RETHINKING IMMIGRATION ENFORCEMENT

Peter L. Markowitz[*]

Abstract

As the nation turns the page away from the dark chapter of President Trump's relentless assault on immigrants, it is time to take stock of the nation's unprecedented immigration enforcement regime. During its relatively short existence, the Immigration and Customs Enforcement agency (ICE) has deported more than twice as many people as were deported in the entire previous history of the United States. The human and fiscal costs of ICE's mass deportation agenda are astronomical, and there is almost universal agreement across the political spectrum that the United States' immigration enforcement apparatus is badly broken. That, however, is where the agreement ends. Immigration hawks focus on the nation's large undocumented population to demonstrate the system's ineffectiveness and advocate that the nation double down on detention and deportations. However, continuing to throw unprecedented and ever-increasing billions of dollars at an enforcement apparatus that has terrorized immigrant communities and failed to meaningfully increase compliance with immigration law can no longer be justified. Immigration advocates focus on the system's unprecedented brutality and proscribe an end to the tactics of mass detention, family separation, and criminalization. Such reforms are necessary and justified but beg the question of how, in the absence of these heavy-handed tactics, the nation can promote compliance with immigration law.

Absent from the political discourse is an affirmative vision for what a just and humane, but also effective, immigration enforcement system could look like. The absence of such a vision has stymied progress and left the immigrant rights movement open to dismissive critique. This Article seeks to set forth a new framework for immigration enforcement that would be dramatically less costly, less brutal, and simultaneously more effective at promoting compliance with immigration law. This new paradigm requires that we radically rethink both the "substantive rules" to be enforced—which dictate who and how people can be penalized for immigration violations—and the "mechanics of enforcement"—the mechanisms by which we can increase compliance with such substantive rules without putting people in cages and tearing apart hundreds of thousands of families each year. The obstacles to meaningful immigration enforcement reform are myriad. However, a clear vision for a new paradigm in immigration enforcement is a necessary, though alone insufficient, precursor to such reform. This Article seeks to provide one such vision and to catalyze a critical national dialogue regarding the immigration enforcement system that ought to replace ICE's failed mass detention and deportation regime.

INTRODUCTION

The twenty-first century has been marked by a historically unprecedented mass deportation[1] wave, with more than twice as many people deported in the first two decades of this century than in the entire previous history of the United States.[2] Hundreds of thousands of noncitizens—overwhelmingly from working class black and brown

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1. The Immigration and Nationality Act (INA) uses the term "removal" rather than deportation. *See, e.g.*, 8 U.S.C. § 1229a. This term tends to sanitize the brutality associated with the physical separation of individuals from their families and communities. Accordingly, this Article uses the term "deportation."

2. *See* OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., 2018 YEARBOOK OF IMMIGRATION STATISTICS 103 tbl.39 (2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/yearbook_immigration_statistics_2018.pdf [https://perma.cc/XF4F-SY2T]; Alex Nowrasteh, *Deportation Rates in Historical Perspective*, CATO INST. (Sept. 16, 2019, 3:43 PM), https:// www.cato.org/blog/deportation-rates-historical-perspective [https://perma.cc/T5LZ-VDG8].

communities—are now detained and deported each year.[3] In recent years, the public has become more aware of the wanton cruelty of the immigration enforcement system, which strikes seemingly at random, tearing individuals from their families, their homes, and their careers, and sending them to a place they may not have lived for decades, where they may face persecution and isolation, and where they may lack the means to survive and thrive.[4]

While the impact of the current mass deportation wave and the urgent need for reform are felt most acutely in the immigrant communities, anyone who cares about effective immigration enforcement, fiscal responsibility, or the rule of law should likewise be in search of a new paradigm for immigration enforcement. The current system has not only devastated families and communities but has utterly failed to increase compliance with immigration laws. It has also imposed an unprecedented and unjustifiable price tag on the American taxpayer.

U.S. Immigration and Customs Enforcement (ICE), the agency responsible for interior immigration enforcement, was hastily created in the aftermath of the attacks on September 11, 2001.[5] As we approach the twentieth anniversary of this national enforcement experiment, the numbers tell a story of startling failure and fiscal irresponsibility.

Over ICE's relatively short lifespan, it has managed to garner ever-increasing billions of tax dollars, growing its budget from $3.3 billion at its inception[6] to $8.3 billion in 2020, such that we now spend more on immigration enforcement than all other federal law enforcement

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3. Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 LATINO STUD. 271, 282 (2013); *see also Latest Data: Immigration and Customs Enforcement Removals*, TRAC IMMIGR. (Feb. 2019, 3:43 PM), https://www.cato.org/blog/deportation-rates-historical-perspective [https://perma.cc/2GLG-BB7D] (illustrating general deportation statistics).

4. *See* Jeffrey M. Jones, *New High in U.S. Say Immigration Most Important Problem*, GALLUP (June 21, 2019), https://news.gallup.com/poll/259103/new-high-say-immigration-important-problem.aspx [https://perma.cc/U89R-NGDG] (reporting that 23% of Americans name immigration as the most important issue facing the United States, the highest Gallup has ever measured); *see also Stop Taking the Kids, 66 Percent of U.S. Voters Say, Quinnipiac University National Poll Finds; Support for Dreamers Is 79 Percent*, QUINNIPIAC UNIV. POLL (June 18, 2018), https://poll.qu.edu/images/polling/us/us06182018_uwsf18.pdf [https://perma.cc/S7KW-MHFD] (finding that 79% of Americans oppose the deportation of certain undocumented immigrants living in the United States); *Shifting Public Views on Legal Immigration Into the U.S.,* PEW RSCH. CTR. (June 28, 2018), https://www.people-press.org/2018/06/28/shifting-public-views-on-legal-immigration-into-the-u-s/ [https://perma.cc/VA6N-4DJQ] ("Nearly seven-in-ten (69%) [of Americans] are very or somewhat sympathetic toward immigrants who are in the United States illegally.").

5. *See* Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, § 442, 116 Stat. 2135, 2193.

6. *Fact Sheet: Immigration and Customs Enforcement (ICE)*, NAT'L IMMIGR. F. (July 10, 2018), https://immigrationforum.org/article/fact-sheet-immigration-and-customs-enforcement-ice/ [https://perma.cc/TJJ7-S95W].

combined.[7] And what have the American taxpayers received in return for this unprecedented investment in interior immigration enforcement? While we have increased ICE's resources by 150% over its lifetime, according to ICE's own estimate, the undocumented population has *grown* by over 70%.[8] Meanwhile, the byzantine and unmanageable deportation system has accumulated a startling backlog of almost 1.5 million cases.[9] Contrary to the rhetoric of some immigration hawks, the growth in the undocumented population and backlog in immigration courts cannot be explained by an increase in unauthorized immigration. While the rate of unauthorized migration can fluctuate significantly month to month and year to year, viewed over the two decades of ICE's existence, the rate of unauthorized migration has been declining.[10]

These numbers show that while the U.S. taxpayer is throwing billions of dollars at ICE, the agency's purported goal—increasing compliance with immigration law—is moving in the wrong direction. ICE's enforcement strategy, focused on detention and deportation, has failed by

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7. *See* U.S. DEP'T OF HOMELAND SEC., FY 2021 BUDGET IN BRIEF 31 (2020), https://www.dhs.gov/sites/default/files/publications/fy_2021_dhs_bib_web_version.pdf [https://perma.cc/7HWY-8VAF]; *see also* DORIS MEISSNER ET AL., MIGRATION POL'Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 9 (2013), https://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf [https://perma.cc/JCY3-E5Q3] ("[T]he US government spends more on its immigration enforcement agencies than on all its other principal criminal federal law enforcement agencies combined." (emphasis omitted)).

8. *Compare* BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE ILLEGAL ALIEN POPULATION RESIDING IN THE UNITED STATES: JANUARY 2015, at 3 fig.1 (2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf [https://perma.cc/Z2WH-UR8X] (estimating that twelve million undocumented immigrants were living in the United States in January 2015), *with* OFF. OF POL'Y & PLANNING, U.S. IMMIGR. & NATURALIZATION SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, at 1 (estimating that the total population of unauthorized immigrants in the United States in January 2000 was seven million). Some nongovernmental actors have estimated that the undocumented population has declined somewhat in recent years. *See, e.g.*, Jeffrey S. Passel & D'vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RSCH. CTR. (Nov. 27, 2018), https://www.pewhispanic.org/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade [https://perma.cc/7P4R-5DSB]. However, such decline is generally understood to be the result of changes in the push and pull factors that drive immigration and is not believed to be attributable to ICE's enforcement strategy. *See* David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 418–19 (2015).

9. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964 (2020) ("As of the first quarter of this fiscal year, there were 1,066,563 pending removal proceedings."); *see also Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/ [https://perma.cc/T68S-3F7H] (noting the number of pending deportation cases at the start of 2021 was 1,290,766).

10. Peter L. Markowitz, *After ICE: A New Humane & Effective Immigration Enforcement Paradigm*, 55 WAKE FOREST L. REV. 89, 105, 117–18 (2020).

every measure.[11] Some inevitably argue that the answer to this failure is a bigger ICE with billions of dollars more to spend to detain and deport.[12] But continuing to throw billions of dollars at an agency that has failed to deliver results over nearly two decades, for more of the same failed approach, can no longer be justified. Accordingly, not just immigrant communities, but anyone interested in responsible and effective immigration enforcement should be eager for a new enforcement paradigm.

While formidable barriers exist, real progress can be made to improve our immigration enforcement system through a coordinated and sustained political movement led by immigrant communities themselves.[13] While that work is underway, a critical prerequisite transformative reform is missing. Absent from the political discourse is an affirmative vision for what a just and humane, but still effective, immigration enforcement system could look like. Much work has been done to diagnose the system's defects—a negative vision of the facets of our immigration enforcement system that we must eliminate. But reformers have yet to articulate a viable positive vision of the enforcement system we need to build. The absence of such a vision has left the reform movements vulnerable to dismissive critiques and has stymied progress.

Elsewhere, I have suggested a new paradigm for how the *mechanics* of such a system could operate—how we could increase compliance with immigration laws without putting people in cages and tearing apart hundreds of thousands of families each year.[14] In that prior work,

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11. The creation of ICE and its placement in the new Department of Homeland Security was not just about civil immigration enforcement. The stated strategy was to integrate immigration enforcement into the nation's anti-terrorism efforts. *See, e.g.*, Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017) (alleging that undocumented immigrants pose a serious threat to the national security of the United States). But here too, and by its own admission, ICE has failed to deliver meaningful results. Indeed, ICE has recently reported that *zero percent* of its civil immigration enforcement work contributes to DHS's national security/anti-terror mission. U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., BUDGET OVERVIEW FISCAL YEAR 2018: CONGRESSIONAL JUSTIFICATION 6 (2018), https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf [https://perma.cc/48VE-37NY]. ICE initiated over two million deportation proceedings in the decade after 9/11, and only thirty-seven of those cases, a miniscule percentage, involved charges of terrorism. *Immigration Enforcement Since 9/11: A Reality Check*, TRAC IMMIGR. (Sept. 9, 2011), https://trac.syr.edu/immigration/reports/260/ [https://perma.cc/7WH9-YRQ9].

12. Peter L. Markowitz, *A New Paradigm for Humane and Effective Immigration Enforcement*, CTR. FOR AM. PROGRESS (Nov. 30, 2020, 9:00 AM), https://www.americanprogress.org/issues/immigration/reports/2020/11/30/493173/new-paradigm-humane-effective-immigration-enforcement/ [https://perma.cc/PWV7-TRMR].

13. *Id.*

14. *See* Markowitz, *supra* note 10, at 130–144; Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J. F. 130, 137 (Nov. 7, 2019), https://www.yalelawjournal.org/pdf/

however, I acknowledge that there is no way to justly and humanely enforce our current deportation laws.[15] That is because the current *substantive rules*—which dictate who can be penalized for immigration violations and how—are so harsh and dysfunctional that the current system is incapable of delivering reliably humane and just outcomes. It is a system where toddlers face trained government prosecutors in one of the most complex arenas of law without any guarantee of assistance of counsel.[16] 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.[17] It is a system where women forced into slavery by terrorist organizations can be denied asylum because their forced labor is considered "material support" for terrorism.[18] The idea that no one should face deportation in a system this broken should be intuitive.

This acknowledgement, however, begs the question—a question not adequately addressed in the existing literature—of what those *substantive rules* should be. This Article seeks to begin to fill that void. It addresses what happens after we have mustered the power and political will to rebuild the immigration enforcement system. At its core, the proposal that follows sets forth an affirmative vision for radically reimagining the substantive rules that dictate when a person can be punished for violating immigration law and when, if ever, that can include the extreme punishment of deportation.[19] This proposal, taken together with my prior work regarding the mechanics of immigration enforcement, sets forth a workable affirmative vision for a new paradigm in immigration enforcement that can help guide reform.

Markowitz_AbolishICEandThenWhat_p1ypp1i9.pdf [https://perma.cc/N86F-64H3]; *see also* Markowitz, *supra* note 12 (advocating for substantive, mechanical, and procedural revisions for immigration enforcement reform).

15. Markowitz, *supra* note 14, at 137; Markowitz, *supra* note 10, at 129.

16. *See* J.E. F.M. v. Lynch, 837 F.3d 1026, 1029, 1038, 1041 (9th Cir. 2016).

17. *See* 8 U.S.C. § 1227(a)(2)(B).

18. *See* Matter of A-C-M-, 27 I. & N. Dec. 303, 306, 308 (B.I.A. 2018) (affirming that a woman enslaved by a Salvadoran guerilla group materially supported terrorism through the forced labor she provided even though that support was "de minimis"); *see also* Matter of M-H-Z-, 26 I. & N. Dec. 757, 760 (B.I.A. 2016) (holding that the material support bar to asylum does not have an implied exception for individuals who provide support for terrorist organizations under duress); Annachamy v. Holder, 686 F.3d 729, 739 (9th Cir. 2012) (holding there is no exception for support for a terrorist organization performed under duress), *superseded by* Annachamy v. Holder, 733 F.3d 254 (9th Cir. 2013).

19. The focus of this Article (like the two pieces that preceded it) is on constructing a just, humane, and effective *interior* enforcement system. That is, the system to enforce immigration laws for people already present in the United States. Border enforcement is a separate system that is equally in need of a new paradigm. However, reimagining the border enforcement system is beyond the scope of this Article.

That reform begins with the recognition that we need to end ICE's failed mass detention and deportation system and refocus the mechanics of our enforcement strategy around a mandatory preference for cooperative enforcement. This would mean helping individuals access existing pathways the law provides to obtain lawful status so that punitive enforcement resources are not wasted on such individuals. This can be achieved through a new "intent to initiate" protocol where, before individuals can be placed in enforcement proceedings, they are provided with the opportunity and legal support to pursue any available affirmative applications for lawful status. Enforcement proceedings could not be initiated unless and until those affirmative applications are denied. The proposal assumes, however, that in some small category of cases where enforcement is deemed necessary, no affirmative pathway to lawful status will exist, and thus the system, as with all enforcement systems, will also require a mechanism and substantive rules to deliver proportionate penalties.

The substantive rules proposed here are intended to make the system more workable and less brutal by reversing decades of one-way ratchet reforms that put tens of millions at risk of deportation but only a random small minority actually subject to enforcement. That will require further focusing our enforcement system by excluding from deportation those with the deepest ties to the United States, where deportation is likely to cause the most disruption and pain, and where deportation will be least likely to serve the public interest. This can be achieved by enacting a statute of limitations, as exists in virtually every other enforcement system, and by making lawful permanent residence truly permanent by exempting green card holders from deportation.

In addition, the system must be dramatically simplified to ensure efficient and fair adjudication is possible. That will require focusing the question of deportability, which currently includes over 200 distinct potential charges, on the straightforward sensible inquiry into whether someone has entered the country without authorization or violated the terms of their admission, usually by staying beyond the authorized period. It will likewise mean eliminating the tangled and sprawling system of waivers and forms of relief from deportation, which consumes endless hours of litigation over hypertechnical eligibility questions, and which ultimately often leaves immigration judges' hands tied, unable to consider the equities in a large category of mandatory deportation cases.

In its place, anyone found deportable would proceed to a second phase of the proceedings focused on identifying a proportional sentence. In this phase, immigration judges would be empowered to deliver a range of scalable penalties and be required to consider the totality of the circumstances in determining which penalty was most appropriate. In cases where the equities tip decidedly in favor of the individual, the

person could be admitted to lawful permanent resident status immediately. In other circumstances, individuals may be required to pay a proportionate fine commensurate with their financial means, or complete a treatment program or community service before they can be admitted to permanent residence. Still others, such as very recent arrivals, may be granted conditional residence such that they will remain subject to the supervision and jurisdiction of the court for a period of a few years (akin to a probationary sentence) to ensure their fitness for admission to permanent residence. Finally, in the most extreme cases, immigration judges would have the power to determine that deportation is the appropriate proportionate penalty.

However, deportation could no longer be used as a second punishment for criminal convictions. The sprawl of deportation grounds based on criminal convictions has been one of the defining novel features of contemporary immigration law. This failed experiment has revealed that the immigration system is uniquely ill-suited to address issues of criminality. Using criminal convictions as triggers for deportation only serves to import the defects and racial disparities of the criminal legal system into deportation proceedings. Moreover, the entanglement of immigration and criminal enforcement systems has created unmanageable complexities while undermining the effectiveness of both systems. Eliminating criminal removal grounds and mandatory deportation provisions would not, however, mean that immigration judges could not consider an individual's likely future impact on society, for better and worse, in the proportionate sentencing phase—including any serious risk of future criminality.

The question of whether migration should ever be penalized and whether deportation can ever be justified evokes fierce debate inside and outside the immigrant rights movement. Immigration advocates have increasingly pushed for recognition of the freedom to move as a human and legal right and have pressed for an acknowledgement of the United States' responsibility to immigrants whose countries of origin have been destabilized by U.S. economic and military policies.[20] These ideas powerfully call into question whether deportation, like banishment before it, has become incompatible with modern notions of a civilized society.[21]

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20. *See, e.g.*, *Abolish ICE*, UNITED WE DREAM, https://unitedwedream.org/abolishice/ [https://perma.cc/5Y78-XSYK] (calling for Congress to abolish ICE).

21. Banishment is a means of punishment dating back to at least 2285 B.C. that had the purpose of removing the banished, regardless of citizenship, from a particular geographical area. Wm. Garth Snider, *Banishment: The History of Its Use and A Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 459, 476 (1998). The Supreme Court has described banishment as inconsistent with "the dignity of man" and as "a form of punishment more primitive than torture." Trop v. Dulles, 356 U.S. 86, 100–01 (1958); *see also* U.S. *ex rel.* Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926) (Hand, J.) (describing deportation as "a dreadful punishment, abandoned by the common consent of all civilized peoples").

On the other side of this debate is the well-established legal principle that sovereign nations have the inherent power to control admission to their national communities.[22] The right of a nation to expel those who are present in violation of the sovereign's legal determination is a definitional corollary of this principle.[23]

This Article takes no position on this theoretical debate. However, three things are clear. First, a system of punishment for immigration violations, which includes deportation in some instances, is likely to persist for the foreseeable future. Second, the principled challenge advanced by some to the very concept of a "just deportation" is a valuable addition not just to this long arc effort, but also to the growth of the national movement necessary to spark near term reform. And third, immigrant communities would be ill-served if rigid adherence to that principle means they are excluded from shaping near term immigration enforcement policy. Developing an affirmative vision for the substantive rules used to determine who can be penalized for immigration violations and what that penalty should be is a necessary, though alone insufficient, precursor to the immigration enforcement reform that is desperately needed. Accordingly, this Article seeks to lay out such a vision bounded by the current constraint that the United States will likely continue to adhere to the principle that it can affirmatively determine who it chooses to admit and include in our national community.[24]

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22. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953), *superseded by statute*, 8 U.S.C. § 1252(e)(2), *as recognized in* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893); Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889).

23. *Knauff*, 338 U.S. at 542 ("The exclusion of aliens is a fundamental act of sovereignty.").

24. Of course, immigration enforcement is a complex system that operates in a dynamic relationship with other components of the immigration system, including, most notably, the affirmative rules establishing legal pathways for the future flow of immigration and the related nature and effectiveness of border enforcement. Reform is desperately needed in these arenas as well. Much work has been done by others examining how we can set up a system for the future flow of immigration that includes, *inter alia*, realistic pathways for the low wage workers our economy depends on. *See, e.g.*, Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 531–32 (2020); PIA M. ORRENIUS ET AL., MIGRATION POL'Y INST., HOW DOES IMMIGRATION FIT INTO THE FUTURE OF THE U.S. LABOR MARKET? 13 (2019); DORIS MEISSNER ET AL., MIGRATION POL'Y INST., THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD 24–28 (2018); Christopher Nugent, *Towards Balancing a New Immigration and Nationality Act: Enhanced Immigration Enforcement and Fair, Humane and Cost-Effective Treatment of Aliens*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 243, 257–60 (2005); Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. FOR AM. PROGRESS (July 22, 2019, 4:45 AM), https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-lawfair-humane-workable-immigration-system/ [https://perma.cc/7YCN-QJHE]. Others have begun to dissect the failures of the modern militaristic approach to border enforcement. *See* Wayne A. Cornelius &

This Article proceeds in five parts. Part I provides a brief overview of the mechanics and substantive rules that operate in our current deportation system. Part II proposes normative principles to guide the creation of a new substantive structure for immigration enforcement. Part III briefly reviews the paradigm I have developed elsewhere for how the mechanics of such a humane, just, and effective system could operate. Part IV suggests that one component of creating humane, just, and effective substantive immigration enforcement rules should be rethinking the category of individuals who can never be deported. Finally, Part V proposes a new structure for the substantive rules that govern immigration enforcement. These rules, together with the new mechanics of enforcement discussed in Part III, would dramatically curtail the brutality that the current system visits on immigrant communities, increase efficiency and reduce costs, and simultaneously increase compliance.

The ideas in this Article were developed with the assistance of, and in close consultation with, immigrant rights leaders. They are intended as a starting point that immigrant communities and policymakers can critique and improve upon.

I. UNDERSTANDING MODERN IMMIGRATION ENFORCEMENT

There are an estimated 24 million noncitizens living in the United States.[25] Approximately half are lawful permanent residents and approximately 40% are undocumented, primarily because they either entered the United States unlawfully or overstayed their visas.[26] For the majority of U.S. history, immigration enforcement was focused almost exclusively on the border—not this population of immigrants living in the United States.[27] Now, a vast expansion of statutory deportation triggers and enforcement resources mean all noncitizens residing in the United States—both documented and undocumented—live under a constant threat of deportation. The number of individuals arrested and detained by ICE and its predecessor has increased astronomically in

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Idean Salehyan, *Does Border Enforcement Deter Unauthorized Immigration? The Case of Mexican Migration to the United States of America*, 1 REG. & GOVERNANCE 139, 150 (2007); Thomas J. Espenshade, *Does the Threat of Border Apprehension Deter Undocumented U.S. Immigration?*, 20 POPULATION & DEV. REV. 871, 871–73 (1994); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 627–29 (2015). Establishing a successful interior enforcement system will depend on successful reforms of these components of our immigration system as well but are beyond the scope of this Article.

25. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/ [https://perma.cc/78G8-TJ7X].

26. *Id.* The remaining portion of the noncitizen population have a variety of lesser forms of lawful immigration status such as asylees and temporary visa holders. *Id.*

27. *See* Markowitz, *supra* note 10, at 108.

recent years, rising an astounding 2500% since 1985.[28] So too has the number of deportations, with more than 18 million people deported in the first two decades of this century.[29] As Professors Adam Cox and Christina Rodríguez have demonstrated, "Congress's radical expansion of the grounds of deportation" means that in addition to the millions of undocumented individuals subject to deportation, over 4 million, or one-third of all lawful permanent residents are now also deportable at the whim of federal immigration authorities.[30] However, in practice, even with unprecedented expenditures, the United States can deport only a few hundred thousand individuals per year.[31] 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 random and unlikely, yet present enough to be a constant source of terror that operates with the cruelty and unpredictability of a lightning strike.

The bases for potential deportation are enumerated by statute. The number, reach, and complexity of such charges has sprawled in recent decades such that there are now over 200 different potential removal charges in the immigration court case management system.[32] The charges can range from the intuitive, like unlawful entry or overstaying a visa,[33] to technical minutia, like failure to timely report a change in address,[34] to the indecipherable, like convictions for a "crime involving moral turpitude" (CIMT), defined as a crime that is "contrary to the accepted rules of morality."[35] Notwithstanding the sprawl of potential charges, the

28. *Id.* at 114–15.

29. *See* 2018 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 2; Nowrasteh, *supra* note 2.

30. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009).

31. 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, 38 Op. O.L.C. 1, 9 (2014), https://www.justice.gov/file/179206/download [https://perma.cc/3HBC-YQBM] (detailing the constitutional and statutory bases for presidential discretion in immigration enforcement).

32. *See generally* 8 U.S.C. §§ 1182, 1227 (enumerating the classes of immigrants who are ineligible for visas or admission as well as those who are deportable). The list of removability charges is drawn from Executive Office of Immigration Review (EOIR) Case Data, publicly available at https://www.justice.gov/eoir [https://perma.cc/68AR-BPBY].

33. 8 U.S.C. § 1227(a)(1)(C).

34. 8 U.S.C. § 1227(a)(3)(A).

35. Matter of Silva-Trevino, 26 I. & N. Dec. 826, 832–33 (B.I.A. 2016); *see also* 8 U.S.C. § 1227(a)(2)(A)(i) (stating that aliens who are convicted of a CIMT are deportable). Consistent with the vaguely constructed definition, CIMT has been interpreted in counterintuitive ways to include, for example, petty shoplifting and animal fighting, but not unlawful possession of a firearm or manslaughter. *Compare* Matter of Diaz-Lizarraga, 26 I. & N. Dec. 847, 847, 852 (B.I.A. 2016) (finding shoplifting an amount less than $1000 to be a CIMT), *and* Matter of Ortega-Lopez, 27 I. & N. Dec. 382, 387–88 (B.I.A. 2018) (finding cockfighting to be a CIMT), *with*

overwhelming majority of cases in practice fall into one of two categories: undocumented individuals charged as removable (1) for some form of unauthorized entry or (2) for being present without permission, such as when someone enters lawfully but overstays their visa.[36]

With such a large swath of the noncitizen population potentially subject to deportation, and without any systematic strategy or means to select enforcement targets,[37] individuals enter the immigration

Matter of Tavdidishvili, 27 I. & N. Dec. 142, 144, 145 (B.I.A. 2017) (holding criminally negligent homicide not to be a CIMT because it does not require a specific mental state), *and* Mayorga v. Att'y Gen. of U.S., 757 F.3d 126, 134 (3d Cir. 2014) (finding unlicensed firearms dealing not to be a CIMT). Similarly, the most serious removal charges are convictions for "aggravated felonies," but the statutory definition of that provision has twenty-one subparts, has spawned decades of litigation to decipher, and here too has been counterintuitively interpreted to include convictions that are neither aggravated nor felonies, even when people have not served a single day in jail. Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 298–310 (2003); Bill Ong Hing, *Re-Examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools*, 8 HARV. L. & POL. REV. 141, 155–57, 165–71 (2014).

36. *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, TRAC IMMIGR. (Jan. 19, 2021), https://trac.syr.edu/immigration/reports/637/ [https://perma.cc/X5GX-7P8N] (documenting that such charges make up over 95% of current immigration court dockets). This assessment is also confirmed by an original analysis of publicly available EOIR Case Data—available at https://www.justice.gov/eoir—by Jennifer Stave, PhD, on file with the author [hereinafter "Stave data"].

37. For years, ICE has claimed to follow enforcement priorities, which have shifted frequently over time. *See, e.g.*, Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, & R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. 3 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf [https://perma.cc/CE36-QQC5] (expanding the DACA program to adults who were parents of United States citizens or lawful permanent residents, though this memorandum was eventually enjoined and never took effect); Memorandum from John Morton, Dir., Immigr. & Customs Enf't, to All Field Office Dirs., All Special Agents in Charge, & All Chief Counsel 1–2 (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/K35B-WC8C] (building on existing memoranda related to prosecutorial discretion and rescinding others); Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Chief Counsel 3–8 (Oct. 24, 2005) (outlining prosecutorial discretion of OPLA attorneys). Under the Trump Administration, ICE's priorities were so broad as to encompass virtually all noncitizens amenable to deportation. *See* Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf't., Lori Scialabba, Acting Dir., U.S. Citizenship & Immigr. Servs., Joseph B. Maher, Acting Gen. Counsel, U.S. Dep't of Homeland Sec., Dimple Shah, Acting Assistant Sec'y for Int'l Affairs, U.S. Dep't of Homeland Sec., & Chip Fulghum, Acting Undersecretary for Mgmt., U.S. Dep't of Homeland Sec. 2 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/WN7G-BU2G]. Most recently, the Biden Administration, has issued interim guidelines enforcement officers and ICE attorneys that

enforcement system largely by happenstance. Sometimes individuals living in the United States with some lawful status become the focus of enforcement when they encounter immigration authorities while renewing their immigration documents, or when returning from a trip abroad. Undocumented individuals can become targets when they apply for asylum or some other immigration benefit the law provides, or during large-scale workplace raids. In addition, any noncitizen who is arrested by local police in the United States automatically has their fingerprints run through federal immigration databases.[38] Arrests by local police, even for minor offenses, and even if they result in no conviction, can trigger a variety of enforcement measures. ICE regularly issues "detainers"—requests to local criminal legal systems that they facilitate the transfer of deportable individuals to ICE for detention and deportation.[39]

Many localities and states now refuse to become entangled in civil immigration enforcement because of the devastation such enforcement has visited upon their communities, and because entanglement undermines police departments' core crime fighting mission.[40] But other

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are intended to better focus the resources of the DHS. *See* Memorandum from John D. Trasviña, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Attorneys 5–7 (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf [https://perma.cc/624C-RJN3]; Memorandum from Tae D. Johnson, Acting Director, U.S. Immigr. & Customs Enf't (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [https://perma.cc/4RHW-2R46]. Ultimately, however, the data demonstrate that stated priorities have historically had little impact on actual enforcement patterns. *See Secure Communities, Sanctuary Cities and the Role of ICE Detainers*, TRAC IMMIGR. (Nov. 7, 2017), https://trac.syr.edu/immigration/reports/489/ [https://perma.cc/ 9Q5G-8E8S]; *New ICE Detainer Guidelines Have Little Impact*, TRAC IMMIGR. (Oct. 1, 2013), https://trac.syr.edu/immigration/reports/333/ [https://perma.cc/XY8S-2P44].

38. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/secure-communities [https://perma.cc/HD7B-PHH6] (Feb. 9, 2021).

39. *See* Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 281, 288 (2013) (considering the role of state law enforcement in the federal immigration system in the wake of ICE's increased reliance on detainers); *ICE Sends Detainers to 3,671 Law Enforcement Agencies in FY 2019*, TRAC IMMIGR. (Feb. 24, 2020), https://trac.syr.edu/immigration/reports/595/ [https://perma.cc/QY9P-YE7L] (reporting the number of detainers sent to law enforcement agencies by ICE from 2003 to 2019).

40. *See* Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 145–46 (2016); *National Map of Local Entanglement with ICE*, IMMIGR. LEGAL RES. CTR. (Nov. 13, 2019), https://www.ilrc.org/local-enforcement-map [https://perma.cc/CK26-QGPB]; *Statement by the International Association of Chiefs of Police on United States Immigration Enforcement Policy and Sanctions*, INT'L ASS'N OF CHIEFS OF POLICE (Mar. 27, 2017) [hereinafter IACP Statement], https://www.theiacp.org/news/blog-post/statement-by-the-international-association-of-chiefs-of-police-on-united-states [https://perma.cc/R8M9-DKTC] ("[S]tate and local law enforcement agencies depend on the cooperation of immigrants, legal or not, in solving a wide array of crimes."); *see also* David

jurisdictions regularly funnel people from their criminal legal system into immigration detention.[41] In any jurisdiction, an arrest also often triggers ICE community raids, with teams of heavily armed agents staking out homes and courthouses.[42] For years, ICE's rhetoric has focused on people with serious convictions who ICE asserts pose a significant risk to public safety.[43] The data tells a different story. Cases with criminal removal charges comprise a very small minority of deportation cases.[44] Thus, becoming an enforcement target depends primarily on bad luck and the rapidly shifting whims of enforcement authorities.

Once immigration authorities have decided to initiate deportation proceedings against an individual, the next decision point—a decision that is often outcome determinative—is whether or not the noncitizen will be detained. For the majority of U.S. history, detention was not a significant feature of interior immigration enforcement in the United

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Hausman, *Sanctuary Policies Reduce Deportations Without Increasing Crime*, PROC. NAT'L ACAD. SCIS. U.S. (Nov. 3, 2020), https://www.pnas.org/content/117/44/27262.short [https://perma.cc/AML2-SPCY] (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*, CTR. FOR AM. PROGRESS (Jan. 26, 2017, 1:00 AM) https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/theeffects-of-sanctuary-policies-on-crime-and-the-economy/ [https://perma.cc/Y3PU-YGH6] ("[O]n average, 35.5 fewer crimes [are] committed per 10,000 people in sanctuary counties compared to nonsanctuary counties.").

41. *How ICE Uses Local Criminal Justice Systems to Funnel People into the Detention and Deportation System*, NAT'L IMMIGR. L. CTR. (Mar. 2014) https://www.nilc.org/issues/immigration-enforcement/localjusticeandice/ [https://perma.cc/5V55-ARUL].

42. *Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State*, IMMIGR. DEF. PROJECT, https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf [https://perma.cc/3XYF-NA83]. Notably, the Biden administration has taken steps to limit ICE's ability to carry out civil immigration enforcement actions in or near courthouses. *See* Memorandum from Tae Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, & Troy Miller, Acting Comm'r, U.S. Customs & Border Prot., to U.S. Immigr. & Customs Enf't & U.S. Customs & Border Prot. (Apr. 27, 2021), https://www.ice.gov/sites/default/files/documents/ciEnforcementActionsCourthouses2.pdf [https://perma.cc/EB43-JTKC].

43. *See, e.g.*, Memorandum from Jeh Charles Johnson, *supra* note 37; *ICE Prioritizes Removing Criminal Aliens*, U.S. IMMIGR. & CUSTOMS ENF'T (Oct. 18, 2021), https://www.ice.gov/features/High-profile-Removals [https://perma.cc/GDN7-8YEY]; *Strengthening Enforcement: Deporting Felons, Not Families*, OBAMA WHITE HOUSE ARCHIVES, https://obamawhitehouse.archives.gov/issues/immigration/strengthening-enforcement [https://perma.cc/BEG3-MZXZ]; Muzaffar Chishti & Michelle Mittelstadt, *Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?*, MIGRATION POL'Y INST. (Nov. 2016), https://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal [https://perma.cc/FU29-3BN2] (discussing the Trump administration's commitment to prioritize the removal of unauthorized immigrants with criminal records).

44. *See The State of the Immigration Courts*, *supra* note 36 (documenting that only 1–2% of pending removal cases involve criminal charges); *see also* Stave data, *supra* note 36.

States.[45] In fact, as recently as the early 1980s, there were no significant permanent immigration detention facilities used for interior enforcement at all.[46] Deportation proceedings were initiated not with handcuffs but with a notice: an order to show cause why you should not be deported—akin to the initiation of any other civil proceeding with a summons.[47]

But in 2019, ICE established a new daily record for an immigration detention population of 52,000—a startling increase from the daily population of 2,000 at the outset of significant interior enforcement detention in 1985.[48] Annually, ICE now regularly detains hundreds of thousands of people each year.[49] While immigration detention is purportedly civil, not criminal, the conditions for ICE detainees are virtually identical to people held on criminal charges.[50] In fact, immigrants are often held in the exact same facilities as criminal detainees.[51]

Like deportation charging decisions, detention decisions can be random. The statutory scheme now subjects large categories of immigrants to "mandatory detention" even if they can affirmatively demonstrate that they pose no danger or risk of flight.[52] For years, federal law also included a bed-mandate, interpreted by ICE to require them to

45. Markowitz, *supra* note 10, at 107–10.

46. *See* Smita Ghosh, *How Migrant Detention Became American Policy*, WASH. POST (July 19, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/07/19/how-migrant-detention-became-american-policy/ [https://perma.cc/P5VP-QBEU].

47. Markowitz, *supra* note 10, at 141.

48. *See* Dominique Mosbergen, *ICE Has a Record-Breaking 52,000 Immigrants in Detention, Report Says*, HUFFINGTON POST (May 22, 2019), https://www.huffpost.com/entry/ice-detainees-record_n_5ce39a0fe4b0877009939c17 [https://perma.cc/E4FZ-S6M8].

49. U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2019 I.C.E. ENF'T & REMOVAL OPERATIONS REPORT 9 (2020), https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/Z43L-72YK]. Notably, detention numbers plummeted in 2020 as a result of the COVID-19 pandemic and various related changes to practice and policy. Maria Sacchetti, *Deportations of Migrant Families Spiked in 2020*, WASH. POST (Dec. 23, 2020, 10:01 PM), https://www.washingtonpost.com/immigration/ice-deportations-decline/2020/12/23/b9c8841c-4532-11eb-b0e4-0f182923a025_story.html [https://perma.cc/LZ3S-VWHJ] (noting that by December 2020, there were fewer than 16,000 people in immigration detention).

50. *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System*, HUM. RIGHTS FIRST (Oct. 5, 2011), https://www.humanrightsfirst.org/resource/jails-jumpsuits-transforming-us-immigration-detention-system [https://perma.cc/X466-DWPS] ("DHS and ICE recognized that detention beds were in facilities that were 'largely designed for penal, not civil, detention.' In fact, many criminal correctional facilities actually offer less restrictive conditions than those typically found in immigration detention facilities . . . .").

51. *See* Silky Shah et al., *Banking on Detention: Local Lockup Quotas & the Immigrant Dragnet*, DET. WATCH NETWORK 1 (2015), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf [https://perma.cc/N6K3-2KFQ].

52. 8 U.S.C. §§ 1225(a)(1), 1226(c).

detain tens of thousands of noncitizens on any given day.[53] Today, detained individuals are often transferred to facilities in remote locations, thousands of miles away from families and potential witnesses, primarily in areas where they lack access to legal service providers.[54] However, while detention decisions often bear no relation to any individualized determination of dangerousness or risk of flight, they have an enormous impact on the likelihood that an individual will successfully defend themselves against deportation.[55]

Individuals living in the United States facing deportation are generally entitled to a hearing before an immigration judge.[56] However, the Trump Administration enacted a regulation that significantly expanded the category of noncitizens who can be deported without any process before an immigration judge.[57] Even for individuals entitled to proceedings before an immigration judge, these "judges" are not independent adjudicators.[58] Rather, they are employees of the Department of Justice

53. *Immigration Detention Bed Quota Timeline*, NAT'L IMMIGRANT JUST. CTR., 1 (2017), https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2017-01/Immigration%20Detention%20Bed%20Quota%20Timeline%202017_01_05.pdf [https://perma.cc/6HRN-A79X].

54. Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 39–40 (2018); Dusty Arajo et al., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court*, NAT'L IMMIGRANT JUST. CTR. 9 (2010), https://immigrantjustice.org/sites/default/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf [https://perma.cc/7CEE-DL9T]; *see also Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, HUM. RIGHTS WATCH 2–4 (Dec. 2, 2009), https://www.hrw.org/report/2009/12/02/locked-far-away/transfer-immigrants-remote-detention-centers-united-states# [https://perma.cc/T7PP-C79M] (discussing the difficulties detainees face as a result of transfers).

55. *See* Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings (New York Immigrant Representation Study Report: Part 1)*, 33 CARDOZO L. REV. 357, 383 (2011).

56. *See* 8 U.S.C. § 1229a (discussing the procedures for removal proceedings); *see also* Nose v. Att'y Gen. of U.S., 993 F.2d 75, 78–79 (5th Cir. 1993) ("Generally, 'even aliens who have entered the United States unlawfully are assured the protection[] of the fifth amendment due process clause,' including the right to a hearing before an immigration judge before being deported." (citation omitted)).

57. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,409 (July 23, 2019); Make The Rd. N.Y. v. Wolf, 962 F.3d 612, 620 (D.C. Cir. 2020).

58. Mimi Tsankov, *Judicial Independence Sidelined: Just One More Symptom of an Immigration Court System Reeling*, 56 CAL. W. L. REV. 35, 39, 41 (2019) (explaining how the Attorney General "curtail[s] Immigration Judge decisional independence [and] threatens the very foundation upon which the Immigration Court system is based" and how "multiple scandals involving politicized hiring decisions, including an ideologically-driven purge of the BIA" have driven "public skepticism . . . regarding the Immigration Court's lack of independence from the DOJ"); *see also The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, INNOVATION L. LAB & S. POVERTY L. CTR. 7 (June 2019),

(DOJ) and answer to the Attorney General, who shifts from adjudicator to adversary once a case proceeds to federal court.[59] The dynamics of administrative deference, whereby federal courts are required to defer to many agency interpretations of immigration law, even when the court would interpret the law differently, make this arrangement with the DOJ as both adjudicator and litigant particularly troubling.[60]

In addition, unlike every other instance in American law where we lock people up and force them to litigate for their liberty against government prosecutors, there is no recognized right to appointment of counsel.[61] Accordingly, noncitizens—often detained, sometimes not fluent in English, and rarely with any legal training—are frequently required to navigate these incredibly complex and consequential proceedings on their own.[62] As one immigration judge explained it, the result is "like holding death penalty cases in traffic court."[63]

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https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [https://perma.cc/H8RE-3PWD] (reporting that immigration courts have been weaponized by attorneys general to achieve their own enforcement priorities, finding their "control over the EOIR has undermined its independence by exposing immigration judges to prosecutorial and political pressures"); Tanvi Misra, *DOJ 'Reassigned' Career Members of Board of Immigration Appeals*, ROLL CALL (June 9, 2020, 4:55 PM), https://www.rollcall.com/2020/06/09/doj-reassigned-career-members-of-board-of-immigration-appeals/ [https://perma.cc/8SNA-BTRS] (criticizing the Trump Administration's "reassigning" of career members at the BIA to new roles because it "dilutes 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").

59. Tsankov, *supra* note 58, at 66 ("DOJ has the authority to set the conditions of employment for Immigration Judges, including if, and whether, such employment continues."); *see* Margaret H. Taylor, *Behind the Scenes of* St. Cyr *and* Zadvydas*: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 273 (2002) (discussing the way policy development and litigation intertwine in the immigration context due in part to the DOJ's supervisory authority over the EOIR).

60. *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984) (expressing that a challenge to an agency's construction of a statutory provision must fail when the challenge is based on the wisdom of the policy); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (applying *Chevron* and holding that the FCC's conclusion that cable companies selling broadband Internet do not provide telecommunications services as defined in the Communications Act was a lawful construction of the act).

61. *See* J.E. F.M. v. Lynch, 837 F.3d 1026, 1029 n.1 (9th Cir. 2016) ("Immigration proceedings are civil, not criminal, in nature. Thus, the right-to-counsel claims invoke the Fifth Amendment's due process requirement, not the Sixth Amendment's right-to-counsel provision, which is reserved for criminal proceedings."); *see also* 8 U.S.C. § 1229a(b)(4)(A) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings . . . .").

62. In 2019, 63.9% of noncitizens in removal proceedings were unrepresented. *State and County Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGR. (Feb. 2021), https://trac.syr.edu/phptools/immigration/nta/ [https://perma.cc/J6MX-SPRQ].

63. Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES (Feb. 8, 2010), https://www.nytimes.com/2010/02/09/us/09immig.html [https://perma.cc/7NC2-9JJK].

Removal proceedings begin with a determination on removability.[64] In the majority of cases—those involving charges of unlawful entry or overstaying a visa—this determination can be relatively straightforward. However, for other charges, particularly those based on criminal convictions, the analysis can be extraordinarily complex and require extensive research into immigration and criminal law precedent. It is an analysis that even most immigration lawyers and judges find extremely challenging and often beyond their capacity to competently maneuver.[65] If an individual is found "removable," proceedings advance to a second phase in which the noncitizen is required to identify if there is any form of "relief from removal" to which they are entitled.[66]

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.[67] 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.[68] Identifying an appropriate form of relief, and establishing eligibility for such relief, can thus be a convoluted and complex task that is often impossible to accomplish while detained and unrepresented.

Moreover, because of increasingly restrictive eligibility requirements, many noncitizens even with the best representation are eventually found ineligible for relief and thus subject to "mandatory deportation." That means that immigration judges' hands are tied and they are forced to order deportation in large categories of cases where they may think it

64. 8 U.S.C. § 1229a.

65. *See* discussion *infra* note 158 and accompanying text.

66. 8 U.S.C. § 1229a(c).

67. 8 U.S.C. § 1229b(a) (cancellation of removal for certain permanent residents); *id.* § 1229b(b) (cancellation of removal for certain nonpermanent residents); *id.* § 1255 (adjustment of status); *id.* § 1231(b)(3) (withholding of removal); 8 C.F.R. § 208.16–208.18 (2020) (protection under the Convention Against Torture); 8 U.S.C. § 1255(h) (Special Immigrant Juvenile Status); 8 C.F.R. § 1212.3 (2020) (cancellation under former 8 U.S.C. § 1182(c)); 8 U.S.C. § 1259 (registry); *id.* § 1182(i) (waiver of inadmissibility for fraud or willful misrepresentation of a material fact); *id.* § 1182(h) (waiver of inadmissibility for certain criminal acts); *id.* § 1101(a)(15)(U) (nonimmigrant visa for victims of certain crimes); *id.* § 1101(a)(15)(T) (nonimmigrant visa for certain victims of human trafficking).

68. *See, e.g.*, 8 U.S.C. § 1101(a)(27)(J) (requiring that an immigrant child have a valid juvenile 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 it is not in their best interest to return to the country of nationality to be eligible for SIJS).

unjustified.[69] If an individual can establish prima facie eligibility, most forms of relief then require an individual calendar hearing—akin to a trial—where lay and expert witnesses present testimony.[70] Ultimately, the immigration judge is generally left with a binary decision: order the individual deported or allow them to remain with lawful status.

Unlike criminal proceedings and virtually all other types of litigation, neither plea bargaining, nor settlement are significant features of the removal system because the binary choice leaves no room for negotiation. As a result, deportation cases require an unusually large number of trials. Thereafter, because of the enormously consequential stakes and the extreme complexity of this system, deportation orders often spark years of appeals. Individuals frequently remain detained for years as cases wind their way through the Board of Immigration Appeals (BIA), the administrative appellate body, to the federal appellate courts.[71] The flow of federal litigation has shifted over time but, as a result of this system, up to 40% of some courts of appeals' dockets have, at times, been clogged with deportation cases, and every year the Supreme Court considers several deportation cases to attempt to bring clarity to some aspect of deportation proceedings.[72] However, more often than not, federal courts

69. 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, 8:03 PM), https://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges [https://perma.cc/8D5V-SCUR].

70. "Individual calendar hearing," not trial, is the term used in immigration court. IMMIGR. CT. PRACTICE MANUAL 4.16(a) (Nov. 16, 2020), https://www.justice.gov/eoir/page/file/1258536/download [https://perma.cc/4F5Q-J6KT].

71. As of April 19, 2021, the BIA has 82,734 case appeals pending. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., ADJUDICATION STATISTICS: CASE APPEALS FILED, COMPLETED, AND PENDING (Apr. 19, 2021), https://www.justice.gov/eoir/page/file/1248501/download [https://perma.cc/8UCC-CYL2]. Of the 55,924 cases the BIA received in 2019, it only completed 19,448 of them. *Id.* As many as 44% of BIA decisions are appealed to federal courts of appeals. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 8 (2008). In 2019, BIA appeals accounted for 85% of the 5,850 administrative agency appeals filed in federal courts of appeals. ADMIN. OFF. OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2019, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 [https://perma.cc/C46W-EMT2].

72. Robert A. Katzmann, *Bench, Bar, and Immigrant Representation: Meeting an Urgent Need*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 585, 588 (2012); *see, e.g.*, Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1071–73 (2020) (holding that the phrase "questions of law" from the Immigration and Nationality Act includes applying a legal standard to undisputed facts); Barton v. Barr, 140

are unable to make unencumbered merits determinations about the validity of the removal orders they review because of strict limits on their jurisdiction and excessively deferential standards of review.[73]

The result of the current removal process is 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 proscribed by Congress unavailable to litigants on a reliable basis.

II. GUIDING PRINCIPLES

The defects in the current interior immigration enforcement system described in Part I are many, but the core failures fall into three categories: (1) the disproportionate brutality the system visits on noncitizens and their families; (2) the inability of individuals facing removal to realize even the very limited rights and privileges the current law provides; and (3) the waste, inefficiency, and inability of the current system to increase compliance with immigration laws. Examination of these core defects helps us identify the normative principles that should guide the creation of a better immigration enforcement paradigm.

First, in contrast to the wanton brutality of our current system, reform must strive to develop a system that is, first and foremost, *humane*. As discussed *supra*, 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.[74] Having started my career defending immigrants in deportation proceedings the same year that ICE was created, and having represented hundreds of individuals and families facing deportation over the nearly two decades of ICE's existence, I have seen first-hand the inhumanity inherent in separating spouses, tearing parents from children, and upending lives by sending individuals to nations they may no longer know and where they often lack the means to survive or thrive. In the near term, however, deportation will remain a feature of our enforcement system and thus, at a bare minimum, we have an obligation to mitigate and avoid whatever unnecessary, extreme, or unduly harsh human suffering that we can.

S. Ct. 1442, 1448–50 (2020) (holding that under the cancellation-of-removal statute, an offense that precludes cancellation of removal does not have to be one of the offenses of removal); Nielsen v. Preap, 139 S. Ct. 954, 966–67 (2019) (rejecting that a mandatory-detention requirement applies only if an alien is arrested immediately after being released from jail).

73. *See, e.g.*, 8 U.S.C. §§ 1252(b)(9), 1252(f)(1), 1252(g), 1226(d); *see also* Katzmann, *supra* note 71, at 7 (writing from the perspective of a judge for the U.S. Court of Appeals for the Second Circuit about the deprivation of legal services for immigrants).

74. *See* discussion *supra* notes 15–21 and accompanying text.

Second, as draconian as the current system is, there often are substantive legal mechanisms for defending against deportation. However, in the majority of cases, people are deprived of access to these mechanisms by a wide variety of intentionally developed features of the deportation system, the most obvious example being the deprivation of counsel.[75] One recent study demonstrated that while only 4% of unrepresented detained individuals were able to prevail in their deportation proceedings, providing free lawyers to those same individuals increased their chances of success dramatically to 48%.[76] That means that 44% of such unrepresented individuals are being ordered to deport not because they lack the legal right to remain in the United States, but because they do not have a lawyer who can help them vindicate that right. As discussed *supra*, the lack of access to counsel, while the most obvious, is just one of many intentional features of the current system designed to prevent individuals from accessing the legal rights to which they are entitled. Unnecessary detention, often in remote locations,[77] political control over immigration judges,[78] and strict limits on federal court jurisdiction,[79] among other deficiencies, all contribute to the inability of individuals to access their rights under the law. Accordingly, the new enforcement paradigm, unlike the current system, must be *just*—meaning that it must afford individuals the tools and opportunity to reliably access the rights and privileges the law provides.

Lastly, the new immigration enforcement system must be *effective*. This virtue is almost too obvious and self-evident to require a defense, but a focus on effectiveness is necessitated by the current system's byzantine nature, its waste and inefficiency, and ultimately, its inability to increase compliance with immigration law. The current system was originally designed in 1952.[80] It has been amended and revised countless times since, but never comprehensively reformed.[81] The result is a

75. 8 U.S.C. § 1229a(b)(4)(A) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings.").

76. Jennifer Stave et al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, VERA INST. OF JUST., 24 (2017), https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf [https://perma.cc/EVP7-LUQV].

77. *See* discussion *supra* notes 50–54 and accompanying text.

78. *See* discussion *supra* notes 58–59 and accompanying text.

79. *See* discussion *supra* notes 72–73 and accompanying text.

80. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163.

81. *See* Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214; Illegal

tangled patchwork of a statutory scheme that federal courts of appeal have described as "labyrinthian."[82] Immigration law is now generally recognized as second in complexity only to the law of the U.S. tax code.[83]

The result is a legal scheme that is enormously difficult to navigate for courts and litigants alike, which regularly spawns protracted legal battles that can span decades.[84] The unnecessary complexity and counterintuitive idiosyncrasy of the current system makes large-scale, efficient adjudication impossible. It exacerbates the enormous backlog in our current immigration system while simultaneously swamping federal courts with cases seeking review of questionable agency determinations.[85] Most importantly, while spending on interior immigration enforcement has grown astronomically in recent decades—far surpassing inflation and the growth of the federal budget as a whole—the immigration enforcement system has proven ineffectual at achieving its ultimate goal.[86] To be sure, the number of detentions and deportations

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Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009; Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135; REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

82. *See* Salazar-Gonzalez v. Lynch, 798 F.3d 917, 919 (9th Cir. 2015); Chi Thon Ngo v. INS, 192 F.3d 390, 394 n.3 (3d Cir. 1999); Sang Seup Shin v. INS, 750 F.2d 122, 130 (D.C. Cir. 1984); Corniel-Rodriguez v. INS, 532 F.2d 301, 304 (2d Cir. 1976).

83. Baltazar-Alcazar v. INS, 386 F.3d 940, 948 (9th Cir. 2004).

84. For example, the Supreme Court still is forced to regularly issue decisions to explain the basic operation of statutory features enacted decades ago. *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2110 (2018) (resolving a circuit split on when the clock stops counting a noncitizen's period of continuous presence in the United States under a deportation statute enacted in 1996); Barton v. Barr, 140 S. Ct. 1442, 1447 (2020) (clarifying a similar stop-time question as part of the same statutory scheme); Emily Beeken, *Supreme Court to Take up Immigration 'Stop-Time Rule' Case*, JURIST (June 8, 2020, 5:02 PM), https://www.jurist.org/news/2020/06/supreme-court-to-take-up-immigration-stop-time-rule-case/ [https://perma.cc/6RB9-575T] (pointing out that the Supreme Court granted certiorari in *Niz-Chavez v. Barr*, another case involving the same stop-time statute).

85. *See Immigration Court Backlog Tool*, *supra* note 9 (showing more than one million pending immigration cases); Miriam Jordan, *Wait Times for Citizenship Have Doubled in the Last Two Years*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/us/immigrant-citizenship-naturalization.html [https://perma.cc/PM98-USKK] (noting 750,000 pending citizenship applications); *see also* Katzmann, *supra* note 71, at 3 (discussing the "avalanche of immigration cases" in the Second Circuit).

86. In 2020, ICE's budget was $8.3 billion. FY 2021 BUDGET IN BRIEF, *supra* note 7. That is an increase of nearly 2300% since 1980, when the former INS's budget was $349 million. JUST. MGMT. DIV., U.S. DEP'T OF JUST., BUDGET TREND DATA: FROM 1975 THROUGH THE PRESIDENT'S 2003 REQUEST TO THE CONGRESS 106 (2002). Moreover, the rise in ICE spending is not simply a function of overall budget growth, as immigration enforcement spending has far outpaced the overgrowth of the federal budget over the same period. Between 1980 and 2019, the federal budget grew by 687%. *See* OFF. OF MGMT. & BUDGET, MAJOR SAVINGS AND REFORMS HISTORICAL TABLES: DONALD J. TRUMP 349–50 (2020), https://www.govinfo.gov/content/pkg/BUDGET-2021-TAB/pdf/BUDGET-2021-TAB.pdf [https://perma.cc/26WT-MEG7].

has soared in recent years,[87] but detentions and deportations are means not ends. Just as the impact of criminal legal systems turns on reductions in crime rates, not incarceration rates, we must judge the effectiveness of our immigration enforcement system on the ultimate measure that matters: compliance with immigration law.

Accordingly, a new immigration enforcement paradigm must be *humane*, insofar as it does not visit unnecessary or unduly harsh externalities on individuals or communities; *just*, insofar as people can, in practice, obtain the rights and enjoy the privileges the rules afford; and *effective*, insofar as they can be realistically and efficiently implemented to promote compliance with the law.

III. REFORMING THE MECHANICS OF ENFORCEMENT

In previous publications, I have suggested a new paradigm for the mechanics of an immigration enforcement system that does not rely on detention and mass deportation. Below is a brief overview of that previously articulated new enforcement paradigm and the four central pillars that underlie it. A full treatment of these proposals is set forth in my prior work.[88]

The first pillar is to dramatically reduce the scale of punitive enforcement. Similar to the enforcement approach successfully implemented by the Internal Revenue Service and the growing consensus regarding the enforcement of marijuana, sex work, and quality-of-life crimes, the current unprecedented scale of interior immigration enforcement cannot be justified.[89] The cost and collateral harms of high levels of punitive enforcement, the low deterrent value of heavy-handed enforcement, and the relatively minor societal injuries associated with noncompliance, all militate in favor of intentionally low levels of punitive enforcement.[90] The first step in constructing a new enforcement paradigm is to dramatically reduce the unprecedented billions of dollars currently allocated to ICE and the resultant scale of punitive enforcement efforts.[91]

87. *See* discussion *supra* notes 28–29, 48–49, and accompanying text.

88. *See* Markowitz, *supra* note 10, at 96–98; Markowitz, *supra* note 14, at 137–47.

89. Markowitz, *supra* note 10, at 133–36.

90. *Id.*; *see also, e.g.*, Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315, 320 (2019) (explaining why collateral consequences are counterproductive); Rebecca Neusteter et al., *Emerging Issues in American Policing, Vol. 3, Special Edition: Alternatives to Enforcement*, VERA INST. JUST. (2018), https://www.vera.org/publications/emerging-issues-in-american-policing-digest/volume-3/digest-3 [https://perma.cc/9DDG-KBGT] (explaining that nonpunitive enforcement alternatives can be equally, if not more, effective than punitive enforcement).

91. The initial steps taken by President Biden in the first days of his administration signal a promising recognition of the need to reduce the scale of interior immigration enforcement. *See* Memorandum from David Pekoske, Acting Sec'y, U.S. Dep't of Homeland Sec., to Troy Miller,

Second, in place of the current focus on detention and deportation we must implement a mandatory preference for compliance assistance through cooperative enforcement. Cooperative enforcement is the strategy increasingly favored by administrative agencies outside the immigration context where, instead of punishing noncompliance, agencies work to assist entities to come into compliance through education, outreach, and flexible implementation.[92] In the immigration arena, 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.[93] For most of its existence, ICE has prioritized deportation, generally initiating proceedings against individuals before providing them with opportunities to apply for the affirmative legalization mechanisms that Congress has created.[94] Indeed, an astounding 37% of the 1.3 million cases currently pending in immigration court involve individuals who could qualify, under current law, for legal status.[95] It makes little sense to waste limited enforcement resources by having immigration prosecutors and judges spend years trying these cases in court, when trained adjudicators at another agency, U.S. Citizenship and Immigration Services, can handle them more efficiently through paper applications. Handling such cases through affirmative applications instead of through deportation proceedings would also save countless families from years of debilitating anxiety and uncertainty, as family separation looms over them while their loved ones' cases inch through the immigration courts. Enforcing the law also means giving people a fair opportunity to comply with the law. Accordingly, the second pillar requires that individuals must be afforded an opportunity to pursue any

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Senior Off. Performing the Duties of the Comm'r, U.S. Customs & Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Tracey Renaud, Senior Off. Performing the Duties of the Dir., U.S. Citizenship & Immigr. Servs. (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/R8FN-WQMJ]. Specifically, the interim enforcement priorities enacted on day one of the new administration should dramatically reduce interior enforcement arrests by ICE. *Id.*

92. *See* Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 21–27 (2017); Markowitz, *supra* note 10, at 126–28.

93. Tom K. Wong et al., *Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey*, 2 J. ON MIGRATION & HUM. SEC. 287, 289 (2014) (estimating that 14.3% of undocumented individuals are eligible for a pathway to lawful permanent residency); *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., USCIS POLICY MANUAL 306 (June 17, 2021), https://www.aila.org/File/Related/19060633bi.pdf [https://perma.cc/KV39-CY67] (listing categories of adjustment applicants to which bars of adjustment do not apply).

94. *See* Markowitz, *supra* note 10, at 128, 137.

95. This original analysis of publicly available EOIR Case Data, available at https://www.justice.gov/eoir, was conducted by David Hausman, a Postdoctoral Fellow RegLab and Immigration Policy Lab at the Lane Center for the American West at Stanford University, and is on file with the author [hereinafter "Hausman data"].

available affirmative pathways to status before punitive enforcement proceedings can be initiated.[96]

In practice, this would mean that before the initiation of such 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 a fixed reasonable period of time.[97] Government-funded legal services would be available to assist individuals in screening for eligibility and preparing such applications.[98] Punitive enforcement proceedings could only be initiated if the affirmative application process resolves negatively or if no application is filed within the proscribed period. This would restore the historic norm of immigration enforcement proceedings being initiated with notices rather than handcuffs.[99]

The third pillar requires the creation of a scalable system of proportionate penalties. Inevitably, some individuals will not have an affirmative pathway to lawful status or will be unsuccessful in their applications and, notwithstanding the low level of punitive enforcement described in pillar one, the government will deem punitive enforcement necessary against some.[100] One core defect in the current system, however, is that there is only a single penalty in our current immigration toolbox—deportation—and that penalty is grossly disproportionate to the

96. Markowitz, *supra* note 10, at 136–39. Notably, there are early indications from the Biden Administration that it understands the value of increasing reliance on cooperative enforcement strategies. Memorandum from John D. Trasviña, *supra* note 37, at 9 ("When a noncitizen has a viable avenue available to regularize their immigration status outside of removal proceedings, whether through temporary or permanent relief, it generally will be appropriate to move to dismiss such proceedings without prejudice so that the noncitizen can pursue that relief before the appropriate adjudicatory body."); Memorandum from Tae D. Johnson, *supra* note 37, at 5 (noting importance of prosecutorial discretion for people who "have pending applications for immigration relief and are prima facie eligible for such relief").

97. Indeed, there is ample precedent for diverting cases out of immigration court in order to allow people to pursue affirmative pathways to status. *See The Life and Death of Administrative Closure* app. tbl.1, TRAC IMMIGR. (Sept. 10, 2020), https://trac.syr.edu/immigration/reports/623/ [https://perma.cc/HA8E-45F2].

98. *See, e.g.*, Stave et al., *supra* note 76, at 31–47 (discussing the importance of providing counsel to individuals facing deportation); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (finding that immigrants with legal counsel were more successful in removal proceedings than those without representation); Dara Lind, *A New York Courtroom Gave Every Detained Immigrant a Lawyer. The Results Were Staggering*, VOX (Nov. 9, 2017, 9:10 AM), https://www.vox.com/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer [https://perma.cc/BY52-6P4X?type=image] (reporting that immigrants have much greater success rates in immigration proceedings when they have access to assistance from legal counsel).

99. *See* discussion *supra* note 47 and accompanying text.

100. Markowitz, *supra* note 10, at 97–98, 139.

overwhelming majority of immigration offenses.[101] A binary choice between no penalty (which is often not even an available option for an immigration judge) and the harshest possible penalty is not the way an effective enforcement system works. Rather, that binary choice makes our immigration system function like a medieval criminal legal system, where the only choices were no penalty or the death penalty. 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. Compliance with such penalties would then create pathways to permanent status. This pillar is developed further *infra* at Part V.B.

Finally, the fourth pillar dictates that a humane and just enforcement system does not subject people to unnecessarily severe deprivations of liberty. This requires, first and foremost, the elimination of the use of preventative immigration detention and the vast detention system that has arisen in recent decades.[102] Detention is currently used on a massive and unprecedented scale, purportedly to ensure people's appearance in immigration court and ultimately, for some, compliance with deportation orders.[103] However, virtually every other federal agency in the administrative state has found a way to enforce its civil administrative scheme without putting people in cages. Indeed, for the majority of U.S. history, detention was not used in this way in the immigration system either.[104] The cost and suffering attendant to such detention cannot be justified—particularly when other less costly and less brutal mechanisms are available to achieve the same goals. Recent studies, other nations'

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101. *See* Michael Wishnie, *Proportionality in Immigration Law: Does the Punishment Fit the Crime in Immigration Court?*, IMMIGR. POL'Y CTR. 2–3 (Apr. 2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/wishnie_-_proportionality_in_immigration_041112.pdf [https://perma.cc/3AP8-F6CK].

102. *See* discussion *supra* notes 48–49 and accompanying text. 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 related appeals are ongoing. This is what the Article means by preventative detention: they are detained to prevent them from some future hypothetical resistance to deportation. *See* Markowitz, *supra* note 10, at 140–41. In contrast, in those rare instances where (1) 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. *See id.* at 144.

103. *See* Markowitz, *supra* note 10, at 140–41; *see also* Matter of R-A-V-P-, 27 I. & N. Dec. 803, 804 (B.I.A. 2020) (explaining that the "setting of bond is designed to ensure an alien's presence at proceedings" (quoting Matter of Urena, 25 I. & N. Dec. 140, 141 (B.I.A. 2009))).

104. *See* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 6–7 (2004); MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX 1–4 (2002); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 248 (2017); Ghosh, *supra* note 46.

immigration systems, and models from the criminal legal system all demonstrate that appearance in court and compliance with deportation orders can be largely achieved without detention through the use of appointed counsel, incentive systems, and supportive reentry services.[105]

IV. WHO SHOULD NEVER BE SUBJECT TO DEPORTATION?

The mechanics of a humane, just, and effective immigration enforcement system described above are, however, distinct from the substantive rules governing who and how we punish for violations of immigration laws. In constructing those substantive rules, the first inquiry involves defining the reach of that system. Who should be subject to potential punishment for immigration violations, and who should be categorically exempt from such punishment, including deportation?

There is, of course, already a category of people who are never subject to deportation: U.S. citizens.[106] This includes not just individuals who were born in the United States, but also millions of U.S. citizens who were born abroad as citizens of other countries, immigrated to the United States, gained lawful status, and then went through a naturalization process whereby the United States admitted them as permanent members

105. *See* Markowitz, *supra* note 10, at 141–43; Markowitz, *supra* note 14, at 145–47; *see also FOIA Disclosures on In Absentia Removal Numbers Based on Legal Representation*, CATH. LEGAL IMMIGR. NETWORK (Mar. 27, 2020), https://cliniclegal.org/resources/freedom-information-act/foia-disclosures-absentia-removal-numbers-based-legal [https://perma.cc/D3ZK-RPGH] (documenting that in FY2020, the overwhelming majority, 93%, of absentia removal orders—orders issued when someone fails to appear in court as required—were issued against unrepresented individuals); FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/alternatives-to-detention#:~:text=Alternative%20Accompaniment%20Programs%20are%20community,to%20remain%20living%20with%20family [https://perma.cc/8DYA-ETDJ]; David Secor et al., *A Better Way: Community-Based Programming as an Alternative to Immigrant Incarceration*, NAT'L IMMIGRANT JUST. CTR. 6–9 (Apr. 2019), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2019-04/A-Better-Way-report-April2019-FINAL-full.pdf [https://perma.cc/3MTQ-NJ7S]; Robyn Sampson et al., *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, INT'L DET. COAL. 1 (2015), https://idcoalition.org/wp-content/uploads/2015/10/There-Are-Alternatives-2015.pdf [https://perma.cc/DK9T-PENW]; *The Real Alternatives to Detention*, AM. IMMIGR. LAWS. ASS'N 1 (June 18, 2019), https://www.aila.org/infonet/the-real-alternatives-to-detention [https://perma.cc/HSX7-GCLA]; *Family Placement Alternatives: Promoting Compliance with Compassion and Stability Through Case Management Services*, LUTHERAN IMMIGR. & REFUGEE SERV. 8 (2016), http://lirs.org/wp-content/uploads/2016/04/LIRS_FamilyPlacementAlternativesFinalReport.pdf [https://perma.cc/WK36-GBQK]; *The Family Case Management Program: Why Case Management Can and Must Be Part of the U.S. Approach to Immigration*, WOMEN'S REFUGEE COMM'N 6 (June 13, 2019), https://www.womensrefugeecommission.org/research-resources/the-family-case-management-program-why-case-management-can-and-must-be-part-of-the-us-approach-to-immigration/ [https://perma.cc/6UQG-J3L8].

106. *See* 8 U.S.C. §§ 1101, 1182, 1227, 1229 (defining "alien" as "any person not a citizen or national of the United States" and listing classes of inadmissible and removable "aliens").

of our national community.[107] It is this formal determination and process—naturalization—that honors the legal principle that sovereign nations can define the boundaries of their own national communities. By and large, naturalized U.S. citizens have been a defining feature of the success story of the American economy and political community.[108] But, of course, not all naturalized citizens end up being productive members of society. As with all groups, some naturalized citizens start businesses that exploit workers, some contribute to racism, sexism, or homophobia in society, some commit serious crimes, some fail to pay taxes, and so on. All of these can be important factors in the decision whether to naturalize an individual. However, after naturalization, an individual's bad acts or character generally cannot be used to deprive them of their right to remain in the United States.[109]

This does not have to be the rule. We could have a legal scheme that strips individuals of their citizenship based on enumerated bad acts and subjects them to deportation. But there are good reasons not to. Once someone has been given the indefinite permission to make the United

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107. There were 761,901 immigrants naturalized in 2018. *See* JOHN TEKE, U.S. DEP'T OF HOMELAND SEC., U.S. NATURALIZATIONS: 2018, at 1 (2019), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/naturalizations_2018.pdf [https://perma.cc/QR9D-8GZ3]; *see also Naturalization Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 18, 2020), https://www.uscis.gov/news/news-releases/naturalization-fact-sheet [https://perma.cc/L4F5-MZXA] (noting that more than 8 million immigrants became naturalized U.S. citizens over the past decade). According to the Pew Research Center, 23 million naturalized immigrants were eligible to vote in the 2020 election—roughly 10% of the U.S. electorate. *See* Abby Budiman et al., *Naturalized Citizens Make Up Record One-in-Ten U.S. Eligible Voters in 2020*, PEW RSCH. CTR. (Feb. 26, 2020), https://www.pewresearch.org/hispanic/2020/02/26/naturalized-citizens-make-up-record-one-in-ten-u-s-eligible-voters-in-2020/ [https://perma.cc/4K7A-4MLP].

108. *See, e.g.*, María E. Enchautegui & Linda Giannarelli, *The Economic Impact of Naturalization on Immigrants and Cities*, URB. INST., 2 (2015), https://www.urban.org/sites/default/files/publication/76241/2000549-The-Economic-Impact-of-Naturalization-on-Immigrants-and-Cities.pdf [https://perma.cc/87T9-A9Q3] (studying the impact of naturalization on twenty-one U.S. cities, and showing increase in employment rate, homeownership, and tax revenue); Manuel Pastor & Justin Scoggins, *Citizen Gain: The Economic Benefits of Naturalization for Immigrants and the Economy*, CTR. FOR THE STUDY OF IMMIGR. INTEGRATION 20 (2012), https://www.immigrationresearch.org/system/files/citizen_gain.pdf (estimating "an overall gain . . . between $37 billion and $52 billion [in GDP] over [a] 10 year period for the most aggressive naturalization program" while acknowledging that "[t]his number is likely a severe underestimate of the overall impact"); Madeleine Sumption & Sarah Flamm, *The Economic Value of Citizenship for Immigrants in the United States*, MIGRATION POL'Y INST. 11–12 (2012), https://www.migrationpolicy.org/research/economic-value-citizenship [https://perma.cc/W2P5-85WG] (describing the benefits of naturalization as a "citizenship premium").

109. *See* 8 U.S.C. § 1451(a) (laying out the very limited grounds for revoking naturalization); USCIS POLICY MANUAL, *supra* note 93, at 894 (listing the reasons a person's naturalization may be revoked); *see also* Maslenjak v. United States, 137 S. Ct. 1918, 1930 (2017) ("We have never read a statute to strip citizenship from someone who met the legal criteria for acquiring it. We will not start now." (citations omitted)).

States their home, they begin to organize their life around that reality. They lay down roots, build families, invest in careers and businesses, and abandon connections that may have allowed them to survive and thrive elsewhere. The certainty that citizenship provides catalyzes productive personal, familial, and economic investment in a way that inures to the benefit of our 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. So, we draw a bright line. Once you have been naturalized, you can still suffer serious consequences for misdeeds, through, *inter alia*, the criminal legal system—but you cannot be deported.

But why draw the line at naturalized citizens? There is another category of immigrants that likewise go through a thorough and rigorous formal vetting process, obtain formal permission to make the United States their permanent home, and lay down roots in ways that benefit society and that make deportation similarly brutal. Lawful permanent resident (LPR) status is the steppingstone to citizenship. Commonly referred to as receiving a "green card," becoming an LPR entitles immigrants to live and work in the United States indefinitely.[110] In order to become an LPR, an individual must have a legal pathway to such status prescribed by Congress.[111] They must go through an application process where they bear the burden to prove both their eligibility and that they warrant a favorable exercise of discretion.[112] In determining whether to grant LPR status as a matter of discretion, the adjudicator considers any positive or negative factors relevant to the applicant's case, including but not limited to: immigration status and history; family unity; length of residence in the United States; business and employment; community standing; and moral character.[113] Adjudicators interview applicants and can request and review relevant records.[114] Ultimately, LPR status is only granted where on balance, "a favorable exercise of discretion is warranted" based on "the evidence of positive and negative factors."[115] Accordingly, the LPR application process, like the naturalization process, affords the government an opportunity to thoroughly vet individuals and to make informed and deliberate choices about who to admit as permanent members of our national community.

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110. *See* 8 U.S.C. § 1101(a)(20), (a)(31).

111. *See generally* 8 U.S.C. § 1255 (explaining the steps to the LPR process and the role of the Attorney General); 8 C.F.R. § 210.5 (outlining the process for adjustment to lawful permanent residence).

112. USCIS POLICY MANUAL, *supra* note 93, at 264–65. 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. *See id.* at 264.

113. *Id.* at 87.

114. *See id.* at 265.

115. *Id.* at 87.

For most of U.S. history, a grant of permanent residence (or its precursors) was, by and large, functionally a final decision that individuals could rely upon to make a permanent life in this nation.[116] But in recent decades that has changed. LPRs can be, and are now, regularly deported in significant numbers for offenses as minor as simple possession of marijuana, petty shoplifting, turnstile jumping, and unauthorized street vending, even if they never serve a day in jail.[117] Deportation is now functionally used as a second punishment for criminal activity—a punishment, in most cases, far more severe than what was or could be imposed in the original criminal proceedings.[118] Permanent residents with such convictions remain at risk of deportation for their entire lives, even if their only transgressions occurred decades ago in their youth, and even if the offenses were not deportation triggers at the time

116. Until the early twentieth century, lawful immigrants were largely functionally exempt from deportation. The Alien and Sedition Acts of 1798 technically authorized the President to deport: (1) noncitizens who were nationals of countries at war with the United States; and (2) noncitizens who the President designated as "dangerous to the peace and safety of the United States," Act of July 6, 1798, ch. 66, 1 Stat. 577, 577; Act of June 25, 1798, ch. 58, 1 Stat. 570, 571. However, Congress did not expand the grounds for deportation to those who entered lawfully until 1907. *See* Act of Feb. 20, 1907, ch. 1134, § 1, 34 Stat. 898, 898; *see also* Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLO. L. REV. 309, 313–17 (1956) (recounting the evolving history of deportable offenses, as well as the new grounds created as part of the Immigration and Nationality Act of 1952). Throughout the greater part of the twentieth century, removal of lawful permanent residents remained an unusual occurrence. "About ninety-two percent of the 80,251 persons deported [between 1952 and 1956] were deported because they entered illegally or violated the conditions of a temporary stay." *Id.* at 323. However, this began to change during the final decades of the twentieth century as legal permanent residents became more vulnerable to deportation. In particular, the passage of AEDPA and IIRIRA in 1996, which increased the list of deportable offenses to include a large category of minor criminal offenses, while limiting the available relief, subjected many more LPRs to deportation. *See* Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 357 (2005) (noting that "from 1995 to 2002, the number of legal permanent residents removed based on criminal convictions increased by about forty-six percent"); *see also* Maritza I. Reyes, Note, *The Latino Lawful Permanent Resident Removal Cases: A Case Study of Nicaragua and a Call for Fairness and Responsibility in the Administration of U.S. Immigration Law*, 11 HARV. LATINO L. REV. 279, 286–87 (2008); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936 (2000).

117. *See* 8 U.S.C. § 1227(a)(2); *see also* Wilber A. Barillas, Note, *Collateral Damage: Drug Enforcement & Its Impact on the Deportation of Legal Permanent Residents*, 34 B.C. J.L. & SOC. JUST. 1, 1 (2014); Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 46 (2011); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 337–38 (2008).

118. *See* Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

of their convictions.[119] As a result, tens of thousands of LPRs, who thought the United States was their permanent home, have been deported in recent years.[120]

One critical component of a humane, just, and effective immigration enforcement system would be to reverse this trend and make permanent residence truly permanent by exempting LPRs, like naturalized citizens, from deportation. LPRs, as a group, like many other immigrants, suffer intolerably from deportation.[121] But exempting LPRs, unlike other immigrants, can be achieved without undermining the government's power to define the boundaries of the permanent national community. As the Supreme Court has recognized, granting LPRs special protections against deportation "does not leave an unprotected spot in the Nation's armor" because before "admission to permanent residence, [LPRs are] required to satisfy the Attorney General [or the Secretary of Homeland Security] and Congress of [their] suitability for that status."[122] Accordingly, a system that leaves LPRs at risk of deportation need not, and should not, be tolerated.

Exempting LPRs from deportation would not undermine the value of citizenship or the distinction between citizens and LPRs. LPRs already enjoy some unique opportunities—like serving in the U.S. military, requesting immigrant visas for certain family members, and applying for certain benefits like Social Security and Medicare—and have some unique obligations—like registering for the draft—that otherwise only

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119. *See* Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U. L. REV. 531, 542 (2017) (explaining that because "there is no general statute of limitations governing deportations of individuals," noncitizens "remain under an indefinite threat of deportation, even decades after their commission of a deportable offense").

120. *See Immigration and Customs Enforcement Removals*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/remove/ [https://perma.cc/6AQZ-R3AY] (last updated June 2020) (choose "All" from "State Departed From at Deportation" and "City Departed From at Deportation" drop down menus, then choose "Status at Latest Entry into U.S." from the third drop down menu; then choose sort "by fiscal year" under "Graph Time Scale") (documenting over 48,000 removals for LPRs between FY 2003–2020).

121. *See, e.g.*, *The Ones They Leave Behind: Deportation of Lawful Permanent Residents Harm U.S. Citizen Children*, AM. IMMIGR. COUNCIL (2010), https://www.americanimmigrationcouncil.org/research/ones-they-leave-behind-deportation-lawful-permanent-residents-harm-us-citizen-children [https://perma.cc/3ZL7-K996] (reporting that being a lawful permanent resident does not protect against deportation for minor crimes).

122. Kwong Hai Chew v. Colding, 344 U.S. 590, 602 (1953); *see also* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); Fong Yue Ting v. United States, 149 U.S. 698, 734 (1893) (Brewer, J., dissenting) (arguing "[t]hat those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in it, has long been recognized by the law of nations").

U.S. citizens enjoy and have.[123] 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,[124] to serve in public office,[125] to serve on juries,[126] to hold certain professions,[127] to be eligible for certain public benefits,[128] or to enjoy the same level of constitutional rights as U.S. citizens.[129] 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 legal systems that deter and punish citizens.

Exempting LPRs from deportation would achieve a variety of goals.[130] It would mitigate the brutality of the current enforcement scheme by exempting the category of immigrants that, as a group, are

123. *Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 15, 2015), https://www.uscis.gov/green-card/after-we-grant-your-green-card/rights-and-responsibilities-a-green-card-holder-permanent-resident [https://perma.cc/J7WU-JAHY].

124. *See, e.g.*, CAL. CONST. art. II, § 2 (requiring United States citizenship to be eligible to vote); N.Y. ELEC. LAW § 5-102 (McKinney 2021) (same); TEX. CONST. art. VI, § 2 (same). In fact, LPRs who vote in violation of any federal, state, or local constitutional provision, statute, ordinance, or regulation are deportable. 8 U.S.C. § 1227(a)(6).

125. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 2 (citizenship requirement for Representatives); *id.* § 3, cl. 3 (citizenship requirement for Senators); *id.* art. II, § 1, cl. 5 (citizenship requirement for President); *id.* amend. XII (citizenship requirement for Vice President); *see also, e.g.*, N.J. CONST. art. IV, § 1, cl. 2 (citizenship requirement for state legislators).

126. *See, e.g.*, 28 U.S.C. § 1865(b) (citizenship requirement to serve on a jury); CAL. CIV. PROC. CODE § 203(a)(1) (West 2021) (same); FLA. STAT. ANN. § 40.01 (2021) (same); TEX. GOV'T CODE ANN. § 62.113(a) (West 2021) (same).

127. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 447 (1982) (upholding state law excluding aliens from becoming probation officers); Ambach v. Norwick, 441 U.S. 68, 80–81 (1979) (upholding statute requiring teachers in New York to be citizens); Foley v. Connelie, 435 U.S. 291, 300 (1978) (allowing states to require police officers to be citizens); Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (stating that aliens may be refused public employment on the basis of their noncitizenship in certain circumstances). *But see* Bernal v. Fainter, 467 U.S. 216, 227–28 (1984) (holding that Texas statute prohibiting all noncitizens from being notaries public was overly broad and did not withstand strict scrutiny); Toll v. Moreno, 458 U.S. 1, 17 (1982) (holding a state university's policy categorically denying in-state status to domiciled nonimmigrant G-4 aliens and their dependents unconstitutional).

128. *See, e.g.*, Andrew Hammond, *The Immigration-Welfare Nexus in A New Era?*, 22 LEWIS & CLARK L. REV. 501, 509 (2018) (explaining how the Personal Responsibility and Work Opportunity Reconciliation Act "created a citizen/noncitizen distinction not just for TANF, but for Medicaid, SNAP, and SSI as well").

129. *See, e.g.*, Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 810 (2013) (discussing alienage in the context of the Fourth, Fifth, Sixth, and Fourteenth Amendments); Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 435–36 (2013) (arguing that the Equal Protection Clause does not provide reliable protection for noncitizens).

130. As with naturalization, there may be very limited circumstances where an individual who obtained LPR status through material fraud could lose that status through federal court proceedings. *See supra* note 109.

most likely to have the deepest ties and roots laid in the United States. It would restore the historic norm that admission to permanent residence is just that—permanent—and thereby encourage productive investments in families, communities, careers, and businesses. It would promote efficiency by addressing the current unworkable reality, where tens of millions of immigrants potentially face deportation, and thereby allow the system to focus its limited resources.[131] And exempting LPRs from deportation would achieve all of this while still honoring the power of the government to thoroughly vet individuals and control admission to the national community.

V. PUNISHING IMMIGRATION VIOLATIONS: RETHINKING THE SUBSTANTIVE RULES

Two decades of ICE's enforcement-only approach has demonstrated that detaining and deporting people, even on unprecedented scale and at unprecedented expense, has failed to increase compliance with immigration. Moreover, this strategy has visited untold human suffering on communities across the nation. That is why, as discussed in Part III, the current extraordinary level of punitive enforcement can no longer be justified, and we must instead invest in cooperative enforcement strategies aimed at helping individuals to come into and maintain compliance with immigration law. However, as with any enforcement system, there will inevitably be some category of individuals where enforcement is deemed necessary and no affirmative pathway to lawful status exists.

The substantive rules that currently operate against that category of individuals, as discussed in Part I, are so convoluted and harsh that enforcement proceedings are both incredibly cumbersome and inefficient, and also incapable of delivering consistent just and humane outcomes. Accordingly, we must rethink and redefine the substantive rules that should govern such proceedings. The proposal below suggests a significantly simplified substantive enforcement scheme with increased individualized discretion. It is a system designed to operate with greater efficiency to help increase overall compliance with immigration law, to ensure that individuals can reliably access the rights to which they are entitled, and to mitigate the brutality of our current enforcement scheme.

The substantive scheme proposed below is a bifurcated system that draws on the existing divide between the removal and relief phases of the current enforcement scheme, the guilt and sentencing phases of criminal proceedings, and in particular, on the bifurcated model used in death penalty proceedings. In death penalty cases, because of the gravity of the punishment, the Supreme Court has required an initial guilt phase where

131. *See* Cox & Rodríguez, *supra* note 30, at 511.

a case can only be "death qualified" if certain limited statutorily enumerated facts are present.[132] However, the presence of such facts does not result in a death sentence. Rather, it triggers a second phase of litigation in which any mitigating factors can be presented and considered, and adjudicators have broad and unbounded discretion to determine that the harshest penalty authorized—death—is not warranted.[133] This Article does not mean to suggest that the death penalty is a just system (it is not), or that deportation is equivalent to death (it is not). But the Supreme Court has recognized that deportation is akin to the loss of "all that makes life worth living," and can be harsher than "any potential jail sentence."[134] The unique gravity of deportation thus justifies similar protections, such that it cannot be imposed absent a violation of clear, bright line rules and where unbounded discretion is present to consider all forms of mitigation that may make the uniquely harsh punishment unjustified.

A. *Phase One: Simplifying Deportability*

Phase one of this system, akin to the current removability determination in deportation proceedings, would be to greatly simplify the scheme 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.[135] These two charges already subsume the overwhelming majority of

132. *See* Gregg v. Georgia, 428 U.S. 153, 191–92 (1976) (plurality opinion) ("When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*." (citing Furman v. Georgia, 408 U.S. 238 (1972))); *see also* Douglas Colby, Note, *Death Qualification and the Right to Trial by Jury: An Originalist Assessment*, 43 HARV. J.L. & PUB. POL'Y 815, 816 (2020) (describing the death qualification standard for capital jurors).

133. *See* Kansas v. Marsh, 548 U.S. 163, 174–75 (2006) (summarizing prior Supreme Court jurisprudence and explaining that "[i]n aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence").

134. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); Padilla v. Kentucky, 559 U.S. 356, 368 (2009) (quoting INS v. St. Cyr, 533 U.S. 289, 322 (2001)); *see also* United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630–31 (2d Cir. 1926) (describing deportation as "a dreadful punishment" and as "cruel and barbarous").

135. Other violations of reasonable conditions of entry could likewise trigger enforcement under this charge. However, as discussed *infra* at notes 151–60 and accompanying text, criminal convictions alone could not support such a charge.

deportation cases.[136] Retaining these two charges also respects the controlling principle that a sovereign has the right to regulate entry into its territory.[137]

Critically, 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. Statutes of limitations are a foundational concept in American law and its precursors.[138] The primary consideration underlying such limitations in proceedings initiated by the government against an individual "is undoubtedly one of fairness to the defendant" because "[t]here comes a time when [an individual] ought to be secure in his reasonable expectation that the slate has been wiped clean . . . ."[139] A person should "not be[] compelled to put his freedom . . . at the hazard of what is likely to be parol evidence of imperfectly remembered events" when the passage of time has reduced "the social utility of punishing [offenses] long past."[140] In addition, statutes of limitation protect "the effectiveness of the courts, and [reflect] a desire to relieve them of the burden of adjudicating inconsequential or tenuous claims."[141] Finally, statutes of limitation benefit society by providing a certainty to long term residents, which in turn incentivizes productive investments in families and communities.[142]

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136. *See* discussion *supra* note 36.

137. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

138. Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177–79 (1950); *see also* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 454 (1997) ("[D]irect antecedents can be traced back for centuries, and some sorts of time limits have been enforced for thousands of years." (footnote omitted)).

139. Note, *supra* note 138, at 1185; *see also* Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time."); Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 981 (1988) ("[S]tatutes of limitations also serve a substantive function; after a specified period has passed without a lawsuit being filed, an individual is entitled to the psychological repose and comfort of knowing that she no longer has the threat of a legal action looming over her.").

140. Note, *supra* note 138, at 1186.

141. *Id*. at 1185 (footnote omitted).

142.

> Living a life of hiding and legal uncertainty disincentivizes undocumented immigrants from investing in their communities of residence as they may be compelled to move more frequently in order to avoid detection, or out of the fear that, if detected, they will lose their investments. The result: bad outcomes not

While deportation grounds are currently unbounded by time,[143] there is ample precedent for statutes of limitation in immigration law dating back as far as the Immigration Act in 1891.[144] Registry—a mechanism whereby individuals can gain lawful status after some period of residing in the United States, regardless of the legality of their entry or residence—is the concept most commonly analogized to a statute of limitations in immigration law.[145] However, while the original registry provision granted status to individuals who had resided in the United States for approximately eight years, the current provision has become all but meaningless since it only grants status to individuals who have resided in the United States since 1972.[146]

There is no science to determining the exact appropriate length of a statute of limitations, however the default statute of limitations for civil offenses under federal law is five years.[147] Accordingly, five years is an appropriate benchmark for civil immigration enforcement proceedings.[148] This change alone would significantly alleviate the burden on our nation's immigration courts, since approximately one in five people in deportation proceedings have lived in the United States for more than five years before the initiation of the proceedings.[149]

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only for the immigrants, but also for society.

Andrew Tae-Hyun Kim, *Penalizing Presence*, 88 GEO. WASH. L. REV. 76, 117 (2020) (footnote omitted).

143. *See* Kim, *supra* note 119, at 534.

144. *See* Patricia S. Mann, *Contingencies of Prosecutorial and Immigrant Agency*, 46 REV. JURIDICA U. INTER. P.R. 777, 778 n.2 (2012).

145. *Id*.; Monica Gomez, Note, *Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States*, 22 GEO. IMMIGR. L.J. 105, 119 (2007).

146. 8 U.S.C. § 1259; *see also* Gomez, *supra* note 145, at 119 (listing entry into the United States prior to January 1, 1972 as one of the eligibility requirements for registry).

147. 28 U.S.C. § 2462 (imposing a five-year statute of limitations on federal civil proceedings "[e]xcept as otherwise provided by Act of Congress"). While one court has held that this general statute of limitations does not apply to civil removal charges, it remains an open question whether this statute, as properly interpreted, should reach such proceedings. *See* Restrepo v. Att'y Gen. of U.S., 617 F.3d 787, 801 (3d Cir. 2010).

148. Indeed, five years is a common statute of limitations even for serious criminal charges. *See* 18 U.S.C. § 3282(a) (imposing a five-year statute of limitations on noncapital federal criminal proceedings "[e]xcept as otherwise expressly provided by law"); WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 18.5(a) (4th ed. 2019) ("For felonies the times usually range between three and six years; for misdemeanors, they are ordinarily somewhere between one and three years.").

149. *See* Stave data, *supra* note 36. 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

The charges that would no longer be bases for enforcement action include, for example, some of the minute technical violations that are rarely invoked—like failure to submit an address change—and charges related to errors made by immigration officials through no fault of the individual—like the charge that an individual was "inadmissible at the time of admission."[150] Most notably, charges related to criminal convictions would be eliminated.

The elimination of criminal removal grounds will be counterintuitive to some, as criminality is to many the paradigmatic marker of social undesirability. However, using criminal convictions as a basis for removing noncitizens living in the United States was not a significant feature of immigration enforcement for the majority of U.S. history.[151] Deportation was deemed a civil, not criminal, penalty at the outset of federal immigration control.[152] Entanglement with criminal legal systems has only become a central feature of federal immigration enforcement in the modern era, most notably accelerated by legislative reforms enacted in 1996, and has served to undermine the effectiveness of both immigration enforcement and crime fighting.[153]

The use, or misuse, of local police encounters and state convictions for immigration purposes has stunted the effectiveness of state criminal legal systems in at least two ways. First, as state criminal legal systems increasingly became the gateway to immigration detention and deportation, immigrant communities became increasingly afraid and unwilling to cooperate with the police, thereby undermining public safety and police departments' core crime fighting mission.[154] Second, as minor

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operation of law mechanisms have precedent in analogous situations both in immigration law and elsewhere. *See, e.g.*, 8 U.S.C. § 1431 (providing for certain children of U.S. citizens to "automatically become[] citizen[s] of the United States").

150. 8 U.S.C. § 1227(a)(1)(H), (a)(3)(A).

151. *See* Markowitz, *supra* note 10, at 110; *see also supra* note 116.

152. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Markowitz, *supra* note 117, at 289.

153. *See* Morawetz, *supra* note 116, at 1939; Markowitz, *supra* note 10, at 107–16.

154. *See* IACP Statement, *supra* note 40; Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017, 1:00 AM), https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/ [https://perma.cc/FML9-EMYY] ("[O]n average, 35.5 fewer crimes [are] committed per 10,000 people in sanctuary counties compared to nonsanctuary counties."); *see also* Laura Muñoz Lopez, *How 287(g) Agreements Harm Public Safety*, CTR. FOR AM. PROGRESS (May 8, 2018, 9:01 AM), https://www.americanprogress.org/issues/immigration/news/2018/05/08/450439/287g-agreements-harm-public-safety/ [https://perma.cc/T7ZY-BHRX] (finding 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"); Michael J. Wishnie, *State and Local Police Enforcement of Immigration*

convictions—some based on offenses that are not even considered crimes by state officials, others that were vacated after a showing of rehabilitation, and many that involved no jail sentence at all—became triggers for the deportation of longstanding members of local communities, some officials began searching for ways to avoid the disproportionate double-punishment of deportation. Accordingly, state criminal legal systems are increasingly crafting their state laws to mitigate these effects and to disentangle themselves from federal immigration enforcement.[155] When state criminal laws need to be crafted to avoid misuse by federal immigration authorities, rather than to maximize the effectiveness of those laws for their intended purpose, the systems are undermined and the lack of uniformity across jurisdictions is exacerbated.

For the immigration enforcement system, the novel entanglement with criminal legal systems has caused different problems. First, by utilizing state criminal convictions as deportation triggers, the immigration system has imported the defects and racial disparities of the criminal legal systems into deportation proceedings.[156] These defects include the political dynamics that have imposed increasingly harsh and mandatory

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Laws, 6 U. PA. J. CONST. L. 1084, 1095 (2004) (stating that "conscription of state and local police as immigration agents threatens severe damage to the social fabric of communities across the nation").

155. *See, e.g.*, CAL. GOV'T CODE §§ 7282–7285.3 (West 2020) (acknowledging the constitutional concerns raised when state and local law enforcement participates in federal immigration enforcement programs); WASH. REV. CODE ANN. § 10.93.160 (West 2021) (restricting local law enforcement's ability to work in tandem with federal immigration authorities); N.Y. PENAL LAW § 70.15(1), (3) (McKinney 2020) (stating that a sentence for imprisonment for certain misdemeanors is "definite"); PETER MARKOWITZ ET AL., IMMIGRANT DEF. PROJECT, "ONE DAY TO PROTECT NEW YORKERS" LEGISLATION PRACTICE ADVISORY 3 (Apr. 29, 2019), https://www.immigrantdefenseproject.org/wp-content/uploads/One-Day-to-Protect-New-Yorkers-364.pdf [https://perma.cc/WVT8-TE4S] (explaining that N.Y. PENAL LAW § 70.15(1) and (3) (McKinney 2020) reduces the maximum sentence for certain misdemeanors to ensure that unduly harsh immigration consequences do not result from such convictions); N.Y.C., N.Y., COUNCIL INT. NO. 1558-A § 1 (limiting the power of the Department of Probation to apply Department of Corrections restrictions to civil immigration retainers); *see also* Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 109–11 (2014) (listing localities, towns, cities, and states that have "pushed back against federal enforcement efforts" and "sought legislative solutions" to limit "the obligation of states to comply with federal immigration detainers"); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1466–69 (2006) (stating that "[m]any of the nation's largest cities have sanctuary policies" and listing examples).

156. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE ERA OF COLORBLINDNESS (2012) (arguing that the American criminal justice system, particularly policies promulgated during the War on Drugs, has reproduced the racial caste system of the Jim Crow era through disproportionate incarceration of African-Americans).

penalties for minor offenses.[157] Second, multiple U.S. Courts of Appeals have recognized that because all fifty 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."[158]

At base, our immigration enforcement system was not designed, and is not well-suited, to address criminality and related public safety issues. That is what the criminal legal system is for. Moreover, while criminal removal charges are a small feature of the current system,[159] they consume vastly disproportionate resources.[160] Finally, eliminating criminal removal grounds would not mean that immigration courts could not consider the danger an individual may pose to the community. As discussed below, the second phase of removal proceedings would vest immigration judges with broad discretion to consider all positive and negative equities.[161]

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157. *See, e.g.*, Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1731–32 (2011) (criticizing immigration laws as failing to acknowledge other ways to reintroduce immigrants into the community); Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 395–96 (1997) (analyzing California's Three Strikes legislation).

158. United States v. Genao, 869 F.3d 136, 147–48 n.7 (2d Cir. 2017) (quoting Nov. 1, 2016 Amendments to the Sentencing Guidelines, 27–28, http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160428_Amendments.pdf); United States v. Bernel-Aveja, 844 F.3d 206, 221 n.17 (5th Cir. 2016) (quoting Nov. 1, 2016 Amendments to the Sentencing Guidelines, 27–28); United States v. Cuevas-Lopez, 934 F.3d 1056, 1074 (9th Cir. 2019) (Ikuta, J., dissenting) (quoting Nov. 1, 2016 Amendments to the Sentencing Guidelines, 27–28); *see also* Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013) (holding that a court's "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense"); Carachuri-Rosendo v. Holder, 560 U.S. 563, 577 n.12 (2010) (stating that "[l]inking [the Court's] inquiry to record of conviction comports with how [the Court has] categorized convictions for state offenses within the definition of generic federal criminal sanctions").

159. *See* discussion *supra* note 44. Moreover, when we factor out lawful permanent residents, who generally can only be deported based on criminal convictions, the portion of cases with criminal deportation charges would decrease further.

160. *See* Lopez, *supra* note 154.

161. 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 be brought before an immigration judge before they can be granted permanent lawful status. 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.

B. *Phase Two: Streamlined Proportional Sentencing*

If the government can prove that an individual made an unauthorized entry or is present in violation of law, proceedings would progress to a second phase.[162] This phase would be akin to the sentencing phase in death penalty cases, where both parties could present 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.[163] There would no longer be any question of "eligibility" for relief, nor the endless litigation and appeals that such determinations trigger. 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),[164] as well as any other factor that bears upon the appropriateness of a potential penalty. Just as in 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 possible penalty: deportation. Rather, judges would have a range of available options. In some instances, where the equities tip decidedly in favor of the individual, just as in many criminal proceedings,[165] no affirmative penalty need be imposed. In these cases, just as when an application for relief is granted

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162. 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. *See* Addington v. Texas, 441 U.S. 418, 424 (1979) (explaining that the clear and convincing evidence standard is appropriate in certain civil cases involving "quasi-criminal wrongdoing").

163. *See* discussion *supra* at notes 67–72 and accompanying text.

164. This is the element in which 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. Indeed, the Constitution should not permit such punishment without the full panoply of constitutional rights afforded to criminal defendants, which are not available in civil deportation proceedings. *See* Markowitz, *supra* note 117, at 345–49.

165. *See* WAYNE R. LAFAVE ET AL., 6 CRIMINAL PROCEDURE § 26.1(d)–(f) (2019) (listing the wide variety of "community release" options, "intermediate sanctions," and "financial sanctions" in the criminal context); *Alternative Sentences*, FINDLAW (Feb. 12, 2019), https://criminal.findlaw.com/criminal-procedure/alternative-sentences.html [https://perma.cc/7VDL-CLZM].

in the current system, the individual would be granted the status of lawful permanent resident. In other cases, a judge could determine that, while deportation is not warranted, some penalty is appropriate and, just as in most other administrative enforcement systems, a fine[166] or some other scalable penalty, such as community service or mandated treatment programs,[167] could be imposed. Payment of the fine or completion of the scalable penalty would likewise be followed by a grant of lawful permanent resident status.

In certain cases, a court may feel unable to make a final determination. This could occur, for example, if an individual has only been in the United States for a very brief period and information is limited. In such circumstances, judges could grant a period of "conditional residence" where they maintain jurisdiction over the individual for a period of a few additional years.[168] If at any point during the period of conditional residence the government believes new evidence dictates that admission to permanent residence is inappropriate, they could reopen the sentencing proceedings. If not, the conditions would be automatically removed at the conclusion of the conditional period and the person would be granted lawful permanent resident status. Finally, in extreme cases, judges would also have the option to impose the harshest penalty available: deportation.

C. *Claims Related to a Fear of Persecution*

A significant portion of deportation proceedings are currently used to adjudicate persecution-based claims, such as asylum claims, related to an individual's fear of persecution if they were returned to their country of origin.[169] The system set forth above is not intended to adjudicate such claims. Instead, they would be handled on a parallel track as set forth below.

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166. Currently, some noncitizens previously barred from adjusting status are able to do so by, among other things, paying a $1,000 fine on top of the application fee. *See* 8 U.S.C. § 1255(i)(1); 8 C.F.R. § 245.10(b)–(c). Extending the use of fines in this context would require ensuring that they do not become excessive and replicate the problems associated with the use of fines in the criminal legal system.

167. In addition to community service and fines, other potential conditions that would have to be completed in advance of adjustment of status could include treatments for addiction or mental health conditions.

168. Three years is a common probationary period in criminal proceedings and would seem appropriate. *See* 18 U.S.C. § 3561(c) (placing the upper limit on probation at five years for felonies); U.S. SENT'G GUIDELINES MANUAL § 5B1.2 (U.S. SENT'G COMM'N 2018) (limiting the term of probation to "no more than three years" in any case level five or lower).

169. *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., STATISTICS YEARBOOK: FISCAL YEAR 2018, at 24 fig.18 (2019), https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/9Q6D-QZ4H] (showing a 258% increase in defensive asylum receipts between FY 2014 and FY 2018, from 30,886 to 110,469).

As discussed *supra* in Part III, before enforcement proceedings could be initiated, individuals would first be given an opportunity to fully explore all affirmative pathways to status. One such pathway is an application for asylum. Indeed, there already exists an affirmative pathway to apply for asylum with USCIS.[170] USCIS's Asylum Office would be further empowered to consider other persecution-based pathways to status, such as withholding of removal and protection under the Convention Against Torture, which are already part of the same application process.[171] Because of the unique dangers presented by incorrectly adjudicating persecution-based applications, there already exist additional review requirements for negative determinations on affirmative asylum applications, such that those cases are presently referred to an immigration judge who can review the application de novo.[172] That review is currently incorporated in deportation proceedings, which are automatically triggered upon a negative determination by the Asylum Office.[173] But it need not be so.

There are other aspects of the asylum process that spawn unique and distinct proceedings before an immigration judge, such as withholding-only proceedings and review of credible fear and reasonable fear determinations.[174] Consistent with these current features, applicants who receive a negative determination on their affirmative persecution-based applications would be entitled to appeal for immigration judge de novo review. However, those proceedings would be distinct from enforcement proceedings, which could only be initiated if the immigration judge denied the persecution-based application. Separating immigration judge review of affirmative asylum applications from removal proceedings would mean that an asylum denial by an immigration judge would no longer necessarily be followed by a deportation order. Enforcement

170. *See* 8 C.F.R. § 208.3(b); U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., FORM I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (2020), https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf [https://perma.cc/3XD7-4S3G].

171. *See* FORM I-589, *supra* note 170, at 5 (inviting applicants to explain whether they are requesting asylum under the Convention Against Torture).

172. 8 C.F.R. § 1003.42(d)(1) ("The immigration judge shall make a de novo determination . . . that the alien would be tortured . . . .").

173. *See* 8 C.F.R. § 208.14(c)(1) (directing asylum officers to refer applications to an immigration judge upon a negative determination); *id.* § 239.1(a)(20) (authorizing supervisory asylum officers to issue a notice to appear); U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., PM-602-0050.1, UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS 3–4 (2018), https://www.uscis.gov/sites/default/files/document/memos/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf [https://perma.cc/XY4E-MN4R] (describing the USCIS's continued policy of issuing notices to appear when an asylum-seeker appears inadmissible).

174. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. §§ 208.30(e)(5)(ii)–(iii), 1003.42.

proceedings would only follow in those cases where immigration authorities affirmatively determine that punitive enforcement proceedings are warranted. To enhance efficiency, such enforcement proceedings could be held before the same judge, who could take judicial notice of the evidence elicited in the prior asylum review.[175] Indeed, subsequent to the drafting of this Article and circulation of the above proposal, the Biden Administration published a Notice of Proposed Rulemaking which incorporates many of the above recommendations.[176]

D. *Critical Procedural Reforms to Immigration Enforcement Proceedings*

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 to hire their own attorney. As discussed *supra*, counsel is absolutely essential to ensure that people can access the legal benefits to which they are entitled by law.[177] That is why the American Bar Association and others have been calling for the creation of a statutory right to appointed counsel in deportation proceedings for many years.[178] Likewise, the real and perceived lack of impartiality caused by

175. This proposal does not address the enumerable nonsensical obstacles to asylum which have been proposed or created in recent years to undermine the protective functions and international obligations that the asylum process was originally intended to honor. *See, e.g.*, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,278–79 (proposed June 15, 2020) (codifying "several nonexhaustive bases that would generally be insufficient" to establish a persecuted social group); Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) (providing that, with limited exceptions, aliens are ineligible for asylum if they try to enter the United States via the southern border without first applying for protection elsewhere); U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., PM-602-0169, GUIDANCE FOR IMPLEMENTING SECTION 235(B)(2)(C) OF THE IMMIGRATION AND NATIONALITY ACT AND THE MIGRANT PROTECTION PROTOCOLS 3 (2019), https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf [https://perma.cc/F4U6-YUXE] (requiring that USCIS officers interview aliens without counsel and determine whether they may be returned to Mexico for the duration of immigration proceedings). A full treatment of the reforms needed in the asylum arena is beyond the scope of this Article.

176. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 86 Fed Reg. 46,906 (proposed Aug. 20, 2021) (to be codified at 8 C.F.R. pts. 1003, 1208, 1235).

177. *See supra* notes 61–63 and accompanying text.

178. *See* COMM'N ON IMMIGR., AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM ES-13 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_executive_summary.pdf [https://perma.cc/2YSC-JX9S]; *see also, e.g.*, Michael Kagan, *Toward Universal Deportation Defense: An Optimistic View*, 2018 WIS. L. REV. 305, 307 (2018) (providing an optimistic view of steps taken to increase access to legal assistance in

the Attorney General's control over immigration judges must be remedied.[179] There have been competing proposals on how to address this, but the recommendation of most informed commentators is to make the immigration court system, like the Tax and Bankruptcy Courts, independent Article I courts.[180] In such courts, judges are appointed by Presidents or Courts of Appeal, respectively, with advice and consent of the Senate, to lengthy fixed terms, during which they can be removed only in very limited circumstances.[181] Like current Article I courts, and unlike the current system riddled with jurisdictional limitations, there must be a mechanism for robust judicial review by Article III courts.[182] Additionally, features related to appointment of counsel, decisional independence, and judicial review are also essential to ensuring that individuals can actually receive the legal rights that Congress has provided.

CONCLUSION

The United States' current immigration enforcement system is the worst of all worlds. It is extraordinarily costly, remarkably ineffective, and gratuitously brutal. The system's unprecedented costs are driven by the ahistorical scale of ICE's mass deportation and detention strategy. The heavy-handed scattershot enforcement regime, which leaves tens of millions at risk of deportation but only a random minority actually subject to enforcement, has succeeded in sowing terror in communities across the country but utterly failed to increase compliance with immigration law. The byzantine complexity of the legal regime that governs deportation proceedings has tied courts in knots, created staggering case backlogs, and made it impossible for individuals to reliably realize even the very limited legal rights and privileges that the law currently provides. Finally, the extraordinarily light triggers for deportation and the overly restrictive

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deportation proceedings); *Representation in Removal Proceedings*, 126 HARV. L. REV. 1658, 1658–59 (2013) (recommending that lawful permanent residents, mentally ill noncitizens, and juvenile noncitizens be entitled to appointed counsel in removal proceedings).

179. *See* discussion *supra* notes 58–60 and accompanying text; *see also* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 384–85 (2006) (explaining how the Attorney General's control over BIA judges has left them without any meaningful decisional independence).

180. *See* COMM'N ON IMMIGR., AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM UD6-16 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [https://perma.cc/5PDN-BWDN]; AM. BAR ASS'N, *supra* note 178, at ES–45; Legomsky, *supra* note 179, at 402–03.

181. *See* 28 U.S.C. § 152 (describing appointment and tenure of bankruptcy judges); 26 U.S.C. § 7443 (describing appointment and tenure of tax court members); *see also* AM. BAR ASS'N, *supra* note 178, at ES-45–ES-46.

182. *See* 28 U.S.C. § 158 (creating appellate jurisdiction over bankruptcy courts); 26 U.S.C. § 7482 (creating appellate jurisdiction over tax courts).

and tangled system of enumerable forms of "relief" from deportation have ensnared even the most sympathetic individuals and tied the hands of judges, rendering them impotent to deliver justice in a large category of cases. As a result, unprecedented billions of tax dollars have been squandered, not to increase compliance with law, but rather to inflict unnecessary pain and suffering.

In contrast, the system proposed above would dramatically reduce the cost of immigration enforcement, increase effectiveness, and mitigate unnecessary cruelty. Reducing the scale of ineffective punitive enforcement will save billions, allow the system to focus its resources, and curtail the random suffering. Investing in proven compliance assistance programs, where people will be able to access benefits proscribed by Congress before punitive enforcement can be considered, will help millions come into compliance at significantly lower costs, will unburden the immigration courts, and will avoid the terror that unnecessary punitive enforcement visits upon individuals and families. Making lawful permanent residence truly permanent by exempting LPRs from deportation and imposing a reasonable statute of limitations on other immigration violations, as exists in virtually every other area of American law, will shrink the enforcement haystack dramatically. Doing so will also protect the categories of individuals who are most likely to have the deepest ties to the United States, whose deportation is likely to cause the most disruption and pain, while being least likely to serve the public interest.

For those who do face punitive enforcement, eliminating detention and replacing it with proven alternative mechanisms to ensure appearance will prevent unnecessary suffering and help ensure that individuals can access counsel, evidence, and witnesses, and that they are not coerced into forgoing viable defenses. Streamlining the sprawling complex statutory scheme, with nearly 200 different deportation grounds, and focusing instead on the very simple inquiry of whether someone entered without authorization or stayed beyond the permitted period, will create significant efficiency while still honoring the legal principle that the government can determine the boundaries of the national community.

Eliminating criminal removal grounds will return the historic norm and enhance the effectiveness of both the criminal legal system and the immigration system. Moreover, eliminating the hypercomplex legal analysis required in removal cases tied to criminal convictions will free up substantial resources without undermining the ability of judges to consider future dangerousness in the sentencing phase of removal proceedings.

Replacing the overly complex hodgepodge of categories of relief with a simple sentencing phase, where litigants can produce all positive and negative equities that might bear upon the appropriate penalty, will

further improve efficiency and ensure that justice can be done in individual cases based on the totality of the circumstances. Providing immigration judges with a set of scalable penalties to consider, rather than the current all-or-nothing deportation determination, will ensure that penalties are proportionate to the circumstances. The range of penalties will also enable meaningful negotiated resolutions in many cases such that immigration cases, like virtually every other type of litigation, can be resolved in large numbers through agreement rather than litigation. Finally, this simplified system, together with access to counsel, adjudicative independence, and full judicial review, will help ensure that individuals can reliably gain access to benefits and rights to which they are entitled under the law.

Much of what is proposed above would require legislative action to rewrite the rules regarding when and how individuals could be punished for immigration violations. However, there is also important progress that the President could make through executive action. Early indications offer hope that President Biden understands the urgency of reforming the nation's interior immigration enforcement system and intends to utilize the substantial power of the presidency to move swiftly toward that end.[183] Through the President's power to direct prosecutorial

183. *See* Memorandum from John D. Trasviña, *supra* note 37, at 1; Memorandum from Tae D. Johnson, *supra* note 37, at 2; Preserving and Fortifying Deferred Action for Childhood Arrivals, 2021 DAILY COMP. PRES. DOC. 64 (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/ [https://perma.cc/8DMW-HNUY]; Reinstating Deferred Enforced Departure for Liberians, 2021 DAILY COMP. PRES. DOC. 65 (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/reinstating-deferred-enforced-departure-for-liberians/ [https://perma.cc/9YP3-A8YS]; Proclamation No. 10,142, 86 Fed. Reg. 7225, 7225 (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/ [https://perma.cc/3BSQ-KZG6]; Exec. Order 13,993, 86 Fed. Reg. 7051, 7051 (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-the-revision-of-civil-immigration-enforcement-policies-and-priorities/ [https://perma.cc/FA8C-GD3G]; Proclamation No. 10,141, 86 Fed. Reg. 7005, 7005 (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/ [https://perma.cc/B3PC-7VP4]. Unfortunately, the same cannot be said of the Biden Administration's border enforcement policy, which has carried forward many of the worst aspects of the prior administration's approach. Michael D. Shear et al., *Biden Pushes Deterrent Border Policy After Promising "Humane' Approach*," N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/09/22/us/politics/biden-immigration-border-haitians.html [https://perma.cc/V5S8-WC6D]; Ted Hesson, *Biden Kept a Trump-Era Border Policy in Place—That Was A Mistake, Allies Say*, REUTERS (July 7, 2021, 6:03 PM), https://www.reuters.com/world/us/biden-kept-trump-era-border-policy-place-that-was-mistake-allies-say-2021-07-07/ [https://perma.cc/6P8M-PFFJ].

discretion,[184] he could for example direct that ICE not expend resources on deportation cases involving LPRs or other individuals whose immigration violations occurred long ago. The intent to initiate the protocol proposed here could likewise be implemented administratively without congressional action.[185] That would ensure that individuals can access the affirmative pathways to status that Congress has prescribed, and that avoidable deportations and detentions do not cause unnecessary expense and suffering. Executive action could likewise be used to greatly reduce costly and unnecessary detention, to roll back the entanglement between the immigration and criminal legal systems, and to explore mechanisms to expand access to counsel. Such executive action would not only help remedy the brutality and ineffectiveness of the current regime but would also provide the President with an opportunity to articulate a new vision for immigration enforcement and to begin to build the national consensus necessary to eventually overhaul the nation's immigration enforcement laws.

The system described here would make the immigration enforcement system dramatically more humane, just, and effective. It would not, however, be a perfect system. Sometimes it would deliver unnecessarily harsh penalties. At other times, meaningful violations would go unpunished. But that is true of all enforcement systems. Finding the right balance should be the goal. Restructuring the mechanics, substantive rules, and procedural rights of immigration enforcement as described above would move us closer to that balance. This proposal is a starting point for others to critique and improve upon. Regardless of the details, what is clear is that the immigration enforcement system is in desperate need of radical reform, and communities, advocates, and policy makers must strive to identify an affirmative vision for the enforcement system we want to build in its place.

184. *See* Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 514–27, 537–48 (2017) (analyzing the constitutional sources of prosecutorial discretion and concluding that the President's power extends broadly to deportation proceedings); Memorandum from John Morton, *supra* note 37.

185. *See* discussion *supra* notes 97–99 and accompanying text.