CAP analysis of the 2018 Current Population Survey Annual Social and Economic Supplement microdata. See Steven Ruggles and others, "Integrated Public Use Microdata Series, 2018 Current Population Survey for Social, Economic and Health Research: Version 6.0" (Minneapolis: Minnesota Population Center, 2018), available at <https://cps.ipums.org/cps/>.
- 2 As with the concept of America as a nation of immigrants, the notion of America as a country of laws is complicated by the nation's long history of unjust and discriminatory laws as well as the selective and unequal application of the laws to different classes of people. But despite that history, which helped to shape the country's immigration laws at various points in history, as discussed later in this paper, the image of America as a country of laws endures.
- 3 A good example of this false choice appears in a recent opinion piece, where Republican pollster David Winston observes that the "basic values debate" that Democrats and Republicans are having over immigration is whether the United States is a "country of laws," the Republican position, or a "country of immigrants," the Democratic position. The key question for politicians, he says, is "how to make those values work together." See Francis Wilkinson, "Trump Is Making Americans More Immigrant-Friendly," *Bloomberg*, December 19, 2018, available at <https://www.bloomberg.com/opinion/articles/2018-12-19/trump-immigration-bashing-provokes-public-opinion-backlash>.
- 4 In 1963, then-Sen. John F. Kennedy (D-MA) delivered a speech to the Anti-Defamation League titled "A Nation of Immigrants," in which he declared: "It is a proud privilege to be a citizen of the great republic ... to realize we are the descendants of 40 million people who left other countries, other familiar scenes, to come here to the United States to build a new life, to make a new opportunity for themselves and their children." See Anti-Defamation League, "John F. Kennedy ADL Address, 'We Are a Nation of Immigrants,'" YouTube, April 18, 2013, available at https://www.youtube.com/watch?time_continue=5&v=ewk_9wQVVz4. Kennedy built upon this notion in a book published after his death, also titled *A Nation of Immigrants*. See John F. Kennedy, *A Nation of Immigrants* (New York: HarperCollins, 1964).
- 5 One illustration of this phenomenon occurred last year, when U.S. Citizenship and Immigration Services (USCIS) changed its mission statement to eliminate the agency's long-standing commitment to secure "America's promise as a nation of immigrants." See Anna Giaritelli, "USCIS took 'nation of immigrants' out of mission statement because it wasn't created to serve them, director says," *Washington Examiner*, August 15, 2018, available at <https://www.washingtonexaminer.com/news/uscis-took-nation-of-immigrants-out-of-mission-statement-because-it-wasnt-created-to-serve-them-director-says>. During an event hosted by the restrictionist Center for Immigration Studies, then-USCIS Director Francis Cissna defended the change by saying it was necessary to clear up the misimpression that USCIS serves the immigrants with whom it interacts rather than the American people and the laws on the books. See Francis Cissna and Jessica M. Vaughan, "Immigration Newsmaker: A Conversation with Director of USCIS Francis Cissna," Center for Immigration Studies, August 16, 2018, available at <https://cis.org/Transcript/Immigration-Newsmaker-Conversation-Director-USCIS-Francis-Cissna>.
- 6 David Bier, "The Founding Fathers Favored a Liberal Immigration System," Cato Institute, March 27, 2018, available at <https://www.cato.org/blog/founding-fathers-favored-liberal-immigration-system>; Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Cambridge, MA: Harvard University Press, 2006), chapters 2 and 3.
- 7 Josh Delk, "ICE chief praises Trump, plans to send more agents to sanctuary cities," *The Hill*, July 18, 2017, available at <https://thehill.com/business-a-lobbying/342580-ice-director-trump-has-taken-the-handcuffs-off-law-enforcement>.
- 8 See, for example, Sean McElwee, "It's Time to Abolish ICE," *The Nation*, March 9, 2018, available at <https://www.thenation.com/article/its-time-to-abolish-ice/>.
- 9 See American Immigration Lawyers Association, "Restoring Integrity and Independence to America's Immigration Courts" (Washington: 2018), available at <https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts#PDF>; American Bar Association Commission on Immigration, "Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases" (Washington: 2010), available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf.
- 10 CAP analysis of the 2017 one-year American Community Survey microdata. See Steven Ruggles and others, "Integrated Public Use Microdata Series, U.S. Census Data for Social, Economic, and Health Research, 2017 American Community Survey: 1-year estimates" (Minneapolis: Minnesota Population Center, 2019), available at <https://usa.ipums.org/usa/>.
- 11 CAP Immigration Team and Michael D. Nicholson, "The Facts on Immigration Today: 2017 Edition" (Washington: Center for American Progress, 2017), available at <https://www.americanprogress.org/issues/immigration/reports/2017/04/20/430736/facts-immigration-today-2017-edition/>; Jynnah Radford, "Key findings about U.S. immigrants," Pew Research Center, June 3, 2019, available at <https://www.pewresearch.org/fact-tank/2019/06/03/key-findings-about-u-s-immigrants/>.
- 12 Massachusetts Legislature, "Massachusetts Constitution," Article XXX, available at <https://malegislature.gov/Laws/Constitution> (last accessed July 2019). Adams, an author of the original Massachusetts Constitution, had used the phrase earlier in his Novanglus essays. See Massachusetts Historical Society, "Papers of John Adams, volume 2: The Letters of Novanglus 23 January–April 1775," No. VII, available at <http://www.masshist.org/publications/adams-papers/view?&id=PJA02dg5> (last accessed July 2019).

- 13 The discussion in the text draws from Tom Bingham, *The Rule of Law* (New York: Penguin, 2011), pp. 1–4, expounding on A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1885); Brian Z. Tamahana, “A Concise Guide to the Rule of Law,” *St. John’s Legal Studies Research Paper* (2007), available at <http://ssrn.com/abstract=1012051>. These same elements are echoed in three of the definitions provided for “rule of law” in Brian A. Garner, ed., *Black’s Law Dictionary* (St. Paul, MN: West Publishing, 1999), p. 1332: “The supremacy of regular as opposed to arbitrary power”; “The doctrine that Every person is subject to the ordinary law within that jurisdiction”; and “The doctrine that general constitutional principles are the result of judicial decisions determining the rights of private individuals in the courts.” A similar formulation can be found on an educational webpage established by the federal courts: “Rule of law is a principle under which all persons, institutions and entities are accountable to laws that are: Publicly promulgated[.]; Equally enforced[.]; Independently adjudicated[.]; And consistent with international human rights principles.” See U.S. Courts, “Overview - Rule of Law,” available at <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> (last accessed April 2019).
- 14 Tamahana, “A Concise Guide to the Rule of Law.”
- 15 Michael C. Dorf, “Trump’s Law and Order Versus the Rule of Law,” *Verdict*, July 27, 2016, available at <https://verdict.justia.com/2016/07/27/trumps-law-order-versus-rule-law>.
- 16 Adam Serwer lays out well the underpinnings of the Trump administration’s lawless approach to immigration policy. See Adam Serwer, “A Crime by Any Name,” *The Atlantic*, July 3, 2019, available at <https://www.theatlantic.com/ideas/archive/2019/07/border-facilities/593239/>.
- 17 Farhana Khara and Johnathan J. Smith, “How Trump Is Stealthily Carrying Out His Muslim Ban,” *The New York Times*, July 18, 2017, available at <https://www.nytimes.com/2017/07/18/opinion/trump-muslim-ban-supreme-court.html>.
- 18 *Ms. L v. U.S. Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133, 1142, 1144 (S. D. Cal. 2018), available at <https://www.aclu.org/legal-document/ms-l-v-ice-order-granting-plaintiffs-motion-classwide-preliminary-injunction>, p. 17 (internal quotations and citations omitted).
- 19 American Civil Liberties Union, “*Ms. L v ICE Order on Class Status*,” available at <https://www.aclu.org/legal-document/ms-l-v-ice-order-class-status> (last accessed July 2019).
- 20 U.S. Department of Justice Office of the Attorney General, “27 I&N Dec. 316 (A.G. 2018): Matter of A-B-, Respondent” (Washington: 2018), available at <https://www.justice.gov/eoir/page/file/1070866/download>.
- 21 *Grace v. Matthew G. Whitaker*, 310 F. Supp. 3d 1133, 1142, 1144 (S. D. Cal. 2018), available at <https://www.aclu.org/legal-document/grace-v-whitaker-opinion>.
- 22 Legal Information Institute, “8 U.S. Code § 1158. Asylum,” Section 208(a)(1), available at <https://www.law.cornell.edu/uscode/text/8/1158> (last accessed July 2019).
- 23 U.S. Citizenship and Immigration Services and others, “Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations,” *Federal Register* 83 (218) (2018): 55934–55953, available at <https://www.federalregister.gov/documents/2018/11/09/2018-24594/aliens-subject-to-a-bar-on-entry-under-certain-presidential-proclamations-procedures-for-protection>; Executive Office of the President, “Addressing Mass Migration through the Southern Border of the United States,” *Federal Register* 83 (221) (2018): 5766–57664, available at <https://www.federalregister.gov/documents/2018/11/15/2018-25117/addressing-mass-migration-through-the-southern-border-of-the-united-states>.
- 24 *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018), available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/12/07/18-17274.pdf>. For application for stay denied, see U.S. Supreme Court, “No. 18A615,” available at <https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public/18a615.html> (last accessed July 2019).
- 25 *Innovation Law Lab v. Kevin McAleenan*, brief of amicus curiae Local 1924, U.S. Court of Appeals for the 9th Circuit, No. 19015716 (June 26, 2019), available at <https://assets.documentcloud.org/documents/6172520/Local-1924-Amicus-Brief.pdf>.
- 26 Hamed Aleaziz, “Central Americans Who Travel Through Mexico To The US Will No Longer Qualify For Asylum,” *BuzzFeed News*, July 15, 2019, available at <https://www.buzzfeednews.com/article/hamedaleaziz/trump-asylum-central-americans>.
- 27 See, for example, *Regents of the University of California v. Department of Homeland Security*, 908 F.3d 476 (2018), available at <http://cdn.ca9.uscourts.gov/datastore/general/2018/11/08/18-15068%20Opinion.pdf>. See generally, National Immigration Law Center, “Status of Current DACA Litigation,” available at <https://www.nilc.org/issues/daca/status-current-daca-litigation/> (last accessed July 2019), tracking various cases. As of this writing, injunctions against DACA termination have been issued or upheld by the 4th Circuit, the 9th Circuit, and by district courts in the Central District of California, the Eastern District of New York, and the District of Columbia. Each of those other cases is currently pending appeal. See Pete Williams, “Supreme Court agrees to hear DACA case in win for Trump administration,” *NBC News*, June 28, 2019, available at <https://www.nbcnews.com/politics/supreme-court/supreme-court-agrees-hear-daca-case-win-trump-administration-n1020481>.
- 28 *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), available at https://scholar.google.com/scholar_case?case=6391238577058628992; *California v. Sessions*, 284 F. Supp. 3d 1015 (N.D. Cal. 2018), available at https://scholar.google.com/scholar_case?case=12995196433054998654; *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087 (C.D. Cal. 2018), available at https://scholar.google.com/scholar_case?case=5356498952117305350; *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 529 (E.D. Pa. 2017), available at https://scholar.google.com/scholar_case?case=11140554450489827956; *New York v. U.S. Department of Justice*, No. 18-cv-6471 (Nov. 30, 2018), available at <https://www.courthousenews.com/wp-content/uploads/2018/11/sanctuary-ruling.pdf>.
- 29 *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1080-81 (N.D. Cal. 2018), available at https://www.aclusocal.org/sites/default/files/aclu_amos_20181003_order_granting_prelim_injunction.pdf, pp. 26–27.
- 30 The last major overhaul of the legal immigration system was the Immigration Act of 1990, Public Law 649, 101st Cong. 2nd sess. (November 29, 1990), available at <https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg4978.pdf>.

- 44 Jill H. Wilson, "Temporary Protected Status: Overview and Current Issues" (Washington: Congressional Research Service, 2019), available at <https://fas.org/sgp/crs/homesecc/RS20844.pdf>.
- 45 See, for example, U.S. House of Representatives Committee on the Judiciary Executive Overreach Task Force, "Hearing: Executive Overreach in Domestic Affairs (Part I)—Health Care and Immigration" (Washington: U.S. Congress, 2016), available at <https://docs.house.gov/meetings/JU/JU00/20160315/104663/HRG-114-JU00-Transcript-20160315.pdf>.
- 46 See, for example, *United States v. Texas*, 579 U.S. ____ (2016).
- 47 U.S. Constitution, Article 2, Section 3, available at <https://www.archives.gov/founding-docs/constitution-transcript>. See also Shoba Sivaprasad Wadhia, "Response, In Defense of DACA, Deferred Action, and the DREAM Act," *Texas Law Review* 91 (59) (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195735.
- 48 Nicholas Kulish, Caitlin Dickerson, and Ron Nixon, "Immigration Agents Discover New Freedom to Deport Under Trump," *The New York Times*, February 25, 2017, available at <https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html>.
- 49 Paul Bedard, "Thomas Homan open to border czar job, 'I will never say never,'" *Washington Examiner*, June 26, 2019, available at <https://www.washingtonexaminer.com/washington-secrets/homan-open-to-border-czar-job-i-will-never-say-never>.
- 50 Delk, "ICE chief praises Trump, plans to send more agents to sanctuary cities."
- 51 Don Kerwin, executive director of the Center for Migration Studies, has written frequently on the rule of law in the U.S. immigration system and several years ago published a powerful rebuttal to the notion that "enforcement-only" reforms or attrition-through-enforcement policies "can restore the rule of law in our system. See, for example, Donald M. Kerwin Jr., "Illegal" People and the Rule of Law," in Cecilia Menjivar and Daniel Kanstroom, eds., *Constructing Immigrant 'Illegality': Critiques, Responses* (Cambridge: Cambridge University Press, 2013); Donald Kerwin, "Restoring the Rule of Law to the U.S. Immigration System," *HuffPost*, March 25, 2012, available at https://www.huffpost.com/entry/restoring-the-rule-of-law_b_1211893.
- 52 Karthick Ramakrishnan and Pratheepan Gulasekaram argue that anti-immigrant groups such as the Federation for American Immigration Reform and NumbersUSA actively worked to first block positive legislation at the federal level, while also then going to states such as Arizona to pass laws such as the restrictive S.B. 1070 "citing the very national legislative inaction they helped foment to justify restrictive solutions at the local level." Karthick Ramakrishnan and Pratheepan Gulasekaram, "Understanding Immigration Federalism in the United States" (Washington: Center for American Progress, 2014), p. 12, available at <https://cdn.americanprogress.org/wp-content/uploads/2014/03/StateImmigration-reportv2.pdf>.
- 53 See, for example, Gallup, "Immigration: Which comes closest to your view about what government policy should be toward illegal immigrants currently residing in the United States?," available at <https://news.gallup.com/poll/1660/immigration.aspx> (last accessed July 2019).
- 54 Ramakrishnan and Gulasekaram, "Understanding Immigration Federalism in the United States." On the Federation for American Immigration Reform and NumbersUSA, see, for example, Noah Lanard, "Trump and His Allies Have Lost the Public Debate Over Immigration," *Mother Jones*, March 18, 2019, available at <https://www.motherjones.com/politics/2019/03/trump-and-his-allies-have-lost-the-public-debate-over-immigration/>; Betsy Woodruff, "The Immigrant-Haters' Heiress Queen," *Daily Beast*, February 17, 2016, available at <https://www.thedailybeast.com/the-immigrant-haters-heiress-queen>; Mark Potok, "The Dirty Secret Behind the Nativist Lobby," *HuffPost*, February 4, 2009, available at https://www.huffpost.com/entry/the-dirty-secret-behind-t_b_163976.
- 55 Maya Rhodan, "Here Are the Facts About President Trump's Family Separation Policy," *Time*, June 20, 2018, available at <http://time.com/5314769/family-separation-policy-donald-trump/>; Lisette Partelow and Philip E. Wolgin, "The Trump Administration's Harsh Immigration Policies Are Harming Schoolchildren," Center for American Progress, November 30, 2018, available at <https://www.americanprogress.org/issues/education-k-12/news/2018/11/30/461555/trump-administrations-harsh-immigration-policies-harming-schoolchildren/>; Anneliese Hermann, "Asylum in the Trump Era: The Quiet Dismantling of National and International Norms" (Washington: Center for American Progress, 2018), available at <https://www.americanprogress.org/issues/immigration/reports/2018/06/13/452025/asylum-trump-era/>; Robert L. Tsai, "Trump's Travel Ban Faces Fresh Legal Jeopardy," *Politico Magazine*, March 27, 2019, available at <https://www.politico.com/magazine/story/2019/03/27/trump-travel-ban-lawsuit-supreme-court-unconstitutional-226103>.
- 56 Donald Kerwin and Robert Warren, "Fixing What's Most Broken in the US Immigration System: A Profile of the Family Members of US Citizens and Lawful Permanent Residents Mired in Multiyear Backlogs," *Journal of Migration and Human Security*, (2019): 1–6, available at <https://journals.sagepub.com/doi/pdf/10.1177/2331502419852925>; U.S. Department of State, "Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based preferences Registered at the National Visa Center as of November 1, 2018" (Washington: 2018), available at https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2018.pdf; U.S. Department of State Bureau of Consular Affairs, "Visa Bulletin for July 2019."
- 57 A common mistake that people make when speaking about immigrant visa backlogs is that they look at the monthly Visa Bulletin published by the State Department and say that the amount of time a person who is now getting a visa spent in the backlog of any given category is the length of time such a person could expect to wait if they were to apply for such a visa today. That is completely false. The Visa Bulletin tells us only how long people who are currently getting visas in any given category have already been waiting in the backlog, but it provides no information about the number of people in the backlog behind them. For that information, it is necessary to consider data maintained by both U.S. Citizenship and Immigration Services and the State Department on the number of people now in each queue, as well as the number of visas given out in each category annually to individuals from each country. This information is explained with perfect clarity in Charles Wheeler, "Backlogs in Family-Based Immigration: Shedding Light on the Numbers," Catholic Legal Immigration Network Inc., March 1, 2019, available at <https://cliniclegal.org/resources/backlogs-family-based-immigration-shedding-light-numbers>.

- 58 Ryan Edwards and Francesc Ortega, "The Economic Impacts of Removing Unauthorized Immigrant Workers: An Industry- and State-Level Analysis" (Washington: Center for American Progress, 2016), available at <https://www.americanprogress.org/issues/immigration/reports/2016/09/21/144363/the-economic-impacts-of-removing-unauthorized-immigrant-workers/>.
- 59 U.S. Bureau of Labor Statistics, "The Employment Situation—May 2019" (Washington: U.S. Department of Labor, 2019), available at <https://www.bls.gov/news.release/pdf/empst.pdf>.
- 60 Section 203(b)(3)(B) of the Immigration and Nationality Act actually specifies that up to 10,000 visas may be made available each year to immigrants in this "other worker" category, but for more than 20 years, up to 5,000 of those visas annually—as well as up to 5,000 visas allocated annually for the diversity visa program—have instead been used to offset green cards issued to beneficiaries of the Nicaraguan Adjustment and Central American Relief Act (NACARA). Because green cards issued under NACARA are given to people who adjust status from within the United States, and most immigrant visas given out through the diversity visa program and "other worker" category are given to immigrants abroad seeking admission to the United States, this offset effectively reduces avenues for legal immigration into the country and reduces overall the number of new immigrants able to enter each year. Although the offset is due to end in the near future, the very fact that visas granted to longtime residents of the country had to be offset by immigrant visas used largely by new immigrants demonstrates the power that restrictionists have long wielded to choke off legal pathways into the country, and shows how they have used that power precisely in the visa categories devoted to so-called lesser-skilled workers and individuals from countries that generally are underrepresented in the U.S. immigration system.
- 61 U.S. Department of State Bureau of Consular Affairs, "Visa Bulletin for July 2019."
- 62 See, for example, Shannon M. Gleeson, *Precarious Claims: The Promise and Failure of Workplace Protections in the United States* (Oakland, CA: University of California Press, 2016); Shannon M. Gleeson, *Conflicting Commitments: The Politics of Enforcing Immigrant Worker Rights in San Jose and Houston* (Ithaca, NY: Cornell University Press, 2012); Annette Bernhardt, Ruth Milkman, and Nik Theodore, "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities" (New York: National Employment Law Project, 2009), available at <https://www.nelp.org/publication/broken-laws-unprotected-workers-violations-of-employment-and-labor-laws-in-americas-cities/>; Adriana Kugler and Patrick Oakford, "Comprehensive Immigration Reform Will Benefit American Workers" (Washington: Center for American Progress, 2013), available at <https://www.americanprogress.org/issues/immigration/reports/2013/09/12/74014/comprehensive-immigration-reform-will-benefit-american-workers/>.
- 63 One of the pernicious effects of prolonged employer-sponsored green card backlogs is that workers can effectively be tied for decades to an employer, often unable to accept promotions that would constitute a "material change" to the job for which a labor certification was filed. This places such workers at a structural disadvantage with respect to other workers when it comes to advocating for better wages and working conditions and generates resentment among U.S. workers and immigrants alike. See generally William A. Kandel, "Permanent Employment-Based Immigration and the Per-country Ceiling," (Washington: Congressional Research Service, 2018), available at <https://crsreports.congress.gov/product/pdf/R/R45447>.
- 64 Stuart Anderson, "Bill Aims to End Decades-Long Wait For High-Skilled Immigrants," *Forbes*, February 15, 2019, available at <https://www.forbes.com/sites/stuartanderson/2019/02/15/bill-aims-to-end-decades-long-waits-for-high-skilled-immigrants/#457b6d3e7b85>. And doubly cruel, for these individuals, the moment their child—who is a derivative beneficiary of their H-1B visa—turns 21, that child will fall out of status and become undocumented unless they, too, can begin to piece together a series of complicated options to remain as a visitor in the only country they may have ever known. See David Bier, "Huge Fiscal Benefits of Including Legal Immigrant Dreamers in the DREAM Act," Cato Institute, October 23, 2017, available at <https://www.cato.org/blog/huge-fiscal-benefits-including-legal-immigrant-dreamers-dream-act>.
- 65 Fairness for High-Skilled Immigrants Act of 2019, H.R. 1044, 116th Cong., 1st sess., available at <https://www.congress.gov/bill/116th-congress/house-bill/1044>.
- 66 CAP analysis of the 2017 one-year American Community Survey microdata. See Ruggles and others, "Integrated Public Use Microdata Series, U.S. Census Data for Social, Economic, and Health Research, 2017 American Community Survey: 1-year estimates."
- 67 David Bier, "Why the Legal Immigration System Is Broken: A Short List of Problems," Cato Institute, July 10, 2018, available at <https://www.cato.org/blog/why-legal-immigration-system-broken-short-list-problems>; Mike Flynn and Shikha Dalmia, "What Part of Legal Immigration Don't You Understand?" *Reason*, October 2008, available at <https://reason.org/wp-content/uploads/files/a87d1550853898a-9b306ef458f116079.pdf>.
- 68 *Plyler v. Doe*, 457 U.S. 202, 219 n. 18 (1982) (internal quotation omitted).
- 69 Importantly, as historian Mae Ngai points out, extralegal workarounds have been used in immigration policy not only to discriminate against immigrants of color, but also to benefit white immigrants. In the mid-1930s, the Immigration and Naturalization Service started a program known as preexamination, which allowed people in the country without status to cross the Canadian border and be readmitted to the U.S. as permanent residents. Because Asian immigrants, for example, were racially ineligible for admission under the national origins quota system in place at the time, they were ineligible for preexamination, which, as Ngai points out, "became restricted to European immigrants." See Ngai, *Impossible Subjects*, pp. 82–87.
- 70 Roger Daniels, *Not Like Us: Immigrants and Minorities in America, 1890-1924* (Chicago, IL: Ivan R. Dee, 1997).
- 71 Kitty Calavita, *Inside the State: The Bracero Program, Immigration and the I.N.S.* (New York: Routledge, 1992); Ngai, *Impossible Subjects*, Chapter 4; S. Deborah Kang, *The INS on the Line: Making Immigration Law on the US-Mexico Border, 1917-1954* (Oxford, UK: Oxford University Press, 2017), Chapter 4.
- 72 Michael Clemens and others, "Migration Is What You Make It: Seven Policy Decisions that Turned Challenges into Opportunities" (Washington: Center for Global Development, 2018), available at <https://www.cgdev.org/publication/migration-what-you-make-it-seven-policy-decisions-turned-challenges-opportunities#case-three>.
- 73 *Ibid.*
- 74 Wolgin, "Beyond National Origins"; Ngai, *Impossible Subjects*.
- 75 Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton, NJ: Princeton University Press, 2002), p. 194.

- 76 Edwards and Ortega, "The Economic Impacts of Removing Unauthorized Immigrant Workers."
- 77 Silva Mathema, Nicole Svajlenka, and Anneliese Hermann, "Revival and Opportunity: Immigrants in Rural America" (Washington: Center for American Progress, 2018), at <https://www.americanprogress.org/issues/immigration/reports/2018/09/02/455269/revival-and-opportunity/>.
- 78 Ibid. See also Sara McElmurry, "Proactive and Patient: Managing Immigration and Demographic Change in 2 Rural Nebraska Communities" (Washington: Center for American Progress, 2018), at <https://www.americanprogress.org/issues/immigration/reports/2018/11/14/460894/proactive-and-patient/>.
- 79 Audrey Singer, "Metropolitan immigrant gateways revisited, 2014" (Washington: Brookings Institution, 2015), available at <https://www.brookings.edu/research/metropolitan-immigrant-gateways-revisited-2014/>.
- 80 Lisa Rapaport, "U.S. relies heavily on foreign-born health-care workers," Reuters, December 4, 2018, available at <https://www.reuters.com/article/us-health-professions-us-noncitizens/u-s-relies-heavily-on-foreign-born-health-care-workers-idUSKBN1O32FR>; Paula Span, "If Immigrants Are Pushed Out, Who Will Care for the Elderly?," *The New York Times*, February 2, 2018, available at <https://www.nytimes.com/2018/02/02/health/illegal-immigrants-caregivers.html>.
- 81 National Academies of Sciences, Engineering, and Medicine, "The Economic and Fiscal Consequences of Immigration" (Washington: The National Academies Press, 2017), figures 2–5, available at <https://doi.org/10.17226/23550>.
- 82 Ibid., p. 71, citing Dowell Myers, *Immigrants and Boomers: Forging a New Social Contract for the Future of America* (New York: Russell Sage Foundation, 2007).
- 83 Hiroshi Motomura, *Immigration Outside the Law* (Bethesda, MD: Oxford University Press, 2014), p. 54. Elizabeth F. Cohen also points out that by ignoring the decades of residence in country that undocumented immigrants have accrued, we devalue their time—and, ultimately, them—entirely. Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration, and Democratic Justice* (Cambridge, MA: Cambridge University Press, 2018), p. 143.
- 84 Motomura, *Immigration Outside the Law*, p. 107.
- 85 For an exhaustive history and analysis of prosecutorial discretion in the enforcement of our immigration laws, see Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* (New York: New York University Press, 2015).
- 86 One example of a workaround adopted by the Obama administration to an intractable challenge involved the 2013 policy providing consistent guidance regarding the use of parole-in-place for certain undocumented family members of military personnel, veterans, and enlistees. U.S. Citizenship and Immigration Services, "Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)," November 15, 2013, available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf. Under the policy, such family members who originally entered the country without inspection could request to be paroled into the country and—depending on their individual circumstances—might then be able to adjust their status to permanent residence. The goal of the policy was to alleviate concerns raised by the U.S. Department of Defense, which had long seen active members of the U.S. armed forces as well as reservists and veterans struggle with stress and anxiety related to their family members' lack of immigration status.
- 87 Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens."
- 88 Johnson, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants."
- 89 Marshall Fitz, "What the President Can Do on Immigration if Congress Fails to Act" (Washington: Center for American Progress, 2014), available at <https://www.americanprogress.org/issues/immigration/reports/2014/07/01/93042/what-the-president-can-do-on-immigration-if-congress-fails-to-act/>.
- 90 Migration Policy Institute, "As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program," Press release, November 19, 2014, available at <https://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>.
- 91 See Constitutional Accountability Center, "United States v. Texas," at <https://www.theconstitution.org/litigation/united-states-v-texas-u-s-sup-ct/> (last accessed July 2019).
- 92 *Texas, et al. v. United States*, No. 18-00068 (S.D. Tex. May 1, 2018).
- 93 U.S. Constitution, Article 2, Section 3.
- 94 See, for example, U.S. House of Representatives Committee on the Judiciary Executive Overreach Task Force, "Hearing: Executive Overreach in Domestic Affairs (Part I)—Health Care and Immigration"; U.S. House of Representatives Committee on the Judiciary, "Hearing: Unconstitutionality of Obama's Executive Actions on Immigration" (Washington: U.S. Congress, 2015), available at <https://docs.house.gov/meetings/JU/JU00/20150225/103010/HHRG-114-JU00-Transcript-20150225.pdf>.
- 95 See, for example, U.S. House of Representatives, "Department of Homeland Security Appropriations Act of 2015," *Congressional Record* 161 (7) (2015), available at <https://www.congress.gov/congressional-record/2015/1/14/house-section/article/H363-3>.
- 96 See Fitz, "What the President Can Do on Immigration if Congress Fails to Act."
- 97 Importantly, because restoring the rule of law in the U.S. immigration system necessarily requires earning back public trust and confidence in that system—both the rules of the road and the systems of enforcement to maintain the integrity of those rules—it is important to acknowledge that in such a system, we would rely less upon large scale exercises of prosecutorial discretion along the lines of DACA and DAPA because the legal pathways for future immigration and the guarantees of fairness in the enforcement of our laws would limit the scope and breadth of our enforcement needs, better focusing them on people that choose not to go through an otherwise functional legal process or those who run afoul of that process.
- 98 Shoba S. Wadhia writes, "when DHS's exercise of prosecutorial discretion results in the non-enforcement of the immigration laws against millions of unauthorized immigrants, public criticism is sharpened." See Shoba S. Wadhia, "The Role of Prosecutorial Discretion in Immigration Law," *Connecticut Public Interest Law Journal* 9 (2010): 243, 298, available at https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1016&context=fac_works.

- 99 In recent years, leading restrictionists also have become increasingly vocal in defending immigration restrictions as being necessary to defend “Western civilization.” These statements, which have been elevated by the president himself and are a mainstay of certain cable news programs, have been cheered by prominent white supremacists. Alongside these aggressive defenses of white nationalism, some commentators actually point to the rise of racist attacks to justify the very same restrictionist policies championed by nativists, saying that immigration sows division and discord, essentially blaming all immigrants for the intolerance of a small minority of Americans. See Jeet Heer, “Trump, Fox News, and the Mainstreaming of White Nationalism,” *The New Republic*, January 19, 2018, available at <https://newrepublic.com/article/146683/trump-fox-news-mainstreaming-white-nationalism>.
- 100 White House, “Executive Order: Enhancing Public Safety in the Interior of the United States,” January 25, 2017, available at <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>. See also Shoba Sivaprasad Wadhia, “Immigration Enforcement Under Trump: A Loose Cannon,” *Harvard Law Review Blog*, February 21, 2018, available at <https://blog.harvardlawreview.org/immigration-enforcement-under-trump-a-loose-cannon/>; Tom Jawetz, “Trump’s Deportation Rules Will Make America Unsafe Again,” *Fortune*, February 24, 2017, available at <http://fortune.com/2017/02/24/donald-trump-public-safety-executive-order-deportation-immigration-illegal-undocumented/>.
- 101 Alan Gomez, “ICE sets record for arrests of undocumented immigrants with no criminal record,” *USA Today*, March 21, 2019, available at <https://www.usatoday.com/story/news/politics/2019/03/21/ice-sets-record-arrests-undocumented-immigrants-no-criminal-record/3232476002/>.
- 102 See Transactional Records Access Clearinghouse Immigration, “ICE Focus Shifts Away from Detaining Serious Criminals.”
- 103 Elise Foley, “ICE Director To All Undocumented Immigrants: ‘You Need To Be Worried,’” *HuffPost*, June 13, 2017, available at https://www.huffpost.com/entry/ice-arrests-undocumented_n_594027c0e4b0e84514eebfbe.
- 104 Motomura, *Immigration Outside the Law*, p. 110.
- 105 See, for example, Gallup, “Immigration.”
- 106 CAP analysis of the 2017 one-year American Community Survey microdata. See Ruggles and others, “Integrated Public Use Microdata Series, U.S. Census Data for Social, Economic, and Health Research, 2017 American Community Survey: 1-year estimates.”
- 107 For a good discussion on why fidelity to the rule of law must mean more than simply heavier enforcement of an immigration system that has proven to be “unrealistic” and insufficiently accommodating to legitimate interests, see Stephen H. Legomsky, “Portraits of the Undocumented Immigrant: A Dialogue,” *Georgia Law Review* 44 (65) (2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372171.
- 108 Hiroshi Motomura, “The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law,” *Washburn Law Journal* 55 (1) (2015), available at <https://contentdm.washburnlaw.edu/digital/collection/wlj/id/6613>.
- 109 McElwee, “It’s Time to Abolish ICE.”
- 110 #Not1More, “About,” available at <http://www.notonemore-deportation.com/about/> (last accessed July 2019).
- 111 Randy Capps and others, “Revving Up the Deportation Machinery: Enforcement under Trump and the Pushback” (Washington: Migration Policy Institute, 2018), available at <https://www.migrationpolicy.org/research/revving-deportation-machinery-under-trump-and-pushback>.
- 112 Susan Gzesh, “Central Americans and Asylum Policy in the Reagan Era,” *Migration Policy Institute*, April 1, 2006, available at <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>.
- 113 As further evidence that the immigration enforcement practices of ICE are making the entire agency toxic, Homeland Security Investigations (HSI), a law enforcement agency within ICE, has been pushing in recent years to separate itself from ICE and break its ties with Enforcement and Removal Operations. Senior HSI personnel have complained that the ICE brand has hampered the agency’s ability to cooperate with many elected officials and local communities, even on efforts to fight human trafficking and transnational criminal organizations that are generally less controversial. See Alexia Fernández Campbell, “19 top ICE investigators ask DHS officials to split up the agency,” *Vox*, June 29, 2018, available at <https://www.vox.com/policy-and-politics/2018/6/29/17517870/ice-agents-dhs-break-up-ice>.
- 114 *Houston Chronicle*, “José Escobar,” available at <https://www.houstonchronicle.com/newamerica/storylines/escobar/> (last accessed July 2019).
- 115 Sonia Moghe and Samira Said, “Arrests at immigration marriage interviews pop up in Florida,” *CNN*, October 3, 2018, available at <https://www.cnn.com/2018/10/03/politics/undocumented-immigrants-arrests-marriage-interview/index.html>.
- 116 CBS News, “Customs arrest in courthouse sends ‘horrible’ message, official says,” February 17, 2017, available at <https://www.cbsnews.com/news/customs-arrest-in-courthouse-of-irvin-gonzalez-sends-horrible-message-official-says/>.
- 117 Scott Neuman and John Burnett, “10-Year-Old Girl Is Detained By Border Patrol After Emergency Surgery,” *NPR*, October 26, 2017, available at <https://www.npr.org/sections/thetwo-way/2017/10/26/560149316/10-year-old-girl-is-detained-by-ice-officers-after-emergency-surgery>.
- 118 Arelis R. Hernández, “ICE raids under Trump spark fear in Maryland, Virginia,” *The Washington Post*, February 17, 2017, available at https://www.washingtonpost.com/local/ice-raids-under-trump-spark-fear-in-maryland-virginia/2017/02/17/01044db8-f517-11e6-8d72-263470bf0401_story.html?utm_term=.8c502918919d.
- 119 Adolfo Flores, “DREAMer Arrested After Speaking At News Conference Files to Stop Her Deportation,” *Buzzfeed*, March 3, 2017, available at <https://www.buzzfeednews.com/article/adolfoflores/dreamer-arrested-moments-after-speaking-out#.gdXq3oL1>.
- 120 Rick Montgomery, “Kansas chemistry instructor arrested by ICE while taking his daughter to school,” *The Kansas City Star*, February 2, 2018, available at <https://www.kansascity.com/news/politics-government/article198215114.html>.
- 121 *The Guardian*, “Donald Trump: deport ‘bad hombres’- video,” October 20, 2016, available at <https://www.theguardian.com/us-news/video/2016/oct/20/donald-trump-bad-hombres-us-presidential-debate-las-vegas-video>.

- 122 See, for example, Julie Turkewitz, "Deportation Looms, and a Father Prepares to Say Goodbye," *The New York Times*, March 8, 2019, available at <https://www.nytimes.com/2019/03/08/us/immigration-deportation.html>; Joseph Dits, "Granger restaurant owner Roberto Beristain deported," *South Bend Tribune*, April 6, 2017, available at https://www.southbendtribune.com/news/local/granger-restaurant-owner-roberto-beristain-deported/article_77635bc8-1a58-11e7-a694-1741825be474.html. FWD.us maintains and updates regularly a list of such arrests. See FWD.us, "Human Consequences," available at <https://www.fwd.us/consequences/> (last accessed July 2019).
- 123 The fact that people frequently believe correctly that the U.S. immigration system is broken and does not—and cannot—currently function effectively is key to understanding why simply enforcing the rules of that broken system more fully will never fix the problem and will only increase growing anger and distrust of the system itself.
- 124 Meagan Flynn, "Detained migrant children got no toothbrush, no soap, no sleep. It's no problem, government argues," *The Washington Post*, June 21, 2019, available at https://www.washingtonpost.com/nation/2019/06/21/detained-migrant-children-no-toothbrush-soap-sleep/?utm_term=.317749fa87e6; Cedar Attanasio, Garance Burke, and Martha Mendoza, "Attorneys: Texas border facility is neglecting migrant kids," Associated Press, June 21, 2019, available at <https://www.apnews.com/46da2dbe04f54adbb875cfc06bbc615>; Joel Rose and John Burnett, "DHS Inspector General Finds 'Dangerous Overcrowding' in Border Patrol Facilities," NPR, July 2, 2019, available at <https://www.npr.org/2019/07/02/738179391/dhs-inspector-general-finds-dangerous-overcrowding-in-border-patrol-facilities>; Serwer, "A Crime by Any Name."
- 125 Adam Serwer, "The Cruelty Is the Point," *The Atlantic*, October 3, 2018, available at <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/>.
- 126 Office of Rep. Zoe Lofgren, "Lofgren: repealing bipartisan protections for trafficking victims would return children to their traffickers," Press release, July 29, 2014, available at <https://lofgren.house.gov/media/press-releases/lofgren-repealing-bipartisan-protections-trafficking-victims-would-return>.
- 127 *Politico*, "President Donald J. Trump Wants to Fully Secure Our Border and Reform Our Immigration System to Put America First," <https://www.politico.com/f/?id=0000016a-c50b-da79-af7e-f77f51610001> (last accessed July 2019).
- 128 David Bier, "Family and Diversity Immigrants Are Far Better Educated Than U.S.-Born Americans," Cato Institute, January 25, 2018, available at <https://www.cato.org/blog/family-diversity-immigrants-are-far-better-educated-us-born-americans>.
- 129 Demetrios G. Papademetriou and others, "Harnessing the Advantages of Immigration for a 21st-Century Economy: A Standing Commission on Labor Markets, Economic Competitiveness, and Migration" (Washington: Migration Policy Institute, 2009), available at <https://www.migrationpolicy.org/research/harnessing-advantages-immigration-21st-century-economy-standing-commission-labor-markets>.
- 130 Council on Foreign Relations, "U.S. Immigration Policy" (New York: 2009), p. 93, available at <https://www.cfr.org/report/us-immigration-policy>.
- 131 Ray Marshall, "Immigration for Shared Prosperity: A Framework for Comprehensive Reform" (Washington: Economic Policy Institute, 2009), available at <https://www.epi.org/files/2013/Marshall-Immigration-for-Shared-Prosperity.pdf>.
- 132 Zoya Gubernskaya and Joanna Dreby, "US Immigration Policy and the Case for Family Unity," *Journal on Migration and Human Security* 5 (2) (2017): 417–430, available at <https://journals.sagepub.com/doi/pdf/10.1177/233150241700500210>.
- 133 This concept also arose in S.744, the Senate-passed comprehensive immigration reform bill of 2013. Section 4701 created a new Bureau of Immigration and Labor Market Research charged with surveying the labor market and coming up with a methodology to determine the number of "W" nonimmigrant (nonagricultural) visas each year. Rather than grant a static number of W visas in perpetuity, S.744 allowed the number of visas made available annually to fluctuate between 20,000 and 200,000 based on labor market conditions. See Border Security Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong., 1st sess. (_____) available at <https://www.congress.gov/bill/113th-congress/senate-bill/744/text>.
- 134 See U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, "Hearing: Past, Present and Future: A Historic and Personal Reflection on American Immigration" (Washington: U.S. Congress, 2007), available at <https://archive.org/details/gov.gpo.fdsys.CHRG-110hrg34418>.
- 135 David Dyssegaard Kallick with Silva Mathema, "Refugee Integration in the United States" (Washington: Center for American Progress, 2016), available at <https://www.americanprogress.org/issues/immigration/reports/2016/06/16/139551/refugee-integration-in-the-united-states/>.
- 136 Silva Mathema, "Refugees Thrive in America: Trump Cuts the Number of New Arrivals Despite Advancements and Success Stories" (Washington: Center for American Progress, 2018), available at <https://www.americanprogress.org/issues/immigration/reports/2018/11/19/461147/refugees-thrive-america/>.
- 137 The Obama White House, "Presidential Determination – Refugee Admissions for Fiscal Year 2017," September 28, 2016, available at <https://obamawhitehouse.archives.gov/the-press-office/2016/09/28/presidential-determination-refugee-admissions-fiscal-year-2017>.
- 138 CAP analysis of WRAPsnet data from Refugee Processing Center, "Admissions and Arrivals: PRM Admissions Graph June 30, 2019," available at <http://www.wrapsnet.org/admissions-and-arrivals/> (last accessed July 2019).
- 139 Priscilla Alvarez, "America's System for Resettling Refugees Is Collapsing," *The Atlantic*, September 9, 2018, available at <https://www.theatlantic.com/politics/archive/2018/09/refugee-admissions-trump/569641/>.
- 140 Christina Goldbaum, "Luring Refugees: N.Y. Cities Desperate for People Try a New Strategy," *The New York Times*, May 13, 2019, available at <https://www.nytimes.com/2019/05/13/nyregion/refugees-upstate-ny-employment.html>.
- 141 Michael Clemens, "The President Has Mostly Wiped out US Refugee Resettlement. Other Countries Aren't Picking up the Slack," Center for Global Development, February 5, 2019, available at <https://www.cgdev.org/blog/president-has-mostly-wiped-out-us-refugee-resettlement-other-countries-arent-picking-slack>.
- 142 Donald Kerwin, "The US Refugee Resettlement Program — A Return to First Principles: How Refugees Help to Define, Strengthen, and Revitalize the United States," *Journal on Migration and Human Security* 6 (3) (2018): 2015–225, available at <https://journals.sagepub.com/doi/pdf/10.1177/2331502418787787>.
- 143 Dara Lind, "Beyond family separation: Trump's ongoing war on asylum, explained," *Vox*, August 6, 2018, available at <https://www.vox.com/explainers/2018/8/6/17501404/trump-asylum-separate-legal-definition>.

- 144 Dan Restrepo, Trevor Sutton, and Joel Martinez, "Getting Migration in the Americas Right: A National Interest-Driven Approach" (Washington: Center for American Progress, 2019), available at <https://www.americanprogress.org/issues/security/reports/2019/06/24/471322/getting-migration-americas-right/>.
- 145 Ibid.
- 146 Northern Triangle and Border Stabilization Act, H.R. 3525, 116th Cong., 1st sess. (_____), available at <https://www.congress.gov/bill/116th-congress/house-bill/3524>.
- 147 See Human Rights First and others, "Protecting Refugees and Restoring Order: Real Solutions to the Humanitarian Crisis" (Washington: 2019), available at <https://www.humanrightsfirst.org/sites/default/files/Protecting-Refugees-Restoring-Order.pdf>.
- 148 See, for example, Jill E. Family, "The Future Relief of Immigration Law," *Drexel Law Review* 9 (393) (2017): 393–418, available at <https://drexel.edu/law/lawreview/issues/Archives/v9-2/family/>.
- 149 Dara Lind, "The disastrous, forgotten 1996 law that created today's immigration problem," *Vox*, April 28, 2016, available at <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>.
- 150 See Cox and Rodríguez, "The President and Immigration Law," pp. 517–518. Incidentally, this also helps to explain the tremendous pressure on state and local officials considering how and under what circumstances they should cooperate in the enforcement of federal immigration laws, because the lack of proportionality and flexibility available in immigration court proceedings means that once a person has been placed in the custody of immigration enforcement personnel the die has often already been cast.
- 151 Juliet Stumpf, "Fitting Punishment," *Washington and Lee Law Review* 66 (4) (2009), available at <https://scholarlycommons.law.wlu.edu/wlulr/vol66/iss4/7/>.
- 152 Currently, only a small handful of grounds of deportability include a statute of limitations. For instance, a noncitizen may be deported for a single crime involving moral turpitude only so long as that crime was committed within five years of admission to the country. See Cox and Rodríguez, "The President and Immigration Law," pp. 515 n. 204.
- 153 Kelly Heyboer, "ICE arrests immigrant husband of disabled Army vet – even though he's a legal resident, family says," *NJ.com*, December 13, 2018, available at <https://expo.nj.com/news/erry-2018/12/bcf157a8022632/ice-arrests-immigrant-husband.html>. See also Human Rights Watch, "A Price Too High: US Families Torn Apart by Deportations for Drug Offenses" (New York: 2015), available at <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses>.
- 154 Ngai, *Impossible Subjects*.
- 155 Immigration Reform and Control Act of 1996, Public Law 603, 99th Cong., 2nd sess. (November 6, 1986), available at <https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3445.pdf>.
- 156 See Kerwin and Warren, "Fixing What's Most Broken in the US Immigration System," arguing for legislation that advances "the registry cutoff date on an automatic basis to provide a pathway to status for noncitizens who have lived continuously in the United States for at least 15 years, have good moral character, and are not inadmissible on security and other grounds."
- 157 Importantly, registry is status blind and is a means of adjusting to permanent residency for anyone who meets the time criteria and is not otherwise ineligible. As such, advancing the date, and allowing it to continue to advance on a rolling basis, would help not just those who are undocumented, but also those trapped in temporary statuses such as TPS. See Andorra Bruno, "Immigration: Registry as Means of Obtaining Lawful Permanent Residence" (Washington: Congressional Research Service, 2001), available at <http://congressionalresearch.com/RL30578/document.php>.
- 158 American Immigration Lawyers Association, "Restoring Integrity and Independence to America's Immigration Courts"; American Bar Association Commission on Immigration, "Reforming the Immigration System."
- 159 Aaron Reichlin-Melnick, "As Immigration Court Quotas Go Into Effect, Many Call For Reform," *Immigration Impact*, October 1, 2018, available at <http://immigrationimpact.com/2018/10/01/immigration-court-quotas-call-reform/>.
- 160 Molly Hennessy-Fiske, "This judge says toddlers can defend themselves in immigration court," *Los Angeles Times*, March 6, 2016, available at <https://www.latimes.com/nation/immigration/la-na-immigration-judge-20160306-story.html>.
- 161 Ingrid Eagly and Steven Shafer, "Access to Counsel in Immigration Court" (Washington: American Immigration Council, 2016), available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.
- 162 Ibid.
- 163 Ibid. See also Lindsay Nash, "Universal Representation," *Fordham Law Review* 87 (2) (2018), available at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5550&context=flr>.
- 164 Bryan Baker, "Immigration Enforcement Actions: 2016" (Washington: U.S. Department of Homeland Security Office of Immigration Statistics, 2017), available at https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf. See also American Civil Liberties Union Foundation, "American Exile: Rapid Deportations That Bypass the Courtroom" (Washington: 2014), available at <https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom>, finding that in fiscal year 2013, 83 percent of removal orders were issued by an immigration enforcement officer, not an immigration judge.
- 165 CAP analysis of the 2017 one-year American Community Survey microdata. See Ruggles and others, "Integrated Public Use Microdata Series, U.S. Census Data for Social, Economic, and Health Research, 2017 American Community Survey: 1-year estimates."
- 166 American Dream and Promise Act, H.R. 6, 116th Cong., 1st sess. (_____), available at <https://www.congress.gov/bill/116th-congress/house-bill/6>.

Our Mission

The Center for American Progress is an independent, nonpartisan policy institute that is dedicated to improving the lives of all Americans, through bold, progressive ideas, as well as strong leadership and concerted action. Our aim is not just to change the conversation, but to change the country.

Our Values

As progressives, we believe America should be a land of boundless opportunity, where people can climb the ladder of economic mobility. We believe we owe it to future generations to protect the planet and promote peace and shared global prosperity.

And we believe an effective government can earn the trust of the American people, champion the common good over narrow self-interest, and harness the strength of our diversity.

Our Approach

We develop new policy ideas, challenge the media to cover the issues that truly matter, and shape the national debate. With policy teams in major issue areas, American Progress can think creatively at the cross-section of traditional boundaries to develop ideas for policymakers that lead to real change. By employing an extensive communications and outreach effort that we adapt to a rapidly changing media landscape, we move our ideas aggressively in the national policy debate.

