



A New Paradigm for Humane and Effective Immigration Enforcement

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Introduction and summary

In recent decades, detention and deportation have become the entirety of America's immigration enforcement strategy. This will strike many, perhaps even most, Americans as both intuitive and inevitable. How else is the nation to enforce its immigration laws? But U.S. Immigration and Customs Enforcement's (ICE) mass detention and deportation strategy is, in fact, both a sharp break from historic norms and neither the only, nor the most effective, way to enforce immigration law. As a result of ICE's unprecedented mass deportation agenda, the United States now spends more on federal immigration enforcement than on all federal criminal law enforcement combined,¹ and has removed more than twice as many people in the first two decades of the 21st century as in the entire previous history of the United States.² The brutality and enormous investment in immigration enforcement have created a well-documented humanitarian disaster³ that has increasingly driven the American public to reject ICE's heavy-handed tactics.⁴ However, less well-recognized are the ways in which that agency's enforcement-only approach has utterly failed as a law enforcement strategy.

This report suggests a new paradigm for interior immigration enforcement in the United States that strives to be more humane,⁵ in that it does not subject individuals or communities to unnecessary suffering; more effective, in that increased compliance with the law can be realistically and efficiently achieved; and more just, in that people can, in practice, obtain the rights and enjoy the privileges the rules afford.⁶

A goal of the immigration enforcement system, like that of all enforcement systems, is to maximize compliance with the law. Doing so will require, first and foremost, a legal scheme that allows for realistic, sensible pathways to comport one's conduct with the law. The absence of such a realistic scheme is why, during the course of ICE's 17-year existence, compliance with immigration law has gone down, not up.⁷ Since its creation, ICE's budget has increased 150 percent,⁸ with immigration enforcement spending far outpacing the U.S. inflation rate and the growth of the federal budget as a whole in recent decades.⁹ Meanwhile, based on the government's own most recent estimates, since the creation of ICE, the undocumented population has grown by 70 percent.¹⁰

The nation's immigration courts also have accumulated an unprecedented and unmanageable million-case backlog.¹¹ Contrary to the rhetoric of some immigration restrictionists, that growth in the undocumented population and backlog in the immigration courts cannot be explained by an increase in unauthorized immigration, as the rate of unauthorized migration has been declining during ICE's lifetime.¹² To be sure, detentions and deportations have skyrocketed since ICE's creation, but detentions and deportations are means, not ends. Just as the goal of criminal justice systems is to reduce crime rates, not to maximize incarceration, policymakers must judge the effectiveness of America's immigration enforcement system on the ultimate measure that matters: compliance with immigration law. By that measure, while ICE's heavy-handed tactics have succeeded in terrorizing communities and dividing the nation, they have failed as a law enforcement strategy. Thus, anyone who cares about fiscal responsibility or effective law enforcement—not simply those who care about immigrant communities—should be eager to rethink the United States' immigration enforcement strategy.¹³

The new immigration enforcement paradigm proposed here requires that America radically rethinks the “substantive rules” to be enforced, which dictate who can be penalized for immigration violations and what penalties can be imposed; the “mechanics of enforcement” used to increase compliance with such substantive rules without putting people in cages and tearing apart hundreds of thousands of families each year;¹⁴ and the “procedural rules” governing enforcement, which guarantee a fair system consistent with the norms of due process. Of course, interior immigration enforcement does not operate in a vacuum. Other components of the immigration system, such as border enforcement, future flow rules, and legalization programs, significantly affect the dynamics of interior enforcement. These aspects of the immigration system are in equally desperate need of reform but are beyond the boundaries of this report.

This report makes several recommendations that, collectively, would facilitate a dramatic paradigm shift in the nation's approach to interior immigration enforcement, including:

Revising the substantive rules of immigration enforcement:

- **Simplify and streamline deportation grounds.** Policymakers can significantly improve the efficiency and fairness of this system by replacing the current tangled scheme, which includes more than 200 different grounds for removal,¹⁵ with a simple inquiry into whether someone entered the country unlawfully or violated the terms of their authorized entry, usually by staying beyond their authorized period.

- **Restore individualized discretion.** Policymakers can further streamline proceedings and ensure that judges are empowered to deliver justice by replacing the current convoluted “relief” inquiry, which is comprised of a dizzying web of overlapping, though significantly underinclusive, defenses to deportation, with a simple proportionate sentencing phase. In this sentencing phase, an immigration judge could consider all relevant factors in an efficient summary proceeding to determine the appropriate penalty based on the individual circumstances, just as criminal court judges do countless times each day.
- **Make lawful permanent residence truly permanent.** Many Americans may be shocked to learn that a significant percentage of individuals facing deportation are not undocumented but are, in fact, lawful permanent residents (LPRs), also known as green card holders, who have already gone through a thorough legal vetting process. LPRs are the class of noncitizens with the deepest ties to the United States and share unique rights and obligations otherwise restricted to citizens, such as draft registration and the right to serve in the military, which make their connections to the nation particularly strong and their removals particularly disturbing.
- **End the ahistoric entanglement between criminal and immigration law.** The current entanglement between immigration and criminal law, where a vast array of mostly minor criminal convictions are now routinely used to trigger removal proceedings, is a sharp break from historic norms. Despite its intuitive appeal, the novel entanglement between criminal and immigration law has proved impracticable and an impediment to justice. Using criminal convictions as the front-end trigger for deportation has led to the most complex and cumbersome legal issues in modern immigration law and to a system of double punishment that is inconsistent with U.S. constitutional norms.

Revising the mechanics of immigration enforcement:

- **Reduce reliance and spending on failed punitive enforcement strategies.** The pattern of throwing ever-increasing billions of tax dollars¹⁶ at ICE’s mass detention and deportation regime can no longer be justified. The unprecedented investment in punitive enforcement strategies during ICE’s nearly two decades of existence is a failed experiment that has caused untold suffering in communities and failed to increase compliance with immigration law.

- **Increase compliance through cooperative enforcement strategies that give individuals a fair chance to comply with the law.** The trend among other federal agencies is increasingly to help regulated entities come into compliance, rather than to punish noncompliance. The same humane and effective strategy could be employed in the immigration arena because a significant percentage of undocumented individuals are in fact eligible for legal status. Instead of needlessly funneling these individuals into removal proceedings, the immigration system should give them a fair chance to affirmatively apply for the forms of legal status that Congress made available to them.
- **End the one-size-fits-all reliance on deportation by creating new scalable alternative penalties for immigration violations.** One primary driver of the cruelty of the immigration enforcement system is that current law only gives immigration judges a single penalty in their immigration toolbox—deportation—and that penalty is grossly disproportionate to the overwhelming majority of immigration offenses. A just enforcement system must also include a range of scalable penalties—such as fines, community service, treatment programs, or probationary periods—that can be adjusted to match the severity of the violation and the circumstances of the individual.
- **Replace preemptive immigration detention with proven alternative mechanisms to promote appearance and compliance with court orders.** Virtually every other federal agency in the administrative state has found a way to enforce its civil administrative scheme without putting people in cages. There is no reason why deportation proceedings, or even the deportation process itself, must begin with handcuffs. In place of inhumane, costly, and unnecessary detention, the federal government can ensure appearance and compliance with court orders by providing counsel and support for those who need it, through proven community-based management programs, as well as incentives for compliance and reentry services for those who ultimately face deportation.

Revising the procedural protections underlying immigration enforcement:

- **Create a federal public defender system for indigent individuals facing deportation.** There is no other arena of American law where people are forced to litigate for their liberty¹⁷ against trained government prosecutors, without any legal assistance whatsoever. Recent research shows that as many as 44 percent of unrepresented immigrants receive removal orders not because they do not have a legal right to remain in the United States but because they cannot vindicate that right without the help of a lawyer.¹⁸ Due process requires that indigent individuals facing removal have the right to appointed counsel.

- **Ensure impartiality and minimize political influence over immigration judges by creating independent Article I immigration courts.** Under current law, immigration judges are appointed by and answerable to the attorney general, who also serves as prosecutor, defending deportation orders in federal court. The dual conflicting roles of adjudicator and prosecutor and the political influence of the current structure have been weaponized in recent years, undermining even the pretext of independent, impartial decision-making. Impartial merit-based decision-making can best be ensured by making immigration courts, like the Tax and Bankruptcy courts, independent Article I courts, which are established by and answerable to Congress, not the president or his attorney general.

Full realization of the paradigm shift in interior enforcement this report proposes will require significant legislative reform, which should be a high priority for the incoming Biden administration and Congress. However, regardless of the prospects for such near-term congressional action, it is critical that thoughtful policymakers and advocates work now to develop a clear vision for the immigration enforcement system the nation needs to build. Absent that clear vision, reform efforts will remain vulnerable to dismissive critiques, and politicians, rather than impacted communities, will be left to identify the goals of reform.

Moreover, some important components of these recommendations could be implemented by the Biden administration alone through key near-term executive reforms. Specifically, the Biden administration would not need Congress to implement prosecutorial discretion guidelines that deprioritize enforcement against LPRs or others who fall outside the removal scheme set forth below, to disentangle immigration and criminal enforcement, to shift away from a punitive enforcement model and toward a cooperative compliance enhancement mode, and to begin winding down the immigration detention system and scaling up access to counsel programs. Implementing such executive reforms, while clearly and forcefully articulating a vision for a new humane, effective, and just immigration enforcement paradigm, would not only improve the function of the immigration enforcement system immediately but would also lay the policy and political groundwork for the eventual legislative reform to come.¹⁹

Rethinking the mechanics of immigration enforcement

In recent decades, heavy-handed punitive enforcement is the only model of immigration enforcement Americans have seen across this country. As a result, detention and deportation are the only immigration enforcement tools most Americans know. However, there are other tested and proven enforcement strategies available. Even in criminal justice systems, there are increasing examples of successful, though still insufficient, moves away from overly punitive enforcement strategies and toward diversionary and community-based programs that help individuals comply with the law rather than merely punishing noncompliance.²⁰ The nation needs a new paradigm for the ways it enforces immigration laws—a paradigm that is more humane, significantly less expensive, and simultaneously more effective at increasing compliance with immigration law. The mechanics of such an enforcement paradigm could be built around the four central pillars articulated below.²¹

Pillar 1: A dramatic reduction in the funding and scale of punitive enforcement

The contemporary scale of detentions and deportations in the United States is unprecedented. In the 20th century, the United States removed, on average, fewer than 25,000 people per year.²² In comparison, in the 21st century, U.S. Immigration and Customs Enforcement has removed more than 300,000 people per year.²³ In 1985, the daily population of detained immigrants was roughly 2,000.²⁴ By 1994, the population rose to about 6,000; by 2001, the population surpassed 20,000; and by 2008, the population reached 33,000 individuals in immigration detention on any given day in the United States.²⁵ In 2019, ICE established a new record daily population of 52,000—a startling 2,500 percent increase since 1985.²⁶ The enormous scale of detentions and deportations in the contemporary immigration system is neither a necessary nor a normal feature of immigration enforcement in the United States. Indeed, at the outset of the 1980s, the nation had no significant permanent immigration detention facilities at all.²⁷

ICE's stated goal from the outset was, and remains, to deport every single person who is potentially subject to deportation.²⁸ This goal, and the unprecedented billions in tax dollars devoted to it, has been the driving force behind the massive scale of punitive immigration enforcement in the 21st century. However, 100 percent enforcement is an unwise and unrealistic goal and not the way effective enforcement schemes operate. A smart enforcement scheme must identify its optimal scale by balancing the societal costs of punitive enforcement against the marginal additional compliance such enforcement can achieve, and the societal benefits associated with that additional compliance. For example, in some enforcement contexts, such as enforcement of safety norms by the Nuclear Regulatory Commission, extremely high levels of enforcement are necessary because even low levels of noncompliance risk significant harm to society. There is growing consensus in other areas—such as tax law, as well as the regulation of marijuana, sex work, or quality-of-life crimes—that the cost and collateral harms associated with high levels of punitive enforcement, the low deterrent value of severe enforcement, and the relatively minor injuries to society associated with noncompliance lend support for low punitive enforcement levels.²⁹

The same is true of immigration enforcement. On one side of the equation, the human and fiscal costs of excessive punitive enforcement are immense.³⁰ On the other side of the equation, the societal harms associated with unauthorized immigration are clearly contested in the political arena. However, the overwhelming weight of the evidence demonstrates that immigrants, including undocumented immigrants, pose no heightened risk of criminality and, in the long run, undocumented workers are a critical net benefit to the U.S. economy.³¹ Moreover, even if there were significant levels of harm from noncompliance, high levels of punitive enforcement are only justified if they actually work at reducing noncompliance. In fact, the weight of the evidence suggests that ICE's heavy-handed tactics are of limited deterrent value.³² Accordingly, the first pillar underlying a new just, humane, and effective immigration enforcement paradigm is a dramatic reduction in the unprecedented billions of dollars currently allocated to ICE and the resultant scale of punitive enforcement efforts.

Pillar 2: A mandatory preference for compliance assistance over punitive enforcement

While a radical reduction in punitive enforcement is a critical component of developing a new workable immigration enforcement paradigm, that reduction alone will not increase compliance with immigration law. In place of detention and deportation, the United States needs a new mechanism to drive up compliance. Cooperative enforcement is the strategy increasingly favored by administrative agencies outside the immigration

context. Instead of punishing noncompliance, agencies should work to assist regulated entities to come into compliance through education, outreach, and flexible implementation.³³ This is the approach favored by U.S. agencies such as the Occupational Safety and Health Administration, the Securities and Exchange Commission, the Environmental Protection Agency, and the Food and Drug Administration when they encounter a corporation in violation of their regulatory scheme.³⁴ The people subject to potential immigration enforcement should be entitled to the same opportunities to come into compliance that are afforded to the corporations regulated by these agencies.

Unfortunately, the current immigration enforcement regime has it entirely upside down. There are large categories of individuals who are both subject to potential deportation but also eligible to obtain some form of legal status—such as someone who overstays their visa but is married to a U.S. citizen.³⁵ According to one study, approximately 14 percent of undocumented individuals are currently eligible for a pathway to lawful permanent residence.³⁶ When lesser immigration benefits that provide temporary protection from deportation, such as Temporary Protected Status and Deferred Action for Childhood Arrivals (DACA), are included, the percentage could be even higher.³⁷ Moreover, a critical component of cooperative enforcement strategies is flexibly interpretation of legal requirements to allow maximum opportunities for individuals to come into compliance. Adopting this approach in the immigration arena could dramatically increase the category of individuals affirmatively eligible for legal status.

However, instead of diverting people with pathways to lawful status out of the deportation process, ICE routinely pursues deportation proceedings before providing these individuals the opportunity to apply for the benefits that Congress has made available to them. Or worse, ICE diverts people who have applied for lawful status into the removal system.³⁸ The unnecessary cruelty of subjecting such individuals to detention and deportation ultimately drives up costs and drives down compliance. Enforcing the law is not just about imposing the harshest possible penalty available. Enforcing the law must also mean giving people the benefits that the law provides. Accordingly, the second pillar requires that individuals must be afforded an opportunity to pursue any available affirmative pathways to status before punitive enforcement proceedings can be initiated.

Prosecutorial discretion has been the mechanism traditionally used to select between cooperative and punitive enforcement. However, for decades now, through Democratic and Republican administrations alike, ICE's prosecutorial discretion practices have failed to realize the value of cooperative enforcement. Accordingly, in place of individualized prosecutorial discretion, the system needs a mandatory preference for helping individuals come into compliance when legal pathways are available.

This can be done through a new “Intent to Initiate” Protocol, which would mean that, before the initiation of removal proceedings, individuals would receive a notice of intent to initiate. The notice would inform the noncitizen that, if they believe they are eligible for any affirmative pathway to legal status, they must initiate the relevant affirmative application within 180 days or some other fixed reasonable period of time.³⁹ Government-funded legal services would be available to assist individuals in screening for eligibility and preparing such applications.⁴⁰ Punitive enforcement proceedings could only be initiated thereafter if the affirmative application process resolved negatively or if an individual did not file an application within the prescribed period. This innovation would drive down costs and drive up compliance rates. The enormous expenses of detention and deportation would be replaced by an increased revenue stream from affirmative applications, and compliance rates would rise as individuals gained lawful status through affirmative applications. Moreover, this system would help improve the workability of the historically overburdened immigration court system by removing cases involving low-priority individuals whom Congress deemed entitled to legal status.⁴¹

Intent to Initiate Protocol

In order to ensure that individuals have a fair opportunity to access pathways to legal status that Congress created and to avoid wasting enforcement resources on individuals who are eligible for lawful status, ICE should implement the Intent to Initiate Protocol. Under this protocol, before ICE could initiate punitive enforcement proceedings, it would be required to issue a “Notice of Intent to Initiate Enforcement Proceedings,” which would:

1. Notify recipients that if they believe they are eligible for some form of legal status, they must file an application with U.S. Citizenship and Immigration Services (USCIS) within 180 days.
2. Provide recipients with a list of free community-based legal service providers who could screen them for eligibility and assist them with preparing USCIS applications.

Thereafter, removal proceedings could only be initiated if no applications were filed or if they were not granted. This protocol would decrease both cost and human suffering while increasing compliance with immigration law.

Skeptics will likely argue that notices of intent to initiate removal proceedings will merely enable people to take steps to avoid eventual apprehension. However, for the majority of U.S. history, immigration enforcement proceedings were initiated with notices rather than handcuffs.⁴² Moreover, to the extent the protocol involves connecting people with legal services, study after study has demonstrated that individuals with lawyers regularly

appear as required in removal proceedings.⁴³ In addition, when necessary, ICE could also address concerns about potential nonappearance by, when necessary, enrolling individuals during the Intent to Initiate period in proven community-based management programs, which maintain ongoing contact with individuals and use support services, rather than coercion, to successfully ensure that people appear in court when required.⁴⁴

Pillar 3: Ensure proportionality by creating new scalable consequences

There will of course be some individuals who have no pathway to legal status. Even if new measures dramatically reduce the scale of punitive enforcement, as discussed in Pillar One, and give individuals a genuine opportunity to come into compliance with the law, as discussed in Pillar Two, some subset of individuals will still face enforcement proceedings in immigration court. The problem is that immigration judges currently have only a single penalty they are permitted to impose—deportation—and that penalty is grossly disproportionate to the overwhelming majority of immigration offenses.⁴⁵ A binary choice between no penalty and the harshest possible penalty is not the way an effective enforcement system works. That binary choice makes the U.S. immigration system function like a medieval criminal justice system, where the only two choices were no penalty or the death penalty. Worse still, based in large part on changes to immigration laws in the 1990s, in many circumstances, immigration judges lack the authority to even consider whether deportation is appropriate based on the individual circumstances of the case. Instead, mandatory deportation is now a common outcome for many immigrants.⁴⁶ That is why immigration judges routinely lament the way their hands are tied, requiring them to impose deportation orders that they believe are unnecessary and unjust.⁴⁷

Accordingly, the third pillar dictates that when punitive enforcement is pursued, immigration judges must have available to them a set of scalable penalties that could be imposed in lieu of deportation when appropriate. Compliance with such penalties would then open up a pathway to permanent lawful status. Fines are one such scalable penalty and are used pervasively in other administrative contexts. While the experience of widespread overuse and misuse of fines in the criminal justice system counsels in favor of caution,⁴⁸ it seems intuitive that virtually anyone faced with the choice between a reasonable fine (tethered to an individual's financial means) or deportation would opt for the former. Indeed, as recently as 2001, there was a provision in immigration law that permitted large categories of undocumented immigrants to pay a fine of \$1,000 to open up a pathway to legal status.⁴⁹ The program was highly successful at helping individuals gain legal status, and many in the immigrant rights movement have advocated

for its reinstatement.⁵⁰ To be clear, in this system, fines would be used as an alternative to deportation orders, not as additional penalties. Moreover, fines should not be the only scalable penalty available. When appropriate, immigration judges should likewise be empowered to order that individuals complete treatment programs, community service, or probationary periods to become eligible for legal status in lieu of deportation.

Some will understandably bristle at the very concept of a penalty for migration. Penalties are usually used to punish individuals who cause others harm. That concept of penalties is at odds with the reality of a parent who brings their child to the United States fleeing gang violence or an individual who enters the United States as a visitor, falls in love with an American, and fails to leave within the time prescribed by law. Indeed, there is a vast body of literature that documents the net positive impact of migration on the United States as a whole.⁵¹ Moreover, there is an undeniable hypocrisy in punishing migration in a system where the U.S. economy is dependent in critical ways on immigrant labor, including labor from undocumented immigrants, but provides no viable pathway for low-wage immigrant workers to migrate lawfully, or even for many highly skilled and highly educated workers to remain. The central problem in these scenarios, however, is defects in the criteria for lawful admission to the United States; such individuals should have lawful pathways available to them. Fixing the admission criteria for the future flow of immigrants is a critical priority, but it is beyond the scope of this report. What is undeniable is that every enforcement system in American law, even those that prioritize cooperative enforcement, includes some scheme of penalties for noncompliance. Thus, while penalties need not, and should not, be the central feature of an immigration enforcement system, they will inevitably remain a component of that system.

Pillar 4: Replace immigration detention with humane and effective alternatives

While American society has grown numb to the wanton cruelty of unnecessarily jailing immigrants—many of whom pose no risk of flight or danger to the community and whose families also suffer the trauma of the separation⁵²—it is, in fact, a dramatic break from historical practice. As discussed above, for the majority of U.S. history, detention was not a significant feature of interior immigration enforcement.⁵³ For most of this country’s history, enforcement proceedings and even the deportation process itself were initiated with notices, not arrests, and the nation can return to that norm without undermining the integrity of the system.⁵⁴

The ahistoric use and scale of detention in the contemporary immigration enforcement system is driven more by the financial interests of the private prison industry and the states and localities that rent out their jails to ICE than by any legitimate policy interest.⁵⁵ This is not to suggest that the immigration court system has not struggled to ensure the regular appearance of some individuals in proceedings. It has—and indeed, nonappearance rates were a driving force behind the advent of the law requiring mandatory detention for many facing removal, which was passed in 1996.⁵⁶ However, the massive expansion of immigration detention since that time⁵⁷ has failed to fix the problem, as the rate of nonappearance today is identical to the rate in 1996.⁵⁸ The data demonstrate that, even with unprecedented investment, detention cannot ensure regular appearance because it is impracticable and inhumane to lock up all those facing deportation. Once again, ICE’s mass detention strategy has simply failed to deliver results.

So while the problem of nonappearance in immigration court is real, detention is not the solution. Accordingly, an effective enforcement scheme must replace failed immigration detention with humane alternatives that can achieve what the expansion of detention has not: the regular systemwide appearance of individuals in immigration court. Thus, the fourth pillar of the new enforcement paradigm proposed here is to eliminate preventative immigration detention⁵⁹ and construct humane and effective alternatives to ensure appearance and compliance.

That effort begins with counsel. Unlike in criminal court, there is no recognized legal right to appointed counsel in immigration court.⁶⁰ There is no other arena of American law that requires individuals, including young children, to litigate for their liberty against trained government prosecutors without any legal assistance whatsoever. The absence of appointed counsel in deportation proceedings is a stain on the American judicial system and offends the most basic notions of due process. Less intuitive, however, is the impact that the absence of counsel has on appearance rates. But study after study has demonstrated that the most important way to improve appearance rates in immigration court is to ensure individuals have lawyers.⁶¹ For example, the most recent publicly available data show that virtually every family (99 percent) released from immigration detention that had a lawyer showed up for all of their immigration court hearings.⁶² In contrast, those without lawyers were significantly less likely (76 percent) to appear consistently.⁶³ In addition, last year, the overwhelming majority (93 percent) of in absentia removal orders—orders issued when someone fails to appear in court as required—were issued against unrepresented individuals.⁶⁴ It is no mystery why lawyers improve appearance rates. Lawyers help ensure that individuals have accurate information, and reminders when necessary, about the time and place of hearings.

Lawyers also remove the terror of walking into an unfamiliar courtroom alone and of litigating in one of the most complex arenas of American law, against trained government prosecutors, without any legal training and often in a language the individual does not understand. Accordingly, ensuring the appointment of government-funded counsel for indigent individuals facing deportation is a critical step toward ensuring regular appearance in immigration court.

In addition, community-based management programs, which provide supportive services to those who need them, can promote regular appearance in court without detention.⁶⁵ Studies of dozens of alternative-to-detention programs have demonstrated average compliance rates of 90 percent or higher, with some as high as 99 percent.⁶⁶ Notably, these are not programs that merely replace brick-and-mortar detention with virtual detention through dehumanizing electronic monitoring, nor are these the problematic programs administered by the same private prison industry that is responsible for the profit-driven growth of immigration detention. These results have been achieved with supportive services from community actors working in the best interests of the noncitizens they support. Moreover, because such programs are dramatically less expensive than detention,⁶⁷ if lawmakers redirect a portion of the billions of dollars now spent on immigration detention to community-based management programs, agencies could provide such supportive services to all those who need it and thereby increase the system's overall court appearance rate dramatically.

There is good reason to believe that those same steps—counsel and community management—will also help ensure compliance with removal orders. In addition, compliance rates within the much smaller group of individuals under this new system who would receive deportation orders can be further bolstered by providing affirmative incentives for those who voluntarily comply. Canada has experimented with financial inducements of up to \$2,000 for such voluntary compliance,⁶⁸ which could be both effective and cost-efficient since the United States spends, on average, \$12,000 per deportation.⁶⁹ Other inducements for those who promptly and voluntarily comply with deportation orders—including reduced wait times for lawful readmission and continued access to earned domestic benefits such as Social Security—could also be powerful tools to promote compliance.⁷⁰ Finally, applying lessons from the criminal justice system regarding the power of reentry services could further increase compliance. Providing supportive services—such as housing assistance, job placement, and mental health services—to help individuals reintegrate into their countries of origin would reduce the brutality of deportation and ease the terror that leads some people to resist compliance with deportation orders.

Rebuilding the mechanics of the U.S. immigration enforcement system around these four pillars would help ensure a more humane, more just, and ultimately more effective enforcement system. But reforming the mechanics of the system alone is insufficient. To realize these goals, policymakers must simultaneously re-envision the system's substantive and procedural rules.

Rethinking the substantive rules governing immigration enforcement

Under the current regime, the immigration enforcement system is so incapable of delivering just and humane outcomes that many people of good conscience reject the very goal of increasing the system's effectiveness. That is why reforming the mechanics of immigration enforcement alone is insufficient and why it must also include rethinking the substantive rules. These are the rules that dictate who can be subject to immigration enforcement, what types of violations could trigger enforcement action, and how to determine the appropriate penalties for such violations. The defects in the current substantive scheme are vast but fall primarily into four categories: the unnecessarily cruel outcomes; the random and haphazard manner in which enforcement occurs; the misguided entanglement with criminal justice systems; and the scheme's hyper-complexity, which has tied the immigration and federal court systems in knots. These defects can be remedied in large part by enacting the substantive rules proposed below, which would be significantly less complex and, as a result, more efficient and effective than the current system. In addition, they limit that class of individuals potentially subject to removal, excluding the categories of noncitizens with the deepest ties to the nation, for whom deportation would be most painful and disruptive. Finally, these measures would ensure that immigration judges are empowered to evaluate the full circumstances of each case in a streamlined proceeding that is both more efficient and more capable of delivering just and humane outcomes.

Identifying the defects in the current substantive immigration enforcement regime

It is difficult to overstate the cruelty of the contemporary immigration enforcement system. It is a system where toddlers stand alone in immigration court against trained government prosecutors.⁷¹ It is a system where long-term lawful permanent residents with children, grandchildren, businesses, and communities that depend on them can be deported based on a single decades-old offense as minor as simple possession of a small amount of marijuana.⁷² It is a system where immigration judges are, in most cases, prohibited from even considering the impact that deportation would have on children and families.⁷³ The idea that no one should face deportation in a system this broken should be intuitive.

A significant component of the system's cruelty is the randomness with which it operates. There are an estimated 24 million noncitizens living in the United States—including both LPRs and undocumented immigrants.⁷⁴ While the public generally perceives of deportation as a punishment for unlawfully entering the country, that is but one of more than 200 different removal grounds that exist in current law.⁷⁵ As professors Adam Cox and Cristina Rodríguez wrote in *The Yale Law Journal*, “Congress’s radical expansion of the grounds of deportation” means that in addition to the millions of undocumented individuals subject to deportation, more than 4 million, or one-third of all LPRs, are now also deportable at the whim of federal immigration authorities.⁷⁶ However, in practice, even with unprecedented expenditures, the United States can deport only a few hundred thousand individuals per year.⁷⁷ With such a large swath of the noncitizen population potentially subject to deportation, and without any systematic strategy or means to select enforcement targets, individuals enter the immigration enforcement system largely by happenstance.⁷⁸ As a result, for noncitizens and their families, life in the United States is like walking through an open field in a thunderstorm. Enforcement is so random and unlikely that it rarely serves a deterrent function, yet it is present and severe enough to be a constant source of terror that operates with the cruelty and unpredictability of a lightning strike.

Beyond its cruelty and haphazard operation, the contemporary immigration enforcement system has been burdened by an unprecedented entanglement with state criminal justice systems. While deportation proceedings are purportedly civil,⁷⁹ the area where removal grounds have expanded most dramatically in recent decades involves the categories of criminal convictions that can trigger deportation.⁸⁰ The large majority of criminal convictions that can now trigger removal involve petty incidents such as low-level shoplifting, simple possession of marijuana, unlicensed street vending, and turnstile jumping.⁸¹ Long-term LPRs, also known as green card holders, are most often the subject of such removal charges, and they can face deportation based on such minor incidents even decades after they occur and even based on changes to immigration law that occurred long after their convictions.⁸² The disproportionality in permitting such crimes, which often do not result in any jail time at all in the U.S. criminal system, to trigger a lawful resident’s lifetime of exile from their family and home in the United States is self-evident. But disproportionality is only part of the story. Regardless of the severity of the crime, imposing deportation for criminal convictions is akin to imposing a second punishment. Subjecting noncitizens to such double punishment in removal proceedings, which lack the constitutional protections afforded in criminal proceedings, offends basic notions of equality and fair play.

Moreover, the entanglement of federal immigration enforcement and state criminal justice systems has undermined the effectiveness and fairness of both systems. The entanglement has created a rift between immigrant communities and local police that has been detrimental to public safety⁸³ and has increasingly led localities and states to refuse to assist in federal immigration enforcement efforts.⁸⁴ On the federal side, the entanglement has imported the defects and racial disparities of the criminal justice system into deportation proceedings.⁸⁵ In addition, regardless of one's view of the merits of such entanglement in theory, relying on criminal convictions as triggers for removal has proven entirely unworkable in practice. Multiple U.S. Courts of Appeals have recognized that, because all 50 states have their own unique criminal codes, the legal analysis necessary to determine whether a conviction under a particular state criminal statute satisfies a federal definition of a deportable offense “is overly complex and resource-intensive and often [leads] to litigation and uncertainty.”⁸⁶ The result is a legal scheme that is enormously difficult to navigate for courts and litigants alike.

While the criminal-immigration intersection is perhaps the most extreme example, it is by no means the only example of the hyper-complexity of the current substantive enforcement regime. Removal proceedings begin with a determination of “removability.”⁸⁷ With more than 200 different potential removal charges, many involving the labyrinthian criminal-immigration analysis, this phase of the proceedings alone can devolve into protracted litigation. However, in the majority of cases—those involving charges of unlawful entry or overstaying a visa—this determination can be relatively straightforward. If an individual is determined to be “removable,” proceedings advance to a second phase wherein the noncitizen is required to identify if there is any form of “relief from removal” to which they are entitled. There is a long list of various forms of relief and waivers, including, but not limited to: cancellation of removal for certain permanent residents, cancellation of removal for certain nonpermanent residents, adjustment of status, asylum, withholding of removal, protection under the Convention against Torture, special immigrant juvenile status (SIJS), 212(c) relief, registry, 212(i) waivers, 212(h) waivers, U visas, and T visas.⁸⁸ Each form of relief has its own, often complex, eligibility criteria and some also require collateral legal proceedings before federal immigration agencies or state courts.⁸⁹ Identifying an appropriate form of relief, and determining and establishing eligibility for such relief, can thus be a convoluted and complex task that is often impossible to accomplish while detained and unrepresented. In addition, because there is no graduated penalty scheme—it is deportation or nothing—unlike in virtually every other arena of litigation, there is no opportunity for negotiated settlements or plea bargaining. As a result, immigration judges must hold trials (referred to in immigration court as “individual hearings”) and/or issue contested legal decisions in the large majority of cases.

The resultant complexity and inefficiency have been primary factors in creating the million-case backlog that is currently crippling the immigration enforcement system.⁹⁰

Layered on top of these substantive defects is a serious and growing challenge to the legitimacy and objectivity of the immigration courts. Immigration judges are appointed by and answerable to the attorney general, who also serves as prosecutor, defending deportation orders in federal court. These dual conflicting roles, and the ultimate presidential control over the immigration “police,” prosecutors, and judges, present a substantial impediment to the independence of the immigration courts. The problem is long-standing but has grown more profound in recent years.⁹¹ As one immigration judge has explained, the attorney general’s control over immigration courts “curtail[s] Immigration Judge decisional independence [and] threatens the very foundation upon which the Immigration Court system is based.”⁹² Ultimately, the current system has subjected judges to political and prosecutorial pressures that undermine the fairness of the system.⁹³

Collectively, these factors mean that enormous resources are expended on an extraordinarily inefficient enforcement scheme that delivers largely random results untethered to societal notions of justice and human decency. It is a scheme that has been ineffectual at increasing compliance with immigration laws and has made the limited legal rights prescribed by Congress unavailable to beneficiaries on a reliable basis.

Envisioning a humane, just, and effective substantive enforcement scheme

In constructing new substantive rules to be employed in enforcement proceedings, it is essential not to lose sight of the fact that, pursuant to Pillars One and Two of the recommendations above related to the mechanics of enforcement, such proceedings would be a significantly less prominent feature of the nation’s immigration enforcement system. Many individuals who today would land in removal proceedings would avoid such proceedings altogether because they would be able to avail themselves of affirmative pathways to status or because their cases would not be sufficient priorities to warrant utilization of the system’s significantly scaled-back punitive enforcement resources. But inevitably, in some smaller category of cases, punitive enforcement would still be deemed appropriate. Accordingly, it is critical to redress the cruelty and dysfunction of the current enforcement regime. This could be achieved in large part by implementing a new two-phase process for immigration enforcement proceedings that is much simpler, much more efficient and easier to navigate for courts and litigants alike, and that is much more capable of delivering just and humane results.

Exempting lawful permanent residents from deportation

A critical initial step in a humane, effective, and just enforcement regime is to categorically exempt LPRs from deportation. This would shrink the proverbial haystack, focus resources, and prevent unnecessary cruelty. Exempting LPRs from deportation will strike many as a radical reordering of the U.S. immigration scheme because durable protection against deportation has long been a paradigmatic distinction between such permanent residents and naturalized citizens. Naturalization—the process of moving from permanent residence to citizenship—has traditionally been the moment when the nation makes inclusion in the national community virtually irrevocable. Lawful permanent residence is somewhat of a misnomer because the permission granted to remain in the United States is indefinite but not necessarily permanent. However, there is no reason that the decision regarding irrevocable inclusion could not be made at the moment of admission to permanent residence rather than naturalization.

Indeed, the process of becoming a permanent resident involves the same type of application and careful vetting as naturalization.⁹⁴ The United States grants durable protection against deportation to naturalized citizens because that certainty catalyzes productive personal, familial, and economic investment in a way that leads to benefits for society as a whole. Moreover, the brutality of uprooting someone from such settled expectations and the hardships that doing so would cause to families and communities is intolerable in a civilized society. Those same considerations apply with virtually equal force to permanent residents.⁹⁵ Indeed, for most of U.S. history, the deportation of lawful residents was a minor, at times nonexistent, feature of the U.S. immigration system. But in recent years, tens of thousands of LPRs, who thought the United States was their permanent home—even LPR veterans who served honorably in the U.S. military—have been deported.⁹⁶ Their cases tend to be among the most complex in the system and, as a group, they have the deepest ties to the United States, making their removal particularly painful for themselves, their families, and their communities. Moreover, unlike other immigrants,

LPRs can be exempted from deportation without undermining the government's power to define the boundaries of the permanent national community.

One important distinction between the vetting process related to applications for LPR status versus citizenship is that the law builds in a required period of residence prior to citizenship—usually three to five years.⁹⁷ This period serves as something of a probationary period during which an applicant demonstrates that they will be a productive permanent member of the national community. Many people applying to adjust their status to LPR have also lived in the United States for years, and those years of residency could serve the same function. But certain categories of individuals are granted immigrant visas before they ever set foot in the United States and are admitted to LPR status upon arrival.⁹⁸ For these individuals, and others who may apply to adjust their status to LPR shortly after arrival, the government may not have sufficient information to make the weighty determination of permanent irrevocable membership in the national community. Accordingly, it would be sensible to expand the current conception of “conditional residence” to include anyone granted LPR status abroad or after having resided in the United States for fewer than three years.⁹⁹ At the conclusion of the three-year conditional residency period, such individuals would have an obligation to submit a request to remove conditions and therein would be required to provide updated information on the original applications. Any negative developments during the conditional period could be considered in determining whether to remove conditions or revoke the status. Absent any negative developments, the government would be obligated to remove the conditions and the individual would become an LPR.

Accordingly, one critical component of a humane, just, and effective immigration enforcement system should be to make permanent residence truly permanent by exempting LPRs, like naturalized citizens, from deportation.¹⁰⁰ All other noncitizens would remain potentially subject to immigration enforcement proceedings.

These proceedings, as set forth below, would be bifurcated in structure, drawing on but improving upon the existing divide between the removability and relief phases of the current enforcement scheme. As discussed above, such punitive enforcement proceedings should be utilized sparingly and only after someone has been provided a fair opportunity to come into compliance through filing any relevant affirmative applications.

Phase 1: Simplifying deportability

Phase one of this system, akin to the current removability determination in removal proceedings, would be greatly simplified to include only two potential charges: 1) unauthorized entry; and 2) presence in violation of law. Unauthorized entry would include people who entered without inspection—crossing the border at an unauthorized location to avoid inspection—and people who obtained entry through fraud—such as through use of fake documentation or through material misrepresentations. Presence in violation of law would include people who entered lawfully but who stayed beyond the period authorized or who otherwise violated the conditions imposed on them.¹⁰¹ These two charges represent the large majority of current cases and, if LPRs are excluded from the system, the overwhelming majority.¹⁰²

Critically, however, these charges would be subject to a statute of limitations, such that enforcement proceedings could only be initiated within some reasonable period of time after the unauthorized entry or the violation of law initially occurs. The concept of a statute of limitations is a foundational concept in American law and its precursors.¹⁰³ Statutes of limitations ensure fairness to the accused, to the degree they will not be called upon to produce witnesses or evidence of events after an unreasonable period. They also protect the resources of the system by screening out the oldest cases, where the public interest in enforcement is likely to be diminished. And critically, they ensure that there comes a time when “the slate has been wiped clean” and thereby incentivize productive investments in families and communities.¹⁰⁴ While none exists presently,¹⁰⁵ there is ample precedent for a statute of limitations in deportation proceedings.¹⁰⁶ Moreover, there is already a default five-year statute of limitations for civil proceedings built into federal law.¹⁰⁷

Applying the default five-year statute of limitation rule in the immigration context would reduce the burden on immigration courts significantly—removing approximately one-third of all cases—and would ensure that those who have built a productive life and family in the United States could not be uprooted based on violations from long ago.¹⁰⁸ Over the most recent five years of publicly available data, the nation’s immigration courts received approximately one-third more new cases (1.738 million) than cases they were able to complete (1.154 million).¹⁰⁹ This mismatch between cases coming into and out of the immigration court system is the primary driver of the courts’ unmanageable backlog.

Accordingly, the innovation of a five-year statute of limitations alone, and the one-third reduction in new cases it would cause, would dramatically improve the functioning of the immigration courts by balancing out the flow of cases coming into and out of the system.

Under this new system, undocumented individuals would remain subject to potential removal upon presentation of straightforward, timely proof of their alleged violations of immigration law. Accordingly, immigration and federal courts would no longer need to expend their limited resources on the hyper-complex analysis currently required to assess removal charges based on criminal convictions.¹¹⁰ This does not mean the government would not have an opportunity to consider criminality. By definition, once LPRs are removed from the category of individuals who can be subject to deportation, all other noncitizens will have to come before federal immigration officials in affirmative applications or could be brought before an immigration judge before they can be granted permanent lawful status.¹¹¹ In either situation, the adjudicator would have broad discretion, as they do now, to consider the fitness of the individual for permanent admission to American society. Part of that assessment, discussed further below, must be an evaluation of the likely impact an individual would have on the national community, for better and for worse. Past criminality is relevant to that analysis whenever it bears upon future dangerousness. In enforcement proceedings, this analysis would occur in the streamlined, second phase of removal proceedings, set forth below.¹¹²

This shift would eliminate the most complex and cumbersome legal issues now facing immigration and federal courts and would thus improve the efficiency of the immigration courts dramatically. Moreover, this shift would go a long way toward addressing the ways in which the unprecedented entanglement between the immigration and criminal justice systems has undermined the effectiveness and fairness of both immigration enforcement and crime fighting.¹¹³

Phase 2: Streamlined proportional sentencing

If the government is able to prove that an individual made an unauthorized entry or is present in violation of law, proceedings would progress to a second phase.¹¹⁴ This second phase would be akin to the sentencing phase in a criminal case, wherein both parties could present evidence of all positive and negative equities that bear upon the appropriateness of any penalty. This would replace the current convoluted and cumbersome inquiry into relief from removal that dominates countless hours of litigation in deportation proceedings.¹¹⁵ There would no longer be any question of “eligibility” for relief, nor the endless litigation and appeals that such determinations generate. Neither would there be any more “mandatory deportations,” where judges’ hands are tied and they are forced to separate families when justice requires otherwise.

In this phase, the immigration judge would consider the totality of the circumstances to determine the appropriate and proportionate penalty, if any, to impose for the identified violation. The court would be required to consider certain factors, including the length of residence, family ties, hardship to the individual and others that would be caused by deportation, and the individual's likely future impact on the community (both positive and negative),¹¹⁶ as well as any other factor that bears upon the appropriateness of a potential penalty. Just as in many sentencing proceedings in criminal court, litigants could produce documentary evidence and witnesses. And just as in criminal courts across the country, these proceedings could be efficiently administered without the endless legal disputes that the current relief and waiver system spawns.

Critically, judges would not be limited to the current binary choice between no penalty and the harshest penalty possible: deportation. In some instances, where the equities tip decidedly in favor of the individual (where individuals receive time-served or suspended sentences), just as in many criminal proceedings, no affirmative penalty need be imposed, and the individual would simply be granted the status of lawful permanent resident. In other cases, judges may impose one of the scalable penalties described in Pillar Three above, satisfaction of which would be followed by a grant of LPR status. Finally, in the most egregious cases, where the balance of hardships tips decidedly against the individual, deportation could be ordered. Replacing the current relief inquiry with this streamlined proportionate sentencing phase would ensure judges have the discretion to deliver justice in individual cases and have a range of possible sanctions on the table. The addition of scalable penalties would also create an opportunity for plea bargaining where one currently does not exist. Systemwide, it would mean that many cases would not require full litigation and all cases would move faster and with fewer appeals, allowing those individuals who obtain favorable outcomes to move on with their lives and allowing the system as a whole to function with greater efficiency and effectiveness.¹¹⁷

Rethinking the procedural protections underlying immigration enforcement

In order for the substantive rules described above to function effectively and deliver humane and just outcomes, several additional procedural reforms to immigration enforcement proceedings would be required. The most obvious and critical is access to appointed counsel for those who cannot afford counsel. Above, this report recommends appointment of counsel as a mechanism to assure individuals summoned in removal proceedings actually appear in court. However, the primary import of counsel is to ensure that individuals have a fair opportunity to access the legal rights available to them. One recent study demonstrated that while only 4 percent of unrepresented individuals were able to prevail in their deportation proceedings, providing free lawyers to that same category of individuals increased their chances of success dramatically to 48 percent.¹¹⁸ That means that 44 percent of such unrepresented individuals are getting deported now, not because they do not have a legal right to remain in the United States but because they do not have a lawyer who can help them vindicate that right. These data demonstrate the widely recognized proposition that the immigration enforcement system must have an appointed counsel system if it is to ensure that people can reliably access the rights and privileges afforded in immigration law.¹¹⁹

Likewise, the real and perceived lack of impartiality caused by the U.S. attorney general's control over immigration judges must be remedied.¹²⁰ There have been competing proposals on how to address this, but the recommendation of most informed commentators is to make immigration courts, like the Tax and Bankruptcy courts, independent Article I courts.¹²¹ In such courts, judges are appointed by the president, with advice and consent of the Senate, to lengthy fixed terms, during which they can be removed only in very limited circumstances.¹²² Like current Article I courts, and unlike the current system riddled with jurisdictional limitations, there must also be a mechanism for robust judicial review by Article III courts, though such appeals are likely to be dramatically fewer in number under the simplified legal scheme proposed in this report.¹²³

Conclusion

The obstacles to meaningful immigration enforcement reform are many. Legislative paralysis, racism, xenophobia, and political cowardice are formidable barriers. Real progress can only result from a powerful, coordinated, and sustained political movement led by immigrant communities themselves. That work is underway, but something is missing. Immigration reformers have yet to coalesce around an affirmative vision for the immigration enforcement system the nation needs to build. The proposal set forth here is intended as a starting point to catalyze a rigorous dialogue in search of that vision. The enforcement scheme recommended by this report would reject U.S. Immigration and Customs Enforcement's exclusive reliance on detention and deportation. In its place, the recommended new mechanisms of enforcement would dramatically scale back failed punitive enforcement in favor of a cooperative enforcement approach that will be both more effective and less costly. The substantive rules proposed here would make the system more workable and less brutal by reversing decades of one-way ratchet reforms that put tens of millions of people at risk of deportation but make only a random small minority actually subject to enforcement. This will require focusing the enforcement system by excluding from deportation those with the deepest ties to the United States, simplifying the system to make it administrable, and restoring discretion to immigration judges to do justice in individual cases. The procedural protections of appointed counsel and politically independent Article I immigration courts will help create a just system where individuals can reliably access the legal right to which they are entitled. Collectively, these reforms would also significantly increase voluntary compliance rates by restoring the legitimacy of a system in which both immigrants and citizens alike have lost faith.

Full realization of the paradigm shift this report recommends will require congressional action. In the current political environment, the near-term prospects for significant legislative immigration enforcement reform are uncertain at best. However, meaningful progress can be made now through executive action. The incoming Biden administration could unilaterally put in place key aspects of these recommendations, including: implementing the intent to initiate protocol, establishing prosecutorial discretion guidance that deprioritizes cases involving lawful permanent residents or where a statute of limitations would bar enforcement, winding down the immigration detention system,

and scaling up access to counsel programs. Such executive actions would blunt the gratuitous human suffering of unnecessary detentions and deportations, while also laying the groundwork for eventual legislative reform. Critically, implementing such executive policies upon taking office would allow President Joe Biden an opportunity to articulate to the American people a new vision for immigration enforcement that is not only less costly and brutal but also more effective and, in so doing, he could begin to build the national consensus needed to eventually overhaul the nation's immigration laws.

About the author

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Endnotes

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- 5 A strong case can be made that no deportation will ever be humane and that deportation, like banishment before it, is marked by an inherent brutality that is incompatible with modern notions of a civilized society. Having started his career defending immigrants in deportation proceedings the same year that U.S. Immigration and Customs Enforcement was created, and having represented hundreds of individuals and families facing deportation over the nearly two decades of ICE's existence, the author has seen firsthand the inhumanity inherent in separating spouses, tearing parents from children, and upending lives by sending individuals to nations they may no longer know, where they often lack the means to survive or thrive. In the near-term, however, deportation will remain a feature of the U.S. enforcement system and thus, at the very minimum, America has an obligation to mitigate and avoid whatever unnecessary, extreme, or unduly harsh human suffering that it can.
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- 12 Markowitz, "After ICE," pp. 105, 117–118.
- 13 Tom Jawetz, "Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System" (Washington: Center for American Progress, 2019), available at <https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-law-fair-humane-workable-immigration-system/>.
- 14 U.S. Department of Homeland Security, "Yearbook of Immigration Statistics 2019: Table 39. Aliens Removed or Returned." (documenting hundreds of thousands of removals each year of ICE's existence)

- 15 The publicly available EOIR case data contains a full list of more than 200 potential removal charges. U.S. Department of Justice, “Executive Office for Immigration Review,” available at <https://www.justice.gov/eoir/foia-library-0> (last accessed November 2020).
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- 27 Smita Ghosh, “How Migrant Detention Became American Policy,” *The Washington Post*, July 19, 2019, available at <https://www.washingtonpost.com/outlook/2019/07/19/how-migrant-detention-became-american-policy/>.
- 28 U.S. Department of Homeland Security, “Endgame: Office of Detention and Removal Strategic Plan, 2003-2012” (Washington: 2003), p. 1-1; Executive Office of the President, “Executive Order 1,768,” *Federal Register* 82 (8,799) (2017); Secure Fence Act, Public Law 367 § 2(b), 109th Cong., 2nd sess. (October 26, 2006).
- 29 Markowitz, “After ICE,” pp. 134–136. Additionally, see Abigail E. Horn, “Wrongful Collateral Consequences,” *George Washington Law Review* 87 (2019): 320; Rebecca Neusteter and others, “Emerging Issues in American Policing, Vol. 3, Special Edition: Alternatives to Enforcement” (New York: Vera Institute of Justice, 2018), available at <https://www.vera.org/publications/emerging-issues-in-american-policing-digest/volume-3/digest-3>.
- 30 For example, see Endnote 3; U.S. Department of Homeland Security, “2021 Budget-in-Brief,” p. 31.
- 31 Rubén G. Rumbaut and Walter Ewing, “The Myth of Immigrant Criminality and the Paradox of Assimilation” (Washington: American Immigration Council, 2007), available at <https://www.americanimmigrationcouncil.org/research/myth-immigrant-criminality-and-paradox-assimilation>; Anna Flagg, “Is There a Connection Between Undocumented Immigrants and Crime?,” *The Marshall Project*, May 13, 2019, available at <https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime>; The National Academies of Sciences, Engineering, and Medicine, *The Economic and Fiscal Consequences of Immigration* (Washington: The National Academies Press, 2017), p. 80; Kevin Murphy, “American Farmers Need Immigration Reform,” *The Wall Street Journal*, May 30, 2019, available at <https://www.wsj.com/articles/american-farmers-need-immigration-reform-11559258759?mod=flipboard>.
- 32 Markowitz, “After ICE,” pp. 104–107.
- 33 Amanda Frost, “Cooperative Enforcement in Immigration Law,” *Iowa Law Review* 103 (1) (2017): 9, 27; Markowitz, “After ICE,” 126–128.
- 34 *Ibid.*, pp. 3–4, 21–27.
- 35 U.S. Citizenship and Immigration Services, “USCIS Policy Manual: Inapplicability of Bars to Adjustment,” available at <https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-8> (last accessed October 2020).
- 36 Tom K. Wong and others, “Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey,” *Journal on Migration and Human Security* 2 (4) (2014): 287, 292. (estimating that 14.3 percent of undocumented individuals are eligible for a pathway to lawful permanent residency)
- 37 Currently, the Department of Homeland Security is not accepting new Deferred Action for Childhood Arrivals applications and there are few opportunities for individuals without Temporary Protected Status to obtain such status. However, there is good reason to believe that these and similar programs could be reopened in meaningful ways in the future. See, for example, Thomas Kaplan and Katie Glueck, “Joe Biden Calls for Overhaul, Acknowledging ‘Pain’ From Deportations,” *The New York Times*, December 11, 2019, available at <https://www.nytimes.com/2019/12/11/us/politics/joe-biden-immigration.html>. (noting Biden’s intention to reinstate DACA)

- 38 Markowitz, "After ICE," pp. 128, 137. Relatedly, ICE now vehemently opposes any delay in its effort to seek deportation, even when individuals are clearly eligible for lawful status but need additional time to obtain such status. See Tom Jawetz, "Board of Immigration Appeals Greenlights Deportation of Immigrants Eligible for and Deserving of Relief," Center for American Progress, January 28, 2020, available at <https://www.americanprogress.org/issues/immigration/news/2020/01/28/479839/board-immigration-appeals-greenlights-deportation-immigrants-eligible-deserving-relief/>. In addition, while immigration courts used to regularly grant continuances, or adjournments, of removal proceedings to allow for a noncitizen's visa priority date to become current, the Board of Immigration Appeals recently held that "good cause [for granting a continuance] does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level." *Matter of L-A-B-R*, 27 I&N Dec. 405 (A.G. 2018).
- 39 Markowitz, "After ICE," pp. 137–139.
- 40 For a discussion of the importance of providing counsel to individuals facing deportation, see Jennifer Stave and others, "Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity" (New York: Vera Institute of Justice, 2017), pp. 31–47, available at <https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf>; Ingrid V. Eagly and Steven Shafer, "A National Study of Access to Counsel in Immigration Court," *University of Pennsylvania Law Review* 164 (1) (2015): 2; Dara Lind, "A New York courtroom gave every detained immigrant a lawyer. The results were staggering," *Vox*, November 9, 2017, available at <https://www.vox.com/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer>.
- 41 A corollary to the Intent to Initiate Protocol would be to provide an off-ramp for current and future cases in the removal pipeline when an individual demonstrates eligibility for a pathway to legal status that could be pursued affirmatively, through an application to USCIS rather than to the immigration judge. An aggressive implementation of such an off-ramp strategy could be a critical first step to reducing the million-case backlog that the nation's immigration courts currently face.
- 42 Markowitz, "After ICE," p. 141.
- 43 A recent study found that 90 percent of removal orders issued against unrepresented immigrants were issued in absentia, while only 29 percent of removal orders issued against represented immigrants were issued in absentia, suggesting "representation by counsel is strongly associated with immigrants coming to court." Ingrid Ealy and Steven Shafer, "Access to Counsel in Immigration Court" (Washington: American Immigration Council, 2016), p. 18, available at https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf. In addition, for families "who are represented, more than 99 percent ... appeared at every hearing held." TRACSyracuse, "Most Released Families Attend Immigration Court Hearings," June 18, 2019, available at <https://trac.syr.edu/immigration/reports/562>. Moreover, recent data show that 94 percent of the nondetained children ordered removed in absentia were not represented by counsel. TRACSyracuse, "Juveniles—Immigration Court Deportation Proceedings: Court Data through August 2020," available at <https://trac.syr.edu/phptools/immigration/juvenile/> (last accessed October 2020); See also Endnotes 60–64 and accompanying text.
- 44 Freedom for Immigrants, "Alternatives to Detention," available at <https://www.freedomforimmigrants.org/alternatives-to-detention> (last accessed October 2020); David Secor, Heidi Altman, and Tara Tidwell Cullen, "A Better Way: Community-Based Programming as an Alternative to Immigrant Incarceration" (Chicago: National Immigrant Justice Center, 2019), available at <https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2019-04/A-Better-Way-report-April2019-FINAL-full.pdf>; International Detention Coalition, "There are alternatives" (Melbourne, Australia: 2015), available at <https://idcoalition.org/wp-content/uploads/2015/10/There-Are-Alternatives-2015.pdf>.
- 45 Michael Wishnie, "Proportionality in Immigration Law: Does the Punishment Fit the Crime in Immigration Court?" (Washington: American Immigration Council, 2012), pp. 2–3, available at <https://www.americanimmigrationcouncil.org/research/proportionality-immigration-law-does-punishment-fit-crime-immigration-court>.
- 46 *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).
- 47 "Historically, the law allowed judges the discretion to consider all the individual factors, including U.S. military service, rehabilitation, and family ties, to determine if it is in the best interests of the United States to let someone remain in the country. But in the 1990s, Congress curtailed the discretion of immigration judges by restricting their authority to grant relief from deportation to a rigidly defined category of offenses called 'aggravated felonies,' a categorical misnomer that includes many offenses that are neither aggravated nor felonies. Consequently, judges are no longer allowed to grant most forms of relief for individuals with an aggravated felony on their record, no matter how minor or old the conviction." Dana L. Marks, "Let Immigration Judges be Judges," *The Hill*, May 9, 2013, available at <https://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges>.
- 48 Matthew Menendez and others, "The Steep Costs of Criminal Justice Fees and Fines" (New York: Brennan Center for Justice, 2019), available at https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf; U.S. Commission on Civil Rights, "Targeted Fines and Fees Against Low-Income Communities of Color: Civil Rights & Constitutional Implications" (Washington: 2017), available at https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf; Beth A. Colgan, "The Excessive Fines Clause: Challenging the Modern Debtors' Prison," *UCLA Law Review* 65 (2018); Laura I. Appleman, "Nickel and Dimed Into Incarceration: Cash-Register Justice in the Criminal System," *Boston College Law Review* 57 (5) (2016): 1483–1541.
- 49 However, this regime stopped applying as of April 30, 2001. 8 U.S.C. § 1255(i)(1)(B)(i) (2018).
- 50 Some have argued for the permanent reinstatement of 8 U.S.C. § 1255(i) because its unavailability mostly harms U.S. citizens and immigrants with strong ties to the United States while not lowering the rates of unlawful immigration. Marisa S. Cianciarulo, "Seventeen Years Since the Sunset: the Expiration of 245(i) and its Effect on U.S. Citizens Married to Undocumented Immigrants," *Chapman Law Review* 18 (2) (2015): 472–479. For a discussion of the effectiveness of 8 U.S.C. § 1255(i) and a proposal that it be reenacted permanently, see Bryn Siegel, "The Political Discourse of Amnesty in Immigration Policy," *Akron Law Review* 41 (1) (2008): 300–304.

- 51 In 2014, undocumented immigrants paid \$11.7 billion in state and local taxes. Lisa Christensen Gee and others, "Undocumented Immigrants' State & Local Tax Contributions" (Washington: Institute on Taxation & Economic Policy, 2017), p. 2, available at <https://itep.org/wp-content/uploads/immigration2017.pdf>. For more on this population's contribution to the U.S. economy, see National Academies of Sciences, Engineering, and Medicine, *Economic and Fiscal Consequences of Immigration*, p. 80; Anne Baxter, "How an Immigration Raid Threw a Small Iowa Town Into Economic Crisis," *Marketplace*, August 3, 2017, available at <https://www.marketplace.org/2017/08/03/economy/postvilles-long-recovery-after-raid/>; Shikha Dalmia, "Actually, The Numbers Show That We Need More Immigration, Not Less," *The New York Times*, January 15, 2019, available at <https://www.nytimes.com/2019/01/15/opinion/trump-immigration-myth.html>; Heather Long, "Over 200 economists say Trump is wrong on immigration," *CNN*, March 6, 2017, available at <https://money.cnn.com/2017/03/06/news/economy/donald-trump-immigration/index.html>.
- 52 César Cuauhtémoc García Hernández, "Abolishing Immigration Prisons," *Boston University Law Review* 97 (245) (2014); Michael Garcia Bochenek, "In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells," *Human Rights Watch*, February 28, 2018, available at <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells/>; Annie Sovick and others, "Tortured & Detained: Survivor Stories of U.S. Immigration Detention" (Washington: Center for Victims of Torture, 2013), available at https://www.cvt.org/sites/default/files/Report_TorturedAndDetained_Nov2013.pdf; Markowitz, "After ICE," pp. 140–141.
- 53 Smita Ghosh, "How Migrant Detention Became American Policy," *The Washington Post*, July 19, 2019, available at <https://www.washingtonpost.com/outlook/2019/07/19/how-migrant-detention-became-american-policy/>.
- 54 Lenni B. Benson, "By Hook or by Crook: Exploring the Legality of an INS Sting Operation," *San Diego Law Review* 31 (1994): 815 n.12, 832; Mary Fan, "The Case for Criminal Migration Reform," *North Carolina Law Review* 92 (1) (2013): 130; César Cuauhtémoc García Hernández, "Abolishing Immigration Prisons," *Boston University Law Review* 97 (245) (2017): 248; David A. Martin, "Reforming Asylum Adjudication: On Navigating the Coast of Bohemia," *University of Pennsylvania Law Review* 138 (5) (1990): 1319.
- 55 Livia Luan, "Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention," *Migration Policy Institute*, May 2, 2018, available at <https://www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention>.
- 56 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, H.R. 828, 104th Cong., 2nd sess. (1996) (Conf. Rep.).
- 57 Meissner and others, "Immigration Enforcement in the United States," pp. 7–8.
- 58 In 1996, 25 percent of all EOIR case competitions were cases in which the respondent failed to appear in court. Executive Office of Immigration Review Office of Planning and Analysis, "Statistical Yearbook 2000" (Washington: U.S. Department of Justice, 2001), p. L1, available at <https://www.justice.gov/sites/default/files/eoir/legacy/2001/05/09/SYB2000Final.pdf>. In 2018, the most recent year with publicly available data, the percentage of all EOIR case competitions in which the respondent failed to appear in court remained exactly the same: 25 percent (46,480 in absentia orders out of 182,421 case completions). Executive Office of Immigration Review Planning, Analysis, and Statistics Division, "Statistics Yearbook Fiscal Year 2018" (Washington: U.S. Department of Justice), p. 33, table 19, available at <https://www.justice.gov/eoir/file/1198896/download> (last accessed November 2020). When one focuses this analysis on those at liberty—the category realistically capable of failing to appear—the same result is seen, with the failure to appear rate virtually unchanged since 1996. Compare 41 percent of nondetained immigrants who failed to appear in EOIR's 2000 Statistical Yearbook, L2, with 39 percent (46,401 in absentia orders out of 119,748 released and never detained case completions) in "Statistics Yearbook Fiscal Year 2018," p. 33, table 19.
- 59 The vast majority of immigration detainees are not detained because the government is actively trying to deport them. Rather, most individuals in immigration detention cannot be deported because their removal proceedings or the appeals therefrom are ongoing. This is what the author means by preventative detention—they are detained to prevent them from some future hypothetical resistance to deportation. In contrast, in those rare instances 1) where an individual's removal proceedings have been completed; 2) where they have been ordered deported; 3) where they have been given a fair chance to comply but have resisted that deportation order; and 4) where the government is prepared to immediately deport the individual, physical coercion and detention limited to a matter of days may be necessary.
- 60 *Debeatham v. Holder*, 602 F.3d 481, 485 (2d Cir. 2010) ("Because immigration proceedings are of a civil rather than criminal nature, aliens in removal proceedings 'enjoy ... no specific right to counsel' under the Sixth Amendment to the Constitution.") (quoting *Jian Yun Zheng v. U.S. Dep't of Justice*, 409 F.3d 43, 46 (2d Cir. 2005)); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) ("It is well-settled that, while there is no Sixth Amendment right to counsel, aliens have a statutory right to counsel at their own expense." (citation omitted)); *Castaneda-Suarez v. Immigration & Naturalization Serv.*, 993 F.2d 142, 144 (7th Cir. 1993) ("Deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment."); *Lozada v. Immigration & Naturalization Serv.*, 857 F.2d 10, 13 (1st Cir. 1988) ("Because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment.") However, some courts have recognized a right to appointed counsel for mentally disabled immigrant detainees; cf. *Franco-Gonzalez v. Holder*, No. CV-10-02211 (DMG) (DTB), 2013 WL 3674492, at *1 (C.D. Cal. Apr. 23, 2013).
- 61 For instance, "representation by counsel is strongly associated with immigrants coming to court and participating in their hearings." Eagly and Shafer, "A National Study of Access to Counsel in Immigration Court," pp. 72–75; Catholic Legal Immigration Network Inc., "FOIA Disclosures on In Absentia Removal Numbers Based on Legal Representation," March 27, 2020, available at <https://cliniclegal.org/resources/freedom-information-act/foia-disclosures-absentia-removal-numbers-based-legal>.

- 62 TRACSyracuse, "Most Released Families Attend Immigration Court."
- 63 Ibid.
- 64 Catholic Legal Immigration Network, "FOIA Disclosures on In Absentia Removal Numbers Based on Legal Representation."
- 65 Freedom for Immigrants, "Alternatives to Detention"; Secor, Altman, and Cullen, "A Better Way"; International Detention Coalition, "There are alternatives."
- 66 Secor, Altman, and Cullen, "A Better Way," p. 4. See also American Immigration Lawyers Association, "The Real Alternatives to Detention" (Washington: 2019), available at <https://www.aiala.org/infonet/the-real-alternatives-to-detention>; Lutheran Immigration and Refugee Service, "Family Placement Alternatives: Promoting Compliance with Compassion and Stability through Case Management Services" (Baltimore: 2016), available at http://lirs.org/wp-content/uploads/2016/04/LIRS_FamilyPlacementAlternativesFinalReport.pdf; Women's Refugee Commission, "The Family Case Management Program: Why Case Management Can and Must Be Part of the U.S. Approach to Immigration" (New York: 2019), available at <https://s33660.pcdn.co/wp-content/uploads/2020/04/The-Family-Case-Management-Program.pdf>; Freedom for Immigrants, "Alternatives to Detention."
- 67 Secor, Altman, and Cullen, "A Better Way," p. 4; American Immigration Lawyers Association, "The Real Alternatives to Detention"; Lutheran Immigration and Refugee Service, "Family Placement Alternatives"; Women's Refugee Commission, "The Family Case Management Program."
- 68 Richard Black and others, "Pay-to-Go Schemes and Other Non-Coercive Return Programs: Is Scale Possible?" (Washington: Migration Policy Institute, 2011), pp. 1–2, available at <https://www.migrationpolicy.org/research/pay-go-schemes-and-other-noncoercive-return-programs>.
- 69 Frost, "Cooperative Enforcement in Immigration Law," p. 5; Philip E. Wolgin, "What Would It Cost to Deport 11.3 Million Unauthorized Immigrants?," Center for American Progress, August 18, 2015, available at <https://www.americanprogress.org/issues/immigration/news/2015/08/18/119474/what-would-it-cost-to-deport-11-3-million-unauthorized-immigrants/>; Ben Gitis, "The Personnel and Infrastructure Needed to Remove All Undocumented Immigrants in Two Years," American Action Forum, February 28, 2016, available at <https://www.americanactionforum.org/research/the-personnel-and-infrastructure-needed-to-remove-all-undocumented-immigrants-in-two-years/>.
- 70 Social Security benefits are terminated upon the deportation of the primary beneficiary. Social Security Act § 202(n), 42 U.S.C. § 402(n) (2018).
- 71 *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016).
- 72 8 U.S.C. § 1227(a)(2)(B).
- 73 This has been especially apparent in the deportation of a woman enslaved by a Salvadoran guerilla group who was judged to have materially supported terrorism through the forced labor she provided. *Matter of A-C-M-*, 27 I. & N. Dec. 303 (BIA 2018). Courts have even held that the material support bar to asylum does not have an implied exception for individuals who provide support for terrorist organizations under duress. *Matter of M-H-Z-*, 26 I. & N. Dec. 757 (BIA 2016); *Annachamy v. Holder*, 686 F.3d 729, 739 (9th Cir. 2012).
- 74 Abby Budiman, "Key findings about U.S. immigrants," Pew Research Center, June 17, 2019, available at <https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/>.
- 75 8 U.S.C. §§ 1182, 1227. The list of removability charges is drawn from EOIR case data. U.S. Department of Justice, "Executive Office for Immigration Review."
- 76 Adam B. Cox and Cristina M. Rodríguez, "The President and Immigration Law," *Yale Law Journal* 119 (3) (2009): 463.
- 77 Karl R. Thompson, "The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others," *Opinions of the Office of Legal Counsel* 38 (2014): 1, available at <https://www.justice.gov/file/179206/download>.
- 78 For years, ICE has claimed to follow enforcement priorities, which have shifted frequently over time. Jeh Charles Johnson, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents," Memorandum from the secretary of homeland security, November 20, 2014, available at <https://perma.cc/6V58-LMTB>; John Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," Memorandum from the director of U.S. Immigration and Customs Enforcement, June 17, 2011, available at <https://perma.cc/8DBM-973D>; William J. Howard, "Prosecutorial Discretion," Memorandum from the principal legal advisor of U.S. Immigration and Customs Enforcement, October 24, 2005, available at <https://asistahelp.org/wp-content/uploads/2018/11/DHS-OPLA-NTA-memo-Prosecutorial-Discretion.pdf>. Currently, ICE's priorities are so broad as to encompass virtually all noncitizens amenable to deportation. John Kelly, "Enforcement of the Immigration Laws to Serve the National Interest," Memorandum from the secretary of homeland security, February 20, 2017, available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf. However, the data demonstrate that stated priorities have had little impact on actual enforcement patterns. TRACSyracuse, "Secure Communities, Sanctuary Cities and the Role of ICE Detainers," November 7, 2017, available at <https://trac.syr.edu/immigration/reports/489/>; TRACSyracuse, "New ICE Detainer Guidelines Have Little Impact," October 1, 2013, available at <https://trac.syr.edu/immigration/reports/333/>.
- 79 *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); Peter L. Markowitz, "Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings," *Harvard Civil Rights-Civil Liberties Law Review* 43 (2) (2008): 337–338.
- 80 Nancy Morawetz, "Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms," *Harvard Law Review* 113 (8) (2000): 1939; Markowitz, "After ICE," pp. 107–116.
- 81 8 U.S.C. § 1227(a)(2). See also Wilber A. Barillas, "Collateral Damage: Drug Enforcement & Its Impact on the Deportation of Legal Permanent Residents," *Boston College Journal of Law and Social Justice* 34 (1) (2014); Anita Ortiz Maddali, "Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?," *American University Law Review* 61 (1) (2011): 47; Markowitz, "Straddling the Civil-Criminal Divide."
- 82 The lack of a general statute of limitations governing deportations of noncitizens has resulted in noncitizens living with the indefinite threat of deportation, no matter when they committed a deportable offense. Andrew Tae-Hyun Kim, "Deportation Deadline," *Washington University Law Review* 95 (3) (2017): 542.

- 83 iacpblog, "Statement by the International Association of Chiefs of Police on United States Immigration Enforcement Policy and Sanctions," International Association of Chiefs of Police, March 27, 2017, available at <https://www.theiacp.org/news/blog-post/statement-by-the-international-association-of-chiefs-of-police-on-united-states> ("[S]tate and local law enforcement agencies depend on the cooperation of immigrants, legal or not, in solving a wide array of crimes."); David Hausman, "Sanctuary policies reduce deportations without increasing crime," *Proceedings of the National Academy of Sciences of the United States of America*, November 3, 2020, available at <https://www.pnas.org/content/117/44/27262.short> (finding that "sanctuary policies, although effective at reducing deportations, do not threaten public safety."); Tom K. Wong, "The Effects of Sanctuary Policies on Crime and the Economy" (Washington: Center for American Progress, 2017), available at <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/> ("[O]n average, 35.5 fewer crimes [are] committed per 10,000 people in sanctuary counties compared to nonsanctuary counties."); Michael J. Wishnie, "State and Local Police Enforcement of Immigration Laws," *University of Pennsylvania Journal of Constitutional Law* 6 (5) (2004): 1095. A survey of undocumented Mexicans found that "[r]espondents who were told that local law enforcement worked with ICE were 61 percent less likely to report crimes that they witnessed and 43 percent less likely to report being the victim of a crime than those who were told that local law enforcement was not working with ICE." Laura Muñoz Lopez, "How 287(g) Agreements Harm Public Safety," Center for American Progress, May 8, 2018, available at <https://www.americanprogress.org/issues/immigration/news/2018/05/08/450439/287g-agreements-harm-public-safety/>.
- 84 Pratheepan Gulasekaram and S. Karthick Ramakrishnan, "The President and Immigration Federalism," *Florida Law Review* 68 (2016); Immigrant Legal Resource Center, "National Map of Local Entanglement with ICE," November 13, 2019, available at <https://www.ilrc.org/local-enforcement-map>; IACPBlog, "Statement by the International Association of Chiefs of Police on United States Immigration Enforcement Policy and Sanctions."
- 85 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Era of Colorblindness* (New York: The New Press, 2010).
- 86 The November 1, 2016, Amendments to the Sentencing Guidelines have been quoted in multiple cases. *United States v. Genao*, 869 F.3d 136, 142, 147 n.7 (2d Cir. 2017); *United States v. Bernel-Aveja*, 844 F.3d 206, 222 n.17 (5th Cir. 2016); *United States v. Cuevas-Lopez*, 934 F.3d 1056, 1074 (9th Cir. 2019) (Ikuta, J., dissenting); *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 577 n.12 (2010).
- 87 8 U.S.C. § 1229a.
- 88 8 U.S.C. § 1229b(a); 8 U.S.C. § 1229b(b); 8 U.S.C. § 1255; 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 208.16-208.18; 8 U.S.C. § 1255(h); 8 C.F.R. § 1212.3; 8 U.S.C. § 1259; 8 U.S.C. § 1182(i); 8 U.S.C. § 1182(h); 8 U.S.C. § 1101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(T).
- 89 For example, to be eligible for Special Immigrant Juvenile Status, immigrant children are required to have a valid juvenile or family court order issued by a state court in the United States which finds that they are dependent on the court; unable to be unified with one or both parents because of abuse, abandonment, or neglect; and that it is not in their best interest to return to their country of nationality. 8 U.S.C. § 1101(a)(27)(U).
- 90 See Endnote 11.
- 91 The Trump administration's "reassignment" of career members at the Board of Immigration Appeals to new roles has received criticism for "dilut[ing] the independence of an important appeals body by filling it with new hires more willing to carry out the Trump administration's restrictive immigration policies." Tanvi Misra, "DOJ 'reassigned' career members of Board of Immigration Appeals," *Roll Call*, June 9, 2020, available at <https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/>; Margaret H. Taylor, "Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation," *Georgetown Immigration Law Journal* 16 (2002): 273; Stephen H. Legomsky, "Deportation and the War on Independence," *Cornell Law Review* 91 (2006): 384-385. Most recently, the Trump administration has succeeded in decertifying the immigration judge union, rendering judges at-will employees subject to virtually unchecked control by political leadership. American Immigration Lawyers Association, "FLRA Strips Immigration Judges of Collective Bargaining Rights," November 9, 2020, available at <https://www.aila.org/advo-media/issues/all/doj-move-decertify-immigration-judge-union>.
- 92 Mimi Tsankov, "Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling," *California Western Law Review* 56 (1) (2019): 39, 41-42.
- 93 Innovation Law Lab and Southern Poverty Law Center, "The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool" (Montgomery, AL: 2019), available at https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf.
- 94 8 U.S.C. § 1255; 8 C.F.R. § 210.5. There are rare exceptions where adjustment of status for certain groups is nondiscretionary, such as for individuals who are admitted to the United States as refugees. U.S. Citizenship and Immigration Services, "USCIS Policy Manual: Legal Analysis and Use of Discretion," available at <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10> (last accessed October 2020).
- 95 American Immigration Counsel, "The Ones They Leave Behind: Deportation of Lawful Permanent Residents Harms U.S. Citizen Children" (Washington: 2010), available at <https://www.americanimmigrationcouncil.org/research/ones-they-leave-behind-deportation-lawful-permanent-residents-harm-us-citizen-children>.
- 96 Between fiscal years 2003 and 2018, 48,666 LPRs were removed. TRACSyracuse, "Immigration and Customs Enforcement Removals," available at <https://trac.syr.edu/phptools/immigration/remove/> (last accessed November 2020); Jie Zong and Jeanne Batalova, "Immigrant Veterans in the United States," Migration Policy Institute, May 16, 2019, available at <https://www.migrationpolicy.org/article/immigrant-veterans-united-states>.
- 97 8 U.S.C. § 1427(a).
- 98 U.S. Citizenship and Immigration Services, "Consular Processing," available at <https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing> (last accessed October 2020).
- 99 8 U.S.C. § 1186a(a).

- 100 Moreover, exempting LPRs from deportation would not undermine the value of citizenship or the distinction between citizens and LPRs. LPRs already enjoy some unique opportunities—such as serving in the U.S. military, requesting immigrant visas for certain family members, and applying for certain benefits including Social Security and Medicare—and have some unique obligations—such as registering for the draft—that otherwise only U.S. citizens enjoy and have. U.S. Citizenship and Immigration Services, “Rights and Responsibilities of a Green Card Holder (Permanent Resident),” available at <https://www.uscis.gov/green-card/after-we-grant-your-green-card/rights-and-responsibilities-a-green-card-holder-permanent-resident> (last accessed October 2020). Exempting LPRs from deportation would provide them with a single additional right now reserved to citizens; however, LPRs would still be generally unable to vote (8 U.S.C. § 1227(a)(6); Cal. Const. art. II, § 2; N.Y. Elec. Law § 5-102; Tex. Const. art. VI, § 2); to serve in public office (U.S. Const. art. I, § 2, cl. 2.; U.S. Const. art. I, § 3, cl. 3.; U.S. Const. art. II, § 1, cl. 5.; U.S. Const. amend. XII; N.J. Const. art. IV, § 1, cl. 2); to serve on juries (28 U.S.C. § 1865(b); Cal. Civ. Proc. Code § 203; Fla. Stat. Ann. § 40.01; Tex. Gov’t Code Ann. § 62.113); to hold certain professions (*Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978); *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973); *Cf. Bernal v. Fainter*, 467 U.S. 216 (1984); *Toll v. Moreno*, 458 U.S. 1 (1982)); to be eligible for certain public benefits (Andrew Hammond, “The Immigration-Welfare Nexus in A New Era?,” *Lewis and Clark Law Review* 22 (2018)); or to enjoy the same level of constitutional rights as U.S. citizens (Karen Nelson Moore, “Aliens and the Constitution,” *New York University Law Review* 88 (3) (2013); Geoffrey Heeren, “Persons Who Are Not the People: The Changing Rights of Immigrants in the United States,” *Columbia Human Rights Law Review* 44 (2) (2013): 435–436. Neither would such a rule undermine the ability of society to deter or punish misconduct of LPRs, as they would remain subject to the same criminal justice systems that deter and punish citizens.
- 101 Other violations of reasonable conditions of entry could likewise trigger enforcement under this charge. However, criminal convictions alone could not support such a charge. See Endnotes 75–82, 103–105.
- 102 This assessment is based on an original analysis of publicly available EOIR case data by Jennifer Stave that is on file with the author. U.S. Department of Justice, “Executive Office for Immigration Review.”
- 103 *Harvard Law Review*, “Developments in the Law Statutes of Limitations,” 63 (1950): 1177–1179; Tyler T. Ochoa and Andrew J. Wistrich, “The Puzzling Purposes of Statutes of Limitation,” *Pacific Law Journal* 28 (1997): 454.
- 104 *Harvard Law Review*, “Developments in the Law Statutes of Limitations,” p. 1185; *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938); Michael D. Green, “The Paradox of Statutes of Limitations in Toxic Substances Litigation,” *California Law Review* 76 (5) (1988): 981.
- 105 Kim, “Deportation Deadline.”
- 106 Patricia S. Mann, “Contingencies of Prosecutorial and Immigrant Agency,” *Revista Juridica University of Puerto Rico* 46 (2012): 785 n.2; Monica Gomez, “Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States,” *Georgetown Immigration Law Journal* 22 (1) (2007): 119.
- 107 28 U.S.C. § 2462.
- 108 Original analysis of publicly available EOIR case data by Jennifer Stave that is on file with the author. U.S. Department of Justice, “Executive Office for Immigration Review.” In implementing a statute of limitation, it would be critical to avoid a situation where undocumented individuals get trapped in a legal limbo—protected from deportation but living as a permanent underclass without formal legal status. Accordingly, individuals who have lived in the United States beyond the statute of limitation must be provided a mechanism to obtain LPR status. The simplest mechanism would be to convert such individuals to LPR status by operation of law upon the expiration of the statute of limitation. Such operation-of-law mechanisms have ample precedent in analogous situations both in immigration law and elsewhere. 8 U.S.C. § 1259; 43 U.S.C. § 1068.
- 109 Executive Office of Immigration Review Planning, Analysis, and Statistics Division, “Statistics Yearbook Fiscal Year 2018,” p. 9.
- 110 Courts would also be relieved of the responsibility to assess the minute technical violations that are rarely invoked—such as failure to submit an address change—and charges related to errors made by immigration officials through no fault of the individual—including the charge that an individual was “inadmissible at the time of admission.” 8 U.S.C. §§ 1227(a)(3), (a)(1).
- 111 In theory, an individual who lawfully enters the country on a nonimmigrant visa could commit some serious crime and pose some serious ongoing danger to society but not be subject to any government review if they have not overstayed their visa or applied for lawful permanent residence. As a practical matter, however, this is exceedingly unlikely to occur and some small tweaks to the regulatory scheme could ensure that anyone who commits a serious crime and poses a true ongoing danger to society would be subject to such review. The large majority of nonimmigrant visa holders have a maximum authorized period of stay of one year (8 C.F.R. § 214.2(b)(1)) and actually receive authorization for much shorter periods. As a result, any such individual who is convicted of a truly serious crime would almost inevitably be incarcerated beyond their period of authorized stay and thus subject to enforcement proceedings prior to their release. There are certain visa categories, such as student visas and certain work visas (8 C.F.R. § 214.1(l)(3)), where longer or even indefinite periods of stay could be authorized. Individuals with these visa categories rarely end up facing removal based on criminal convictions because, as a group, they have extremely low propensities toward criminality. However, if such individuals did commit serious offenses that triggered lengthy prison sentences, they would almost certainly be unable to maintain the work or school requirements of their visas and thus would become removable on that basis for being present in violation of law.
- 112 In addition, for that very small group of individuals who commit the most serious offenses and receive substantial prison sentences, their enforcement proceedings would be completed while they were incarcerated, as happens in the current system, and, if appropriate, deportation orders and travel documents would be in place prior to their release from criminal custody. Accordingly, moving away from criminal convictions as front-end triggers for deportation would not prevent immigration courts from considering and addressing dangerousness.
- 113 Morawetz, “Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms,” p. 1939; Markowitz, “After ICE,” pp. 107–116.
- 114 In addition, the government would have to prove by at least “clear and convincing” evidence that the individual was not a citizen or lawful permanent resident. *Addington v. Texas*, 441 U.S. 418, 433 (1979).

115 See Endnotes 87 and 88.

116 This is the element wherein past criminality could be considered but only insofar as it bears upon the likely future impact on the community. Deportation would never be imposed merely as a sanction for a crime.

117 Perhaps the most common categories of relief sought currently in removal proceedings are asylum, withholding of removal, and protection under the Convention against Torture (CAT), known collectively as “persecution-based relief.” Between FY 2014 and FY 2018, there was a 258 percent increase in defensive asylum receipts. Executive Office of Immigration Review Planning, Analysis, and Statistics Division, “Statistics Yearbook Fiscal Year 2018,” p. 24.

118 Stave and others, “Evaluation of the New York Immigrant Family Unity Project.”

119 American Bar Association Commission on Immigration, “Reforming the Immigration System: Executive Summary” (Chicago: 2010), p. ES-13, available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_executive_summary.pdf; Michael Kagan, “Toward Universal Deportation Defense: An Optimistic View,” *Wisconsin Law Review* (2018); *Harvard Law Review*, “Representation in Removal Proceedings,” 126 (2013).

120 See Endnotes 91–93 and accompanying text.

121 See American Bar Association Commission on Immigration, “2019 Update Report Reforming the Immigration System” (Chicago: 2019), pp. UD 6–15–UD 6–16, available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf; American Bar Association Commission on Immigration, “Reforming the Immigration System,” p. ES–45; Legomsky, “Deportation and the War on Independence,” pp. 402–403.

122 28 U.S.C. § 152; 26 U.S.C. § 7443; American Bar Association Commission on Immigration, “Reforming the Immigration System,” pp. ES–45–46.

123 Cf. 28 U.S.C. § 158; 26 U.S.C. § 7482.

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