

AFTER ICE:  
A NEW HUMANE & EFFECTIVE IMMIGRATION  
ENFORCEMENT PARADIGM

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*In recent years, as the U.S. Immigration and Customs Enforcement Agency’s (“ICE”) brutal tactics have devastated communities across the nation, a growing chorus of activists and policymakers have begun calling for the agency to be abolished. Abolish ICE advocates have made a compelling case for the irredeemable deficiencies of ICE; they have exposed the core injustices that lay at the heart of our current enforcement scheme, and they have proposed specific and thoughtful changes that are both defensible and achievable. However, these changes tend to focus on a negative vision of what we need to eliminate in our current enforcement scheme. Missing from the public discourse is an affirmative vision for the mechanics of a just and humane immigration enforcement system—one that does not rely on detention or mass deportation but is nevertheless realistic and effective. This void has left the movement open to dismissive attacks and has meant that politicians rather than impacted communities have been left to answer the question: what comes after ICE? Their answers to date have been insufficient and sometimes at odds with the movement’s core goals. Drawing on lessons from our own and other nation’s past immigration enforcement schemes, on the enforcement mechanisms employed by other federal agencies, and on interviews with leaders of the Abolish ICE movement, I propose a new paradigm for immigration enforcement. My proposal is consistent with the movement’s goal to not just eliminate ICE but to create a real and workable immigration*

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*enforcement scheme that does not rely on detention, mass deportation, or a dedicated immigration police force at all.*

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#### I. INTRODUCTION

The movement to abolish the U.S. Immigration and Customs Enforcement (“ICE”) agency erupted onto the national political scene in the summer of 2018.<sup>1</sup> A parade of political leaders quickly embraced the call to abolish ICE, and a flurry of media attention followed.<sup>2</sup> To many, the growing chorus calling for the end of ICE

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1. Molly Hensley-Clancy & Nidhi Prakash, “Abolish ICE” Was the Call of Last Summer. 2020 Democrats Have Moved On., BUZZFEED (May 15, 2019, 11:25 AM), <https://www.buzzfeednews.com/article/mollyhensleyclancy/abolish-ice-2020-democrats-immigration>.

2. *Id.*; Elaine Godfrey, *What ‘Abolish ICE’ Actually Means*, ATLANTIC (July 11, 2018), <https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/>; Amy Gottlieb, *It Is Time to Abolish ICE. It Cannot Be Reformed*, GUARDIAN (June 23, 2018, 6:00 AM) <https://www.theguardian.com/commentisfree/2018/jun/23/it-is-time-to-abolish-ice-it-cannot-be-reformed>; Tania Unzueta et al., *We Fell in Love in a Hopeless Place: A Grassroots History*

seemed to come out of nowhere. In fact, the movement was the natural extension of years of thoughtful organizing by a loose coalition of grassroots immigrant rights organizations.<sup>3</sup> These organizations had come to see not only Republicans but also traditional Washington, D.C. immigrant advocacy groups and Democratic politicians as impediments to the struggle against the abusive enforcement regime.<sup>4</sup> Eight years of a Democratic president, beloved by many on the left, had delivered a brutal record of detention and deportation on a scale never before seen, leading many in the grassroots immigrant rights community to conclude that efforts to reform this agency were futile.<sup>5</sup> A new, more radical approach developed with a grander target: dismantling ICE altogether.

While the Obama Administration had done its best to obscure ICE's worst abuses, the Trump Administration, by contrast, seeks every opportunity to publicize and revel in the agency's brutality.<sup>6</sup>

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from *#Not1More to Abolish ICE*, MEDIUM (June 29, 2018), <https://medium.com/@LaTania/we-fell-in-love-in-a-hopeless-place-a-grassroots-history-from-not1more-to-abolish-ice-23089cf21711>; Esther Wang, *What the Movement to Abolish ICE Looks Like on the Ground*, JEZEBEL (July 31, 2018, 2:51 PM), <https://theslot.jezebel.com/what-the-movement-to-abolish-ice-looks-like-on-the-grou-1827825182>.

3. See, e.g., JOMO, *Fighting Obama's Deportation Policies Without Papers—and Without Fear*, NATION (Apr. 24, 2014), <https://www.thenation.com/article/fighting-obamas-deportation-policies-without-papers-and-without-fear> (discussing the #Not1More campaign calling for a moratorium on deportations); #Not1More, NOT ONE MORE DEPORTATION, <http://www.notonemoredeportation.com>; N.Y. Times Editorial Board, Editorial, 'Not One More', N.Y. TIMES (Oct. 27, 2013), <https://www.nytimes.com/2013/10/28/opinion/not-one-more.html>; see also Wang, *supra* note 2.

4. See JOMO, *supra*, note 2; see also *infra* Part II.

5. Sdhbh Walshe, *Obama, Deportee-in-Chief: The Shame of Immigration Policy, One Family at a Time*, GUARDIAN (Apr. 9, 2014, 12:33 PM), <https://www.theguardian.com/commentisfree/2014/apr/09/obama-deporter-in-chief-immigration-policy-minor-crimes>.

6. Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 309, 316 (2018) (“One could argue that Trump and his advisors are intentionally reckless with how they rolled out the enforcement efforts, and this creates an even scarier scene . . . . President Trump and his ICE army want to disrupt the lives of these workers and their families. The President wants to create confusion and chaos even when it may not be legally justified.”); see also Scott Martelle, Opinion, *About Those Immigrants Trump Referred to as ‘Animals’*, L.A. TIMES (May 17, 2018), <https://www.latimes.com/opinion/la-ol-enter-the-fray-about-those-immigrants-trump-referred-to-1526569123-htmstory.html>; Michael D. Shear et al., *Trump Signals Even Fiercer Immigration Agenda, With a Possible Return of Family Separations*, N.Y. TIMES (Apr. 8, 2019), <https://www.nytimes.com/2019/04/08/us/politics/trump-asylum-seekers-federal-judge.html>; Michael D. Shear & Zolan Kanno-Youngs, *White House Considered Releasing Migrants in ‘Sanctuary Cities’*, N.Y. TIMES (Apr. 11, 2019), <https://www.nytimes.com/2019/04/11/us/politics/sanctuary-cities-trump.html>.

This shift led to a decline in popular support for ICE,<sup>7</sup> laying the groundwork for the “Abolish ICE” movement’s breakout summer of 2018. The Trump Administration’s policy of separating and detaining parents and children, and the startling victory of U.S. Representative Alexandria Ocasio-Cortez, who had built her campaign in large part around a call to abolish ICE, created a tipping point for the movement, catapulting it into the public eye.<sup>8</sup> The backlash came quickly, and while the movement continues, it has lost much of its initial momentum.<sup>9</sup> No movement ever proceeds on a straight trajectory from birth to transformative change, and there are multiple factors hindering the progress of the effort to abolish ICE. However, a central impediment has been the perception that the movement lacks an adequate answer to the question of what comes next.<sup>10</sup> If we abolish ICE, then what?<sup>11</sup> The assumption underlying this inquiry is that ICE’s system of detention and deportation is the only realistic way to enforce immigration law.

The immigrant rights movement has engaged deeply with the core injustices that lay at the heart of our current enforcement scheme and has proposed specific and thoughtful changes that are both defensible and achievable. However, these changes tend to focus on a negative vision of what we need to eliminate in our current

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7. Rachel Levinson-Waldman & Hayley Hinkle, *The Abolish ICE Movement Explained*, BRENNAN CTR. FOR JUST. (July 30, 2018), <https://www.brennancenter.org/blog/abolish-ice-movement-explained>.

8. Matt Fuller, *Paul Ryan Says “Abolish ICE” Is “Craziest Position I’ve Ever Seen”*, HUFFINGTON POST (July 12, 2018, 1:53 PM), [https://www.huffingtonpost.com/entry/paul-ryan-abolish-ice-craziest\\_position\\_us\\_5b477f38e4b0e7c958f90ab1](https://www.huffingtonpost.com/entry/paul-ryan-abolish-ice-craziest_position_us_5b477f38e4b0e7c958f90ab1); see Dan Merica & Eric Bradner, *The Biggest Night so Far For Progressives and Other Takeaways From Tuesday Night’s Primaries*, CNN (June 27, 2018, 9:09 AM), <https://www.cnn.com/2018/06/27/politics/takeaways-tuesday-primaries-crowley/index.html>; Michael D. Shear et al., *Trump Retreats on Separating Families, but Thousands May Remain Apart*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html>.

9. Fuller, *supra* note 8; Hensley-Clancy & Prakash, *supra* note 1; Jeh Charles Johnson, Opinion, *Abolishing ICE is Not a Serious Policy Proposal*, WASH. POST (July 6, 2018), [https://www.washingtonpost.com/opinions/ice-needs-reform-not-abolition/2018/07/06/5d2cec0e-8133-11e8-b658-4f4d2a1aeeef1\\_story.html](https://www.washingtonpost.com/opinions/ice-needs-reform-not-abolition/2018/07/06/5d2cec0e-8133-11e8-b658-4f4d2a1aeeef1_story.html); Bill Scher, *The Problem with “Abolish ICE”*, REAL CLEAR POL. (July 2, 2018), [https://www.realclearpolitics.com/articles/2018/07/02/the\\_problem\\_with\\_abolish\\_ice.html](https://www.realclearpolitics.com/articles/2018/07/02/the_problem_with_abolish_ice.html).

10. Godfrey, *supra* note 2 (“[I]t’s not at all clear that every politician embracing the slogan is on the same page—or what the alternative to ICE might be.”); Scher, *supra* note 9 (calling the idea “half-baked” and explaining that “the ‘Abolish ICE’ movement doesn’t have an actual proposal for what should replace ICE. . . . Abolish ICE advocates dance around questions of if and how exactly those laws would be enforced.”).

11. In many ways, this critique speaks to the power of the indictment laid out against ICE. The movement’s critics tend not to rebut the well documented brutality, lawlessness, and ineptitude of the agency they defend. See *infra* Part II.

enforcement scheme: an end to the use of detention, a moratorium on deportations, a disentanglement of our criminal justice and immigration systems, and an end to the privatization of immigration enforcement.<sup>12</sup> But the movement has yet to coalesce around an affirmative vision of what would follow.<sup>13</sup> How would we enforce<sup>14</sup> immigration law in the interior of the United States in a system that is not centered around the coercive use of violent state power?<sup>15</sup> How would we construct a just and humane, but also effective, immigration enforcement scheme after ICE?

There are good reasons for the movement's present focus. Ending the daily brutality ICE visits upon immigrant communities is the

12. See, e.g., *Defund the Detention and Deportation Machine*, DEFUND HATE NOW, [https://www.detentionwatchnetwork.org/sites/default/files/DefundHate%20Explainer\\_11.12.2018.pdf](https://www.detentionwatchnetwork.org/sites/default/files/DefundHate%20Explainer_11.12.2018.pdf) (last visited Mar. 29, 2020); *Free Our Future: An Immigration Policy Platform for Beyond the Trump Era*, MIJENTE (June 2018), [https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform\\_0628.pdf](https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf); Gottlieb, *supra* note 2; Unzueta et al., *supra* note 2.

13. Elliot Hannon, *House Democrats Preparing Legislation That Would Abolish ICE*, SLATE (July 10, 2018, 9:05 PM), <https://slate.com/news-and-politics/2018/07/house-democrats-preparing-legislation-that-would-abolish-ice.html> (discussing proposed legislation that would abolish ICE and create a commission to recommend a new immigration enforcement system); Julianne Hing, *What Does It Mean To Abolish ICE?*, NATION (July 11, 2018), <https://www.thenation.com/article/mean-abolish-ice/> (noting that “[t]here appears to be a surfeit of moral righteousness among politicians, but little consensus on how to translate that anger into policy”); Scher, *supra* note 9 (“[T]he ‘Abolish ICE’ movement doesn’t have an actual proposal for what should replace ICE.”).

14. “Enforcement” as used throughout this Article is not limited to systems of punishment through coercive physical state power. Rather, the term is used broadly to describe the system by which we address non-compliance and encourage compliance with the rules governing who may enter and who may remain in the United States. I use the term “punitive enforcement” to characterize strategies aimed at punishing non-compliance (through deportation, detention, or otherwise). I use the term “cooperative enforcement” to describe strategies aimed at assisting or incentivizing people to maintain or come into compliance with the law (through, for example, applying for an available legal pathway to status).

15. Some in the Abolish ICE community have rejected the idea of enforcement altogether, calling for an end to borders and state control of migration. See CAL. IMMIGRANT YOUTH JUSTICE ALL., *FIRST WE ABOLISH ICE* (2018), <https://ciyja.org/wp-content/uploads/2018/07/AbolishICE.pdf>. However, the majority of the movement, while recognizing the truth underlying many of the claims that support this call for open borders, have not seen any utility in staking out a formal position on the issue. In contrast, the movement is sincere and clear in its goal to abolish ICE and to oppose the creation of some alternative new agency iteration of a dedicated agency of immigration police. The clear majority of the leaders I spoke with, however, recognize the reality that borders are likely here to stay and are interested in the practical, immediate effort to mitigate the pain that borders and immigration enforcement visit upon their communities. I adopt this approach throughout—assuming that rules will remain about who may enter and remain in the United States, I seek to envision the most just and humane way to enforce those rules.

right place to start. Moreover, to many, it is a focus of necessity, not one of choice. For those who are targets of ICE's campaign of terror, it is hard to envision a just version of enforcement. The substantive immigration laws and the current enforcement scheme are so scarred by racism and xenophobia and so distorted by corporate lobbying efforts that the idea of "just enforcement" can sound like an oxymoron.<sup>16</sup> To be sure, addressing these core injustices is on a long list of necessary pre-requisites to the realization of a just enforcement system.<sup>17</sup> However, the absence of a workable affirmative vision of a humane enforcement approach, one that is consistent with the goals of the immigrant rights movement, cannot wait.

The void has become a drag not just on the effort to abolish ICE but more generally, on the immigrant rights movement's efforts to achieve more modest enforcement reforms. Immigration restrictionists responded to the call to abolish ICE with a familiar dismissive refrain. They argued that Abolish ICE activists are against all enforcement and that there is no realistic alternative to the current focus on detention and deportation.<sup>18</sup> This line of attack has been a long standing go-to restrictionist response to virtually any attempt to address enforcement abuses, though it had particular force in the Abolish ICE context where the absence of an alternative enforcement vision lent it unwarranted credibility. Moreover, the affirmative visioning void has left politicians—rather than impacted communities—to answer the hard questions about what enforcement should look like after ICE, and the answers are often inconsistent with the movement's goals.<sup>19</sup> The lack of an affirmative vision has also hampered the movement's ability to leverage the nation's widespread and growing disaffection with ICE into overt support for the agency's abolition.<sup>20</sup> The response to the Abolish ICE movement has thus brought into sharp focus the necessity of a credible, well-formed, affirmative vision for a just and effective enforcement scheme.

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16. See Walshe, *supra* note 5.

17. See *infra* Part IV.

18. See Hing, *supra* note 13.

19. See Sarah Lazare, *What We Mean When We Say Abolish ICE*, IN THESE TIMES (July 5, 2018), [web.inthesetimes.com/article/21252/abolish-ice-donald-trump-jeff-sessions-protest-mijente-not-one-more](http://web.inthesetimes.com/article/21252/abolish-ice-donald-trump-jeff-sessions-protest-mijente-not-one-more).

20. See *Most Don't Want to Get Rid of ICE*, RASMUSSEN REP. (July 5, 2018), [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/immigration/june\\_2018/most\\_don\\_t\\_want\\_to\\_get\\_rid\\_of\\_ice](http://www.rasmussenreports.com/public_content/politics/current_events/immigration/june_2018/most_don_t_want_to_get_rid_of_ice) (noting that while 33 percent of "voters believe the U.S. government is too aggressive in deporting those who are in this country illegally[,] only 25 percent favor abolishing ICE); *Polling Update: American Attitudes on Immigration Steady, but Showing More Partisan Divides*, NAT'L IMMIGR. F. (Apr. 17, 2019), <https://immigrationforum.org/article/American-attitudes-on-immigration-steady-but-showing-more-partisan-divides/> (explaining that public opinion, even among Republicans, has shifted in favor of prioritizing a pathway to citizenship and away from aggressive enforcement).

One obstacle the movement has encountered in formulating such a vision is the void in academic literature attempting to articulate and theorize an alternative positive vision of immigration enforcement. Theories alone, of course, will not overcome the political divisions that have paralyzed progress.<sup>21</sup> They are a necessary but insufficient precursor to realizing the reforms our nation's immigration system desperately needs. This Article attempts to begin filling the academic void and to provide a starting point for the movement to use, critique, and improve upon.

It should be of critical interest not just to immigrant communities and Abolish ICE activists but also to all who care about effective immigration enforcement. The one thing that seems to unite the right and the left on immigration today is a shared understanding that our current enforcement regime has failed. Even if one's goal is simply to reduce the undocumented population—and, to be clear, the goals of the Abolish ICE movement are much grander—then we must start by acknowledging the current reliance on a massive immigration police state has been a failure.<sup>22</sup>

This Article draws upon the work of others who have examined immigration enforcement strategies within the context of the current agency system,<sup>23</sup> as well as the deep literature on administrative enforcement theory in other contexts.<sup>24</sup> However, the greatest

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21. See *Polling Update: American Attitudes on Immigration Steady, but Showing More Partisan Divides*, *supra* note 20.

22. See *infra* Part II.

23. See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 464 (2009) [hereinafter Cox & Rodríguez, *President and Immigration Law*]; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 113 (2015) [hereinafter Cox & Rodríguez, *Redux*]; Thomas J. Espenshade, *Does the Threat of Border Apprehension Deter Undocumented US Immigration?*, 20 POPULATION & DEV. REV. 871, 873 (1994); Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 1 (2017); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 246 (2017); Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1089 (2011); David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 412 (2015); 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, 243 (2005); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 636–37 (2015); 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-law-fair-humane-workable-immigration-system/>;

24. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 4–7 (1997); Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1156–57 (2010); Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555, 557; Orly Lobel, *The Renew Deal*:

contemporary experts in immigration enforcement are the communities that have lived under the current regime. Accordingly, a critical and primary source for this Article is also a series of interviews conducted with leaders of the Abolish ICE and immigrant rights movement who generously shared their time and insights toward the goal of envisioning a just and humane immigration enforcement system.<sup>25</sup>

This Article proceeds in four additional Parts. Part II examines the case for the abolition of ICE by demonstrating the ways in which the agency was ill-conceived from the outset and how it has amassed a well-documented record of illegality, abuse, and waste that has both undermined its legitimacy and failed to deliver results even by its own metrics of success. Part III challenges the popular narrative that our current immigration enforcement system is the only realistic system and the way we have always enforced our immigration laws. This Part tracks the evolution of immigration enforcement throughout U.S. history to demonstrate the historically anomalous nature of our current immigration enforcement system. Part IV examines alternative agency enforcement models that have been explored or proposed in the immigration arena and implemented in other federal administrative enforcement schemes. Finally, Part V draws upon earlier episodes in our nation's immigration enforcement history, lessons from other nations' immigration systems, administrative enforcement systems outside the immigration context, and the insights of the immigrant rights movement leaders to set forth four policy pillars of a proposal for a humane and effective immigration enforcement system after ICE.<sup>26</sup>

*The first pillar is optimal enforcement scaling.* The Department of Homeland Security ("DHS") was founded with the mission of

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*The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343 (2004); Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713, 715–16 (1997).

25. I am extremely grateful to Lorella Praeli from Community Change; to Silky Shah from Detention Watch Network; to Mizue Aizeki and Marie Mark from the Immigrant Defense Project; to Paromita Shah from Just Futures Law; to Javier Valdez, Natalia Aristizabal, and Luba Cortes from Make the Road New York; and to Jacinta Gonzalez from Mijente, all of whom generously shared their time, insights, and feedback with me for this project.

26. Traditionally, immigration enforcement is conceived of as bifurcated between border enforcement and interior enforcement. ICE is the federal agency charged with responsibility for interior enforcement. Border enforcement is a related but distinct function carried out by the U.S. Customs and Border Protection agency ("CBP"). Accordingly, in attempting to envision a world after ICE, this Article focuses on interior immigration enforcement. Of course, border and interior enforcement are interconnected and have the potential to impact one another and thus it is impossible to completely isolate the two. *See* discussion *infra* Subpart III.A. Nevertheless, reconceptualizing our border enforcement paradigm raises a host of distinct theoretical and practical considerations that are beyond the scope of this Article's inquiry.

getting to 100 percent enforcement; that is, to physically deport every person possible.<sup>27</sup> That is not the way the overwhelming majority of agencies operate and not the way immigration enforcement has historically been resourced in this country.<sup>28</sup> The goal of a 100 percent enforcement mission has stunted the agency's behavior from the outset.<sup>29</sup> Scaling enforcement to an optimal level requires balancing the societal and individual harms of enforcement against the marginal addition to compliance enforcement can trigger, and the societal benefits of such additional compliance. That calculus militates in favor of dramatically reducing the level of punitive immigration enforcement at least back to historic norms.

*The second pillar is mandatory prioritization of compliance assistance.* In many instances, even under the current regime (and more so following desperately needed substantive immigration reform), individuals are both subject to deportation and eligible to regularize their immigration status.<sup>30</sup> ICE has chosen to prioritize punitive (deportation) over cooperative (allowing individuals to regularize their status) enforcement.<sup>31</sup> This runs counter to the larger trends in administrative law, which recognize the efficiency and societal advantages of systems that prioritize compliance assistance. In the face of a long history of failed line-level prosecutorial discretion initiatives (the traditional sorting mechanism between punitive and cooperative enforcement), we must enact mandatory rules which give people the legal right to affirmatively pursue available pathways to legal status before they can be subject to any punitive enforcement.

*The third pillar is a system of proportional consequences.* Even with a preference for cooperative enforcement, there will be instances where penalties are necessary to address non-compliance. The current problem is that we have only a single penalty—deportation—in our immigration toolbox, and that penalty is grossly disproportionate to the overwhelming majority of immigration

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27. Memorandum from Anthony S. Tangeman, Dir., Office of Det. & Removal, to Deputy Assistant Dir., Field Operations Div., and Field Office Dirs. (June 27, 2003).

28. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1834 (1993).

29. See Frost, *supra* note 23, at 1. See generally CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY (2019) (discussing the renewed 100 percent enforcement efforts under the Trump Administration).

30. See *Summary of Executive Order "Enhancing Public Safety in the Interior of the United States"*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/immigration-enforcement-executive-order> (last visited Mar. 29, 2020).

31. U.S. DEP'T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003–2012, at 1-1 (2003).

offenses.<sup>32</sup> A system of fines, however, has precedent as an immigration enforcement mechanism and is a central tool in most administrative enforcement schemes.<sup>33</sup> Leveraging fines and other scalable penalties would allow us to craft penalties appropriate to the individual offense and offender, avoiding much of the brutality that has characterized our system of mass deportation in recent years.

*The final pillar is minimizing the use of physically coercive state power.* I presume that, even in this system, there will be outlier cases where we are unsuccessful in bringing individuals into compliance, and where the proportional punishment is deemed to be deportation. In such cases, we have a legal and moral obligation to ensure that unnecessary deprivations of liberty are eliminated. First and foremost, that means ending immigration detention. Through a system of inducements, deportation planning services (akin to reentry planning services from prison), and the expansion of effective legal counsel for immigrants, we can create sufficient incentives and support for people to appear in immigration court and to comply with any penalties imposed. With physically coercive state power being the rare exception, we will no longer need a dedicated immigration police force but will be able to rely on a small cohort of enforcement officers imbedded in an agency whose primary function is to look after the well-being and economic vitality of our nation and of immigrants themselves.

## II. THE CASE FOR THE ABOLITION OF ICE<sup>34</sup>

In many ways, laying out the case for the abolition of ICE is the easy part. Others have delivered powerful indictments of ICE that lay bare its deep and irredeemable defects.<sup>35</sup> Nevertheless, a brief review of the case against ICE is a necessary foundation in order to think through what should come next. As set forth below, the agency was fundamentally ill-conceived from its inception and has amassed a notorious record of abuse, illegality, waste, and ineffectiveness that is unparalleled in the modern administrative state.

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32. MICHAEL WISHNIE, PROPORTIONALITY IN IMMIGRATION LAW: DOES THE PUNISHMENT FIT THE CRIME IN IMMIGRATION COURT? 2–3 (2012).

33. Geneva Sands & Pierre Meilhan, *ICE Seeks to Fine Some Undocumented Immigrants Potentially Thousands of Dollars*, CNN (July 3, 2019 4:16 PM), <https://www.cnn.com/2019/07/02/politics/ice-fines-undocumented-migrants/index.html>.

34. This Part draws and builds upon a previous essay of mine, which is forthcoming in the Yale Law Journal Forum. See Peter L. Markowitz, *Abolish ICE . . . and Then What?*, YALE L.J.F. 130, 130 (forthcoming), [https://www.yalelawjournal.org/pdf/Markowitz\\_AbolishICEandThenWhat\\_p1yp1i9.pdf](https://www.yalelawjournal.org/pdf/Markowitz_AbolishICEandThenWhat_p1yp1i9.pdf).

35. García Hernández, *supra* note 23, at 246, 288–89, 291; Kari Hong, *10 Reasons Why Congress Should Defund ICE's Deportation Force*, 43 N.Y.U. REV. L. & SOC. CHANGE: HARBINGER 40, 41–42 (2019), [https://socialchangenyu.com/wp-content/uploads/2019/03/Kari-Hong\\_-RLSC-The-Harbinger\\_43.pdf](https://socialchangenyu.com/wp-content/uploads/2019/03/Kari-Hong_-RLSC-The-Harbinger_43.pdf); MIJENTE, *supra* note 12, at 1; Gottlieb, *supra* note 2; Unzueta et al., *supra* note 2.

ICE was created in the aftermath of the September 11th attacks.<sup>36</sup> Its predecessor agency, the Immigration and Naturalization Service (“INS”), had been housed in the U.S. Justice Department (“DOJ”) and had a combined services and enforcement mission.<sup>37</sup> The INS had its own checkered history, and the DOJ’s criminal justice paradigm had a strong and problematic influence on the nation’s immigration enforcement regime in the decades before the creation of ICE.<sup>38</sup> Indeed, the origins of many of the core defects in our current immigration enforcement scheme can be tied to the INS. However, in creating ICE, Congress amplified those defects by excising the services mission of the INS and placed it in a new and separate agency, the U.S. Citizen and Immigration Services (“USCIS”). Congress then placed all immigration related agencies in the newly created DHS.<sup>39</sup> The message was clear: immigration policy was to be understood first and foremost as a component of the nation’s counter-terrorism efforts, and ICE should be singularly focused on enforcement, undistracted by the alternative mechanisms available through USCIS to allow undocumented immigrants to regularize their status.<sup>40</sup> In fact, ICE’s civil immigration enforcement efforts have proved themselves ill-suited to DHS’s national security mission.<sup>41</sup> That mission, however, has led to the heavy-handed strategies that ICE has come to rely upon against a population that is virtually devoid of national security threats.<sup>42</sup> Moreover, ICE’s

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36. Homeland Security Act of 2002, Pub. L. No. 107–296, § 451, 116 Stat. 2135, 2195 (2002).

37. USCIS HISTORY OFFICE & LIBRARY, OVERVIEW OF INS HISTORY 3 (2012), [uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf](https://uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf).

38. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 387–90 (2006); see also discussion *infra* Subpart III.A.

39. Homeland Security Act § 451.

40. See, e.g., Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,799–800 (Jan. 25, 2017).

41. See, e.g., *id.* (ordering that ICE should prioritize the arrest of undocumented immigrants who have been convicted of *any* criminal offense at the same level as those who pose a threat to national security); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FISCAL YEAR 2018 I.C.E. ENFORCEMENT & REMOVAL OPERATIONS REPORT 4 (2019), <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf> (explaining that 80,730 individuals arrested by ICE have been convicted of or charged with DUI offenses, while only 1374 individuals have been charged or convicted with a “threat”).

42. See U.S. DEP’T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW, FISCAL YEAR 2018, CONGRESSIONAL JUSTIFICATION 6 (2018), <https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf> (conceding that ICE’s Enforcement Removal Operations (“ERO”) component, responsible for civil immigration enforcement, contributes 0 percent to the “Prevent Terrorism and Enhance Security” portion of DHS’s mission); see also Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1860 (2007).

singular focus on punitive enforcement has served to obscure the critical role that compliance assistance can play in an effective and efficient enforcement regime.<sup>43</sup>

ICE's abusive tactics are legion and well-documented. Perhaps the most well-known examples center on the treatment of families and children. The Trump Administration's policy of detaining and separating children from parents, a mechanism intended to deter families fleeing brutal sexual and gang violence from seeking lawful avenues to asylum, struck a particularly discordant note with the American public.<sup>44</sup> For many citizens, this policy was an introduction to the brutality of our current immigration enforcement paradigm. But for immigrants living in the United States, it was merely an extension of a pattern of extreme and inhumane abuse that ICE regularly employs to terrorize communities.<sup>45</sup> In fact, ICE's practice of detaining families to deter asylum seekers began long before the Trump Administration;<sup>46</sup> although, the scale of such detention has increased, and now numbers are in the thousands on any given day.<sup>47</sup> The public outcry following President Trump's family separation policy did not bring an end to the abuse of detained children. The Administration has, notwithstanding an injunction, continued to

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43. See discussion *infra* Subpart IV.B.1.

44. Ben Kamisar, *Poll: 88 Percent of Voters Don't Want Families Separated at Border*, HILL (June 27, 2018, 3:58 PM), <https://thehill.com/homenews/administration/394480-poll-88-percent-of-voters-dont-want-families-separated-at-border>; David Smith & Tom Phillips, *Child Separations: Trump Faces Extreme Backlash from Public and His Own Party*, GUARDIAN (June 19, 2018, 2:23 PM), <https://www.theguardian.com/us-news/2018/jun/19/child-separation-camps-trump-border-policy-backlash-republicans>; Talia Wiener & Richard Gonzales, *Hundreds Arrested Protesting Trump Administration's Immigration Policies*, NPR (June 28, 2018, 8:04 PM), <https://www.npr.org/2018/06/28/624401005/hundreds-arrested-protesting-trump-administrations-immigration-policies>.

45. Hing, *supra* note 13 (quoting an immigrant community leader as explaining that "Ever since the agency was created . . . there's been no question that its role has been to terrorize immigrants." (internal quotation marks omitted)); Tal Kopan, *ICE Director: Undocumented Immigrants "Should be Afraid"*, CNN (June 16, 2017, 6:52 PM), <https://www.cnn.com/2017/06/16/politics/ice-immigrants-should-be-afraid-homan/index.html> (quoting former ICE director Thomas Homan as saying he has "zero regrets" about testifying before Congress that undocumented immigrants "should be afraid" under the Trump administration); see also U.S. IMMIGRATION & CUSTOMS ENF'T, STATEMENT OF THOMAS D. HOMAN 3 (2017), <https://www.ice.gov/sites/default/files/documents/Speech/2017/170613homan.pdf> ("ICE will no longer exempt entire classes or categories of removable aliens from potential enforcement. . . . ICE arrests are up 38 percent since the same time period last year, charging documents issued are up 47 percent, and detainers issued are up 75 percent.").

46. See *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 172 (D.D.C. 2015).

47. *FOIA 16-40015 ICE Average Daily Population & Family Residential Center (FRC) Average Daily Population*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <https://www.ice.gov/foia/library> (follow "Detention Facility Statistics" hyperlink and then follow "Family Residential Center Populations FY2013–February 11, 2017" to download Excel file).

separate families and has announced that it will cut basic educational, recreational, and legal services for the children it detains.<sup>48</sup> This announcement is consistent with long-standing punitive mistreatment of undocumented children whose parents brought them to the United States. One of the first acts of the Trump Administration was to announce its intent to deport such children, who had previously been granted protection under the Deferred Action for Childhood Arrivals (“DACA”) program.<sup>49</sup> In addition, immigration authorities have vigorously and consistently contested the idea that unaccompanied children need to be assigned lawyers to protect their rights in deportation proceedings.<sup>50</sup> Instead, the Administration absurdly asserts that children, even those as young as three-years-old, are competent to represent themselves against trained government prosecutors in these highly complex legal proceedings.

ICE’s abuses extend far beyond its treatment of children. Disregard for the life and health of immigrants is its norm. The stories are endless: ICE has detained pregnant women and denied them vital medical treatment;<sup>51</sup> shackled those giving birth and denied them care after miscarriages;<sup>52</sup> detained individuals with critical health conditions;<sup>53</sup> and deported critically ill individuals without life-sustaining medication.<sup>54</sup> In addition, widely circulated images and videos of ICE officers physically tearing parents from the

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48. Miriam Jordan, *No More Family Separations, Except These 900*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/us/migrant-family-separations.html>.

49. *Attorney General Sessions Delivers Remarks on DACA*, U.S. DEPT JUST. (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>; *President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration*, WHITE HOUSE (Sept. 5, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-restores-responsibility-rule-law-immigration/>; see also Adam Edelman, *Trump Ends DACA Program, No New Applications Accepted*, NBC NEWS (Sept. 5, 2017, 9:14 AM), <https://www.nbcnews.com/politics/immigration/trump-dreamers-daca-immigration-announcement-n798686>.

50. *C.J.L.G. v. Barr*, 923 F.3d 622, 625 (9th Cir. 2019); *J.E.F.M. v. Whitaker*, 908 F.3d 1157, 1158 (9th Cir. 2018).

51. Chantal Da Silva, *ICE Agents Detain Woman Despite “High Risk” Pregnancy and Deny Her Medication for Days, Immigration Lawyers Say*, NEWSWEEK (Jan. 21, 2019, 12:29 PM), <https://www.newsweek.com/ice-agents-arrest-high-risk-pregnant-woman-during-her-green-card-interview-1299295>.

52. Esther Wang, *CBP and ICE Officials Are Shackling Pregnant Women, Deny Them Care When They Miscarry*, JEZEBEL (July 9, 2018, 5:50 PM), <https://theslot.jezebel.com/cbp-and-ice-officials-are-shackling-pregnant-women-den-1827459344>.

53. Carlos Ballesteros, *Federal Immigration Agents Target 10-Year-Old Girl Straight Out of Surgery*, NEWSWEEK (Oct. 25, 2017, 8:49 PM), <https://www.newsweek.com/cruelty-ice-unparalleled-693299>.

54. Matt Katz, *Critically Ill Man Deported Without Adequate Medication, Access to Care*, WNYC (May 24, 2019), <https://www.wnyc.org/story/critically-ill-man-deported-without-adequate-medication-access-care/>.

arms of their screaming children in front of schools and homes are now a grotesque daily routine in the United States.<sup>55</sup> These are not isolated examples but rather are a part of a decade-long pattern that has been documented by both federal government watchdogs and independent reviews, demonstrating a consistent practice of “egregious medical neglect in [immigration] detention facilities across the country” and large scale family separation programs. Unsurprisingly, the disregard for human life has led to a startling pattern of deaths in ICE custody.<sup>56</sup> The deaths and medical neglect are the easiest to document, but they are only one facet of the ruthlessness that characterizes immigration enforcement more generally in the age of ICE.<sup>57</sup>

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55. See, e.g., Justin Boggs, *ICE Attempted to Arrest Three Fathers Dropping Kids Off for School in NJ*, ABC 15 (Jan. 26, 2018, 8:59 AM), <https://www.abc15.com/news/national/ice-attempted-to-arrest-3-fathers-dropping-kids-off-for-school-in-nj>; Ryan Bort, *This is What an ICE Arrest Looks Like*, ROLLING STONE (July 25, 2019, 1:10 PM), <https://www.rollingstone.com/politics/politics-news/ice-arrest-video-window-shattered-kids-in-car-863339/>; *ICE Agents Arrest Undocumented Mom in Front of Children in San Diego*, ABC 7 (Mar. 9, 2018), <https://abc7.com/ice-agents-arrest-mom-in-front-of-children-in-san-diego/3196448/>; Morgan Winsor, *ICE Arrests Father of Three as he was Getting Kids Ready for School*, ABC NEWS (Feb. 3, 2018, 5:35 PM), <https://abcnews.go.com/US/ice-arrests-father-kids-ready-school/story?id=52818039>; The Young Turks, *Children Sob as Father Arrested by ICE (VIDEO)*, YOUTUBE (Mar. 3, 2017), <https://www.youtube.com/watch?v=ZertaIloD3I>.

56. HUMAN RIGHTS WATCH, AM. CIVIL LIBERTIES UNION, NAT'L IMMIGRANT JUSTICE CTR. & DET. WATCH NETWORK, *CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 1–2* (2018); Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 SOUTH ATLANTIC Q. 621, 623 (2014); Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES (Jan. 9, 2010), <https://www.nytimes.com/2010/01/10/us/10detain.html>; Ken Klippenstein, *ICE Detainee Deaths Were Preventable*, TYT (June 3, 2019), <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/688s1LbTKvQKNCv2E9bu7h>; Hannah Rappleye & Lisa Riordan Seville, *24 Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019, 7:00 AM), <https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291>.

57. See, e.g., *Calderon v. Sessions*, 330 F. Supp. 3d 944, 958–59 (S.D.N.Y. 2018) (finding that ICE efforts to deport an individual that had a legal pathway toward attaining citizenship status was an “attempt[] to strip the Petitioner’s right with no explanation or justification”); *Ragbir v. Sessions*, No. 18-cv-236 (KBF), 2018 WL 623557, at \*2 (S.D.N.Y. Jan. 29, 2018) (finding that ICE tactics designed to prevent individuals slated for deportation from having a chance to say goodbye to their families violates fundamental constitutional rights); see also Rafael Bernal, *Army Vet Slated for Deportation for Drug Charges*, HILL (Mar. 20, 2017, 6:40 PM), <http://thehill.com/latino/324899-army-vet-slated-for-deportation-over-drug-charges>; Charles M. Blow, Opinion, *Trump’s ‘Concentration Camps’*, N.Y. TIMES (June 23, 2019), <https://www.nytimes.com/2019/06/23/opinion/trump-migrants-camps.html>; Julia Conley, *Positively Evil: Immigration Checkpoints to Remain Open as Harvey Forces Evacuations*, COMMON DREAMS (Aug. 25, 2017), <https://www.commondreams.org/news/2017/08/25/positively-evil-immigrant-checkpoints-remain-open-harvey-forces-evacuations>; Alissa J. Rubin & Nicholas

ICE also has amassed a well-earned reputation as a rogue agency unconstrained by the constitution and other legal limits. Virtually every major immigration enforcement policy enacted by the Trump Administration has been deemed to violate the law.<sup>58</sup> The illegal policies have included the violation of court-mandated protocols for ensuring that detained children are treated humanely, attempts to illegally limit federal funding to sanctuary cities, retaliatory deportations targeting activists who speak out against ICE, attempts to illegally withdraw DACA protections, and attempts to prevent refugees from accessing asylum protections.<sup>59</sup> This is, in part, a piece of a larger pattern of the Trump Administration's lawlessness.<sup>60</sup> However, ICE's pattern of disregard for legal limits was well established before Trump ever entered office. Pre-Trump violations included, for example, a pattern of illegal warrantless home raids, the detention of minors in conditions that violated court-mandated protocols, and the unlawful use of family detention as a constitutionally impermissible deterrent.<sup>61</sup> Beyond the documented

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Bogel-Burroughs, *ICE Deported Him to a Country He'd Never Seen. He Died 2 Months Later*, N.Y. TIMES (Aug. 8, 2019), <https://www.nytimes.com/2019/08/08/us/iraq-jimmy-aldaoud-deport.html?smid=nytcore-ios-share>.

58. Fred Barbash, *Trump's Immigration Policies Fail Time and Again When Faced with Scrutiny From the Federal Courts*, WASH. POST (Apr. 11, 2019, 7:07 PM), [https://www.washingtonpost.com/world/national-security/trumps-immigration-policies-fail-time-and-again-when-faced-with-scrutiny-from-the-federal-courts/2019/04/11/e2bfcc5a-5bb3-11e9-9625-01d48d50ef75\\_story.html](https://www.washingtonpost.com/world/national-security/trumps-immigration-policies-fail-time-and-again-when-faced-with-scrutiny-from-the-federal-courts/2019/04/11/e2bfcc5a-5bb3-11e9-9625-01d48d50ef75_story.html).

59. See *Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 705 (4th Cir. 2019) (finding that the government failed to provide a proper explanation for its attempt to revoke DACA protections); *Ragbir v. Homan*, 923 F.3d 53, 71 (2d Cir. 2019) (finding that ICE retaliation against a known immigrant rights activist was egregious and amounted to selective punishment); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 510 (9th Cir. 2018) (finding that DACA could not be rescinded by the Trump administration based solely on the administration's belief that the program was implemented illegally); *City of S.F. v. Trump*, 897 F.3d 1225, 1234–35 (9th Cir. 2018) (finding that an executive order seeking to withhold federal funding from a sanctuary city violated constitutional separation of powers principles); *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019) (granting preliminary injunction to prevent implementation of illegal asylum restriction); see also Abigail Hauslohner & Maria Sacchetti, *Hundreds of Minors Held at U.S. Border Facilities Are There Beyond Legal Time Limits*, WASH. POST (May 30, 2019, 5:23 PM), [https://www.washingtonpost.com/immigration/hundreds-of-minors-held-at-us-border-facilities-are-there-beyond-legal-time-limits/2019/05/30/381cf6da-8235-11e9-bce7-40b4105f7ca0\\_story.html](https://www.washingtonpost.com/immigration/hundreds-of-minors-held-at-us-border-facilities-are-there-beyond-legal-time-limits/2019/05/30/381cf6da-8235-11e9-bce7-40b4105f7ca0_story.html); Vanessa Romo & Joel Rose, *Administration Cuts Education And Legal Services For Unaccompanied Minors*, NPR (June 5, 2019, 6:07 PM), <https://www.npr.org/2019/06/05/730082911/administration-cuts-education-and-legal-services-for-unaccompanied-minors>.

60. See Fred Barbash et al., *Federal Courts Have Ruled Against Trump Administration Policies at Least 70 Times*, WASH. POST (Apr. 26, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-overruled/>.

61. R.I.L.-R v. Johnson, 80 F. Supp. 3d 164, 170 (D.D.C. 2015); BESS CHIU, LYNLY EGYES, PETER L. MARKOWITZ & JAYA VASANDANI, CARDOZO IMMIGRATION

illegal conduct, ICE has also amassed a notorious record of lies and racism.<sup>62</sup>

The one area where ICE has demonstrated startling success has been in its effort to garner ever increasing resources for itself. Funding for ICE has risen from \$3.3 billion in 2003, the year after its creation, to \$7.5 billion in 2018—an increase of approximately 130 percent—and ICE has requested \$9.3 billion for 2020.<sup>63</sup> As a nation, we now spend more on federal immigration enforcement than on all other federal law enforcement combined.<sup>64</sup> And what have we gotten for this enormous increase in spending? Certainly, the number of removals, arrests, and detentions have skyrocketed.<sup>65</sup> But enforcement is not a goal in and of itself. Rather, it is a means to increase compliance or to reduce noncompliance with the law. On that front, ICE has failed miserably.<sup>66</sup>

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JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 1 (2009); Amy Taxin, *Obama, Like Trump, Grappled with Family Immigration*, ASSOCIATED PRESS (June 21, 2018), <https://www.apnews.com/98f0385378d14dc795edc0d85c46d9cf>.

62. See, e.g., AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, WARREN INST., SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 2 (2011) (documenting how Latino immigrants are disproportionately targeted for removal by ICE); García Hernández, *supra* note 23, at 283–84 (documenting ICE’s pattern of racially discriminatory enforcement); Hing, *supra* note 6, at 308 (documenting ICE’s lies to fellow law enforcement agencies); Hiroshi Motomura, *The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 25 (2015) (noting that although “only about seventy-eight percent of unauthorized immigrants” were Latino from 2008 through 2012, more than 96% of those removed in 2012 were Latino); Erik Larson, *Trump Administration Lied to Federal Judge to Deport Iraqis, He Rules*, BLOOMBERG (Nov. 20, 2018, 1:58 PM), <https://www.bloomberg.com/news/articles/2018-11-20/judge-orders-ice-to-free-iraqi-says-it-gave-false-information>; Dan Simon, *ICE Spokesman in SF Resigns and Slams Trump Administration Officials*, CNN (Mar. 12, 2018), <https://www.cnn.com/2018/03/12/politics/ice-spokesman-resigns-san-francisco/index.html> (“James Schwab, a spokesman for the San Francisco Division of Immigration and Customs Enforcement, has resigned, citing what he says are falsehoods being spread by members of the Trump administration including Attorney General Jeff Sessions.”).

63. AM. IMMIGRATION COUNCIL, THE GROWTH OF THE U.S. DEPORTATION MACHINE: MORE IMMIGRANTS ARE BEING “REMOVED” FROM THE UNITED STATES THAN EVER BEFORE 4 (2014); U.S. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2020, at 27 (2019).

64. DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 9 (2013), <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

65. See discussion *infra* Subparts III.B, III.C.

66. Frost, *supra* note 23, at 10 (“[B]y virtually all accounts, removal-or-forbearance has failed. . . . Removal is expensive, disruptive, frequently inhumane, and cannot keep pace with the burgeoning unauthorized population.”); Martin, *supra* note 2323, at 417 (“Furthermore, for all the hardship the 1996 amendments imposed, they were stunningly weak in deterring or

In 2000, just before the creation of ICE, the undocumented population of the United States stood at seven million, based on the government's own estimates.<sup>67</sup> DHS's most recent estimate of the undocumented population is twelve million.<sup>68</sup> Thus, while we have increased ICE's resources by 130 percent, the undocumented population has grown by over 70 percent.<sup>69</sup> Notwithstanding the Trump Administration's rhetoric about a new border crisis, these numbers cannot be explained by an increase in unauthorized immigration. In fact, the rate of unauthorized migration has been moving in the opposite direction. In 2000, we had approximately 1.4 million unauthorized arrivals in the United States.<sup>70</sup> Since that time, the rate of unauthorized migration has dipped significantly, stabilizing in recent years at approximately four hundred–six hundred thousand per year.<sup>71</sup> The growth of the undocumented population is not a function of a historically anomalous rate of migration, which is in fact, in line with historic norms.<sup>72</sup> So, while ICE's mass deportation program is exacting incredible human suffering, as a law enforcement strategy, it just is not working. In the words of the INS's former General Counsel, ICE's "massive, showy,

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controlling illegal migration."); Ryo, *supra* note 23, at 637 ("The failure of current policy to deter unauthorized migration is not surprising.").

67. U.S. IMMIGRATION & NATURALIZATION, OFFICE OF POLICY & PLANNING, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, at 6, <https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%201990%20to%202000.pdf>.

68. U.S. DEP'T OF HOMELAND SEC., OFFICE OF STRATEGY, POLICY, & PLANS, POPULATION ESTIMATES: ILLEGAL ALIEN POPULATION RESIDING IN THE UNITED STATES: JANUARY 2015, at 3 (2018). Some non-government actors have, more currently, estimated that the undocumented population has declined somewhat in recent years. *See, e.g.*, JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., U.S. UNAUTHORIZED IMMIGRANT TOTAL DIPS TO LOWEST LEVEL IN A DECADE 5 (2018). However, as explained below, such decline is not believed to be attributable to ICE's enforcement strategy. *See* Martin, *supra* note 23, at 418–19; discussion *infra* Part III.

69. *See* Frost, *supra* note 23, at 9 ("In legal briefs, policy statements, and testimony before Congress, U.S. immigration officials have consistently stated that their goal is to reduce the size of the unauthorized population . . .").

70. Robert Warren, *Sharp Multiyear Decline in Undocumented Immigration Suggests Progress at US-Mexico Border, Not a National Emergency*, CTR. FOR MIGRATION STUD. (Feb. 27, 2019), [https://cmsny.org/publications/essay-warren-022719/#\\_ftnref4](https://cmsny.org/publications/essay-warren-022719/#_ftnref4).

71. *Id.* Some may point to this decline itself as evidence that ICE's enforcement regime is working. However, the best evidence does not support this conclusion and, in any event, to the extent any portion of the decline in unauthorized flow is related to stepped up enforcement, this is likely attributable to border enforcement conducted by CBP not ICE. *See* discussion *infra* Subpart III.A.

72. NAT'L ACADS. OF SCIS., ENG'G, AND MED., THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION 79 (Francine D. Blau & Christopher Mackie eds., 2017).

and tough-sounding” enforcement regime is remarkably “ineffectual in controlling illegal migration.”<sup>73</sup>

In regard to ICE’s record of failure, waste and mismanagement are part of the problem, but the numbers demonstrate that ICE’s ever-increasing investment in detention and deportation has simply failed as a law enforcement strategy even by ICE’s own metric of success: reducing violations of the immigration laws.<sup>74</sup> In fact, ICE’s strategies have often been counterproductive, undermining other law enforcement efforts.<sup>75</sup> There is, of course, no way to test the counterfactual to see what the undocumented population would be today without the unprecedented massive build up in interior enforcement.<sup>76</sup> Nor am I suggesting that the rate of compliance with immigration laws would be increased by simply removing the current enforcement apparatus. Rather, these numbers simply demonstrate that the current scheme has failed to achieve its goal and thus begs the question of whether there is a better way. For the communities that know ICE’s lawless brutality firsthand, the case for the abolition of ICE is self-evident. There are legitimate disagreements, even within the immigrant rights community, about the political wisdom of advancing the calls to abolish ICE. This Article takes no position on

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73. David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 525, 525 (2007).

74. *ICE’s Fiscal Mismanagement: Deceit and Abuse*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/sites/default/files/ICE%E2%80%99s%20Fiscal%20Mismanagement-%20Deceit%20and%20Abuse.pdf> (last visited Mar. 29, 2020).

75. See, e.g., Hing, *supra* note 6, at 294 (explaining how “[p]olice departments across the country have reported a decrease in crime reporting in predominantly Latino neighborhoods, which some officials believe is related to the fear of immigration enforcement; for example, the Houston police chief reported a 13% decrease in violent crime reporting by Latinos during the first three months of 2017”); Angela Hart, *Speaking Out Against Immigration Raids Is Her Duty*, *California Justice Says*, SACRAMENTO BEE (Aug. 22, 2017, 02:27 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article168714487.html>. California Supreme Court Chief Justice explained how ICE’s actions make immigrants “less likely to report crimes, to come forward as witnesses to crimes and to seek help if they are victims of crimes.” She claims that this “impedes public safety . . . access to justice and has led to a ‘tide of rising violence.’” *Id.*

76. The same of course can be said about reductions or increases in crime rates, but, nevertheless, those are regularly touted as relevant measures of the success or failure of policing strategies in other contexts. See, e.g., Sarah Holder, *What Happened to Crime in Camden?*, CITYLAB (Jan. 10, 2018), <https://www.citylab.com/equity/2018/01/what-happened-to-crime-in-camden/549542/>; Ray Suarez, *How Crime Rates in New York City Reached Record Lows*, NPR (Dec. 30, 2017, 6:33 PM), <https://www.npr.org/2017/12/30/57480001/how-crime-rates-in-new-york-city-reached-record-lows>; Simone Weichselbaum & Wendi C. Thomas, *More Cops. Is it the Answer to Fighting Crime?*, USA TODAY (Feb. 12, 2019, 7:17 PM), <https://www.usatoday.com/story/news/investigations/2019/02/13/marshall-project-more-cops-dont-mean-less-crime-experts-say/2818056002/>.

the political strategy question. However, on the merit, even for those traditionally hostile to the Abolish ICE movement, the dramatic failure of the current enforcement paradigm calls for an alternative positive vision.

### III. THE AHISTORIC NATURE OF IMMIGRATION ENFORCEMENT IN THE AGE OF ICE

The defense of ICE's system of mass deportation and detention often begins and ends with the assumption that there is no other way.<sup>77</sup> The assumption that a large-scale deportation program is a necessary centerpiece of our interior immigration enforcement paradigm is, however, belied by the historical record. In fact, today's massive punitive interior enforcement system is a dramatic historical anomaly.<sup>78</sup> A review of immigration enforcement in the United States over time also reveals some components of alternative approaches, mechanisms, and structures that can inform the effort to construct a new humane and effective paradigm.

For the first one hundred years of the United States, immigration enforcement was handled almost exclusively by the states; their efforts, while limited, were almost entirely focused on regulating the admission of new immigrants.<sup>79</sup> During this period, there was no meaningful punitive interior enforcement in the United States.<sup>80</sup> The federal government assumed responsibility for immigration regulation around the turn of the twentieth century, and Congress created the first federal immigration agency, the Bureau of Immigration in 1895.<sup>81</sup> Like the state enforcement that preceded it, the agency focused on regulating the admission of new immigrants without any significant interior enforcement component at all.<sup>82</sup> The Bureau of Immigration was housed in the Treasury Department, evincing the economic regulatory paradigm Congress envisioned.<sup>83</sup>

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77. See, e.g., Emily Cochrane, *Trump Attacks Democrats on Calls to Abolish ICE*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/us/politics/trump-interview-ice-trade-nafta.html>. See generally N.Y. Times Editorial Board, Opinion, *All Presidents Are Deporters in Chief*, N.Y. TIMES: OPINION (July 13, 2019), <https://www.nytimes.com/2019/07/13/opinion/sunday/trump-deportations-immigration.html> (discussing presidential reliance on deportation).

78. See generally Neuman, *supra* note 28, at 1881–83 (reviewing the historical forms of regulating immigration through state legislation, quarantine, and the move to federal enforcement in other forms prior to detention and deportation).

79. 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, 324–26 (2008); Neuman, *supra* note 28, at 1841.

80. Neuman, *supra* note 28, at 1884–85.

81. Immigration Act of 1895, ch. 177, §1, 28 Stat. 764, 780–81 (1895); see also Immigration Act of 1891, ch. 551, § 8, 26 Stat. 1084, 1085 (1891).

82. See SCIS HISTORY OFFICE & LIBRARY, *supra* note 37, at 3–4.

83. *Id.*

During the first half-century of federal control, the federal government experimented with different agency structures. At times, it divided the services component of the federal immigration system—which consisted almost exclusively of naturalization—apart from the enforcement component—which remained focused on the border.<sup>84</sup> In 1933, the two components were reunited by the creation of the INS.<sup>85</sup> During this early period, economic regulation remained the prevailing frame for immigration policy, as the agencies were moved at various times between the Treasury Department, the Labor Department, and the Department of Commerce.<sup>86</sup>

Early moves toward interior enforcement were sparked by moments of national crisis and insecurity. The Great Depression was an economic phenomenon driven by factors generally understood to be unrelated to immigration;<sup>87</sup> however, that moment of national insecurity led to the first significant interior enforcement efforts in the United States—though quite modest by contemporary standards.<sup>88</sup> While border enforcement remained the central focus, the onset of World War II sparked a growing anxiety about “alien criminal and subversive elements” in our midst.<sup>89</sup> This anxiety began a shift that led the INS to move to the DOJ, placing it outside of an economically focused agency for the first time and transforming it “from a department whose functions were essentially protective to one whose functions were essentially prosecutorial.”<sup>90</sup> This shift was part of the same wartime cultural hostility toward immigrants that led to the historical stain of Japanese internment.<sup>91</sup> By the end of World War II, the INS’s workforce doubled from approximately four thousand to eight thousand employees, and a significant component of its mission had become locating and tracking non-citizens, operating internment camps and detention facilities for “enemy aliens” and enforcing deportation orders.<sup>92</sup> However, with the significant and notable exception of Japanese internment, detention did not play a prominent role in interior enforcement during the first

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84. See, e.g., Act of March 4, 1913, ch. 141, §3, 37 Stat. 737 (1913) (creating, separately, the Bureau of Immigration and the Bureau of Naturalization).

85. Exec. Order No. 6,166 (1933).

86. ROGER DANIELS, *GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRANT POLICY AND IMMIGRANTS SINCE 1882*, at 39 (2004); USCIS HISTORY OFFICE & LIBRARY, *supra* note 37, at 4–5, 7.

87. See Nicholas Crafts & Peter Fearon, *Lessons from the 1930s Great Depression*, 26 OXFORD REV. ECON. POL’Y 285, 285 (2010).

88. USCIS HISTORY OFFICE & LIBRARY, *supra* note 37, at 7.

89. SHARON D. MASANZ, CONG. RESEARCH SERV., *HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE* 42, 47 (1980).

90. DANIELS, *supra* note 86, at 83; MASANZ, *supra* note 89, at 47.

91. See *Korematsu v. United States*, 323 U.S. 214, 214 (1944).

92. MASANZ, *supra* note 89, at 48–49; USCIS HISTORY OFFICE & LIBRARY, *supra* note 37, at 8.

hundred years of federal regulation. Indeed, within a decade after World War II, the INS largely abandoned the use of detention.<sup>93</sup>

The 1980s marked the onset of our nation's dramatic paradigm shift toward large-scale punitive interior immigration enforcement—though the shift accelerated dramatically and crescendoed in the twenty-first century with the creation and expansion of ICE. The 1980s and 1990s were a period of national preoccupation and anxiety around crime, exemplified best by the War on Drugs.<sup>94</sup> In addition, during this period, an economic crisis in Mexico, a robust U.S. economy, and a loss of legal immigration pathways for low wage Mexican workers, converged to drive a sharp increase in unauthorized immigration.<sup>95</sup> The first major legislative shifts toward interior enforcement were reactions to this national fixation on crime and this increase in unauthorized immigration, though abundant research has debunked any link between immigration and criminality.<sup>96</sup> The 1995 bombing of a federal building in Oklahoma, though committed by a natural-born U.S. citizen, and later the 2001 September 11th terrorist attacks sparked additional legislation that was also critical in accelerating the shift toward large scale interior immigration enforcement.<sup>97</sup> Collectively, these legislative enactments laid the groundwork for the three novel features that have come to characterize the modern era of immigration enforcement, which began in the 1980s and had become firmly established by the outset of the twenty-first century: (A) the entanglement of criminal and immigration enforcement schemes, (B) the dramatic expansion of enforcement scale, and (C) the rise of immigration detention.

#### A. *Novel Entanglement of Criminal and Immigration Enforcement Schemes*

Deportation was deemed a civil penalty at the outset of federal immigration control. Thus, deportation proceedings are considered

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93. See MASANZ, *supra* note 89, at 53.

94. García Hernández, *supra* note 23, at 248.

95. PEW RESEARCH CTR., MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065, at 93 (2015), [https://www.pewresearch.org/wp-content/uploads/sites/5/2015/09/2015-09-28\\_modern-immigration-wave\\_REPORT.pdf](https://www.pewresearch.org/wp-content/uploads/sites/5/2015/09/2015-09-28_modern-immigration-wave_REPORT.pdf) (“With the onset of the Great Recession of 2007–2009, immigration dropped dramatically after 2007, largely due to a decrease and then a reversal of unauthorized immigration from Mexico.”); see also Martin *supra* note 23, at 418–19.

96. Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), Pub. L. No. 104–208, 110 Stat. 3009–546 (1996); see discussion *infra* note 266 and accompanying text; Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, 102 Stat. 4181 (1988); Immigration Reform and Control Act of 1986 (“IRCA”), Pub. L. No. 99–603, 100 Stat. 3445 (1986).

97. Homeland Security Act of 2002 (“HSA”), Pub. L. 107–296, 116 Stat. 2135 (2002); Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104–132, 110 Stat. 1214 (1996).

civil, not criminal, in nature.<sup>98</sup> The entanglement with the criminal justice systems has only become a central feature of federal immigration enforcement in the modern era.<sup>99</sup> The entanglement has been multifaceted and has included a vast expansion of the types of crimes that can trigger deportation, a novel utilization of state and local criminal justice systems in federal civil immigration enforcement, and a shift toward using the federal criminal justice system as a primary and direct tool in immigration enforcement.<sup>100</sup>

Prior to the 1980s there was only a limited category of crimes that could trigger deportation.<sup>101</sup> In addition, people who faced deportation on the basis of such crimes generally had the opportunity to apply for various forms of discretionary relief from immigration judges.<sup>102</sup> They could prove, for example, that they had been rehabilitated, their crimes were minor, or their deportation would cause them or their families severe hardship.<sup>103</sup> However, the legislative shifts noted above, most notably the 1996 laws, vastly and retroactively expanded the categories of crimes that could trigger deportation and severely restricted immigration judges' discretion to grant relief from deportation.<sup>104</sup> Today, even long-term lawful permanent residents (green card holders) can be, and regularly are, deported for crimes as minor as turnstile jumping or possession of small amounts of marijuana.<sup>105</sup> The increasingly light and numerous statutory triggers for deportation based on criminal convictions and the severely limited availability of discretionary relief have fundamentally changed the nature of immigration enforcement.<sup>106</sup>

Relatedly, in recent decades, state and local criminal justice systems have become tools of federal civil immigration enforcement efforts like never before. The number of ICE officers has grown tremendously in recent years but is still dwarfed by the number of officers in state and local police and corrections departments across

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98. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); see Markowitz, *supra* note 79, at 351.

99. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000).

100. *Id.* at 1936, 1939.

101. *See id.* at 1938–39.

102. *Id.* at 1957.

103. *Id.*; Martin, *supra* note 23, at 459.

104. *See* Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104–132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104–208, 110 Stat. 3009–546; Martin, *supra* note 23 at 459–60; Morawetz, *supra* note 99, at 1938–39.

105. 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, 47 (2011); Markowitz, *supra* note 79, at 338.

106. Ryan D. King et al., *Employment and Exile: U.S. Criminal Deportations, 1908–2005*, 117 AM. J. SOC. 1786, 1798 (2012).

the country.<sup>107</sup> Following the September 11th attacks, ICE made the decision to try to leverage the vast apparatus of state criminal justice systems as “force multipliers” to expand the reach of their civil enforcement efforts.<sup>108</sup> The idea was to use the millions of contacts that local authorities have with individuals each year to help ICE identify and apprehend potentially deportable noncitizens. Enabled in part by the 1996 laws, the federal government began uploading certain civil immigration information into the FBI database that local police routinely query during traffic or street stops, and formally deputized some local police and correctional officers with the authority to directly enforce immigration law.<sup>109</sup> Most importantly, ICE introduced its Secure Communities program, which redirects all routine FBI criminal fingerprint queries from local authorities to DHS to scan for civil immigration violations.<sup>110</sup> In turn, this led to a significant expansion of ICE’s practice of issuing immigration “detainers” to local authorities.<sup>111</sup> A detainer is a formal request from ICE to local or state authorities, asking them to hold an individual who is otherwise eligible for release for transfer into immigration detention.<sup>112</sup> These efforts to draft local criminal justice systems into the work of federal civil immigration enforcement were met with fierce resistance from immigration activists and from some local police departments.<sup>113</sup> Both groups feared that the entanglement

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107. Compare DEP’T OF HOMELAND SEC., *supra* note 63, at 27 (tallying 24,461 ICE employees), with BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ233982, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), <https://www.bjs.gov/content/pub/pdf/csllea08.pdf> (counting 1,133,915 full time employees of state and local law enforcement agencies in 2008, the most recent data available from the U.S. Department of Justice).

108. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005).

109. 8 U.S.C. § 1357(g)(1) (2018); Antiterrorism and Effective Death Penalty Act of 1996 §439 (formally authorizing sub-federal law enforcement officers to arrest and detain unlawfully present noncitizens who had “previously been convicted of a felony in the United States”).

110. *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <https://www.ice.gov/secure-communities> (last updated Mar. 20, 2018).

111. *Tracking Immigration and Customs Enforcement Detainers: ICE Data Through November 2015*, TRAC SYRACUSE U. (2015), <https://trac.syr.edu/phptools/immigration/detainhistory/>; see also *Secure Communities*, *supra* note 110 (explaining that Secure Communities was fully implemented by Jan. 22, 2013).

112. U.S. DEP’T OF HOMELAND SEC., SAMPLE FORM I-247, IMMIGRATION DETAINER—NOTICE OF ACTION (2012), <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>.

113. See MAJOR CITIES CHIEFS ASS’N, IMMIGRATION POLICY 1 (2013), [https://www.majorcitieschiefs.com/pdf/news/2013\\_immigration\\_policy.pdf](https://www.majorcitieschiefs.com/pdf/news/2013_immigration_policy.pdf) (“Immigration is a federal policy issue between the United States government and other countries, not local or state entities and other countries.”); Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v.*

would undermine public safety by making immigrant witnesses and victims of crime afraid to cooperate with local police. Concerns about racial profiling were also prominent.<sup>114</sup> This opposition, in turn, gave rise to a wave of sanctuary laws, where many jurisdictions now refuse to engage in ICE's civil enforcement.<sup>115</sup> These sanctuary laws have significantly blunted, but not eliminated, the critical and novel role that local and state criminal justice systems play in the recent ramp-up in interior immigration enforcement.<sup>116</sup>

Local resistance, however, has been unable to stem the steady shift toward using the *federal* criminal justice system as a new direct tool in federal immigration enforcement.<sup>117</sup> Unlawful entry into the United States has long been classified as a federal misdemeanor, but criminal prosecutions were the rare exception. Prosecution for unlawful entry was not a meaningful part of federal immigration enforcement strategy before the 1990s.<sup>118</sup> Now, while actual violations have decreased, nearly half of all federal criminal arrests are for immigration matters, which consist overwhelmingly of arrests for illegal entry or reentry.<sup>119</sup> There were close to seventy thousand individuals arrested on such federal criminal immigration charges in

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United States, 3 WAKE FOREST J.L. & POL'Y 281, 288 (2013) (discussing the "significant controversy" of the federal government's increased reliance on detainers).

114. Lasch, *supra* note 113, at 289.

115. LENA GRABER & NIKKI MARQUEZ, IMMIGRANT LEGAL RES. CTR., SEARCHING FOR SANCTUARY: AN ANALYSIS OF AMERICA'S COUNTIES & THEIR VOLUNTARY ASSISTANCE WITH DEPORTATIONS 19–21 (2016), [https://www.ilrc.org/sites/default/files/resources/sanctuary\\_report\\_final\\_1-min.pdf](https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf); *see also* KRSNA AVILA ET AL., IMMIGRANT LEGAL RES. CTR., THE RISE OF SANCTUARY: GETTING LOCAL OFFICERS OUT OF THE BUSINESS OF DEPORTATIONS IN THE TRUMP ERA 8 (2018), [https://www.ilrc.org/sites/default/files/resources/rise\\_of\\_sanctuary-lg-20180201.pdf](https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf).

116. García Hernández, *supra* note 23, at 254–55; *Latest ICE Data on Detainer Usage Updated Through April 2018*, TRAC SYRACUSE U. (July 27, 2018), <https://trac.syr.edu/immigration/reports/522/> (explaining that ICE continues to issue around fourteen thousand detainers per month, but that 609 law enforcement agencies have refused to comply with them on at least one occasion).

117. *See generally* Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 639–41 (2012) (discussing the confusion surrounding recent federal enforcement directives); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–84 (2010) (emphasizing the increase in federal immigration prosecutions); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"*, 29 N.C. J. INT'L L. & COM. REG. 639, 669 (2004) (highlighting the concern regarding enforcement which disproportionately serves federal interests).

118. Act of Mar. 4, 1929, Pub. L. No. 1018, §2, 45 Stat. 1551, 1551; Chacón, *supra* note 117, at 635, 636 n.125; Eagly, *supra* note 117, at 1298.

119. *Compare infra* notes 134–35 and accompanying text, with MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, NCJ 251770, FEDERAL JUSTICE STATISTICS, 2015–2016, at 4 (2019). *See generally* Chacón, *supra* note 117, at 637 (discussing rates of "felony reentry prosecutions").

2016, which is a 1000 percent increase from the early 1990s.<sup>120</sup> Many have decried the way this shift has distorted the federal criminal docket, undermined due process, and diverted resources from the investigation and prosecution of the types of serious crimes that had previously dominated the federal criminal docket.<sup>121</sup>

Collectively, these three components—the vast expansion of increasingly light criminal triggers for deportation, the novel use of state and local criminal justice systems, and the federal criminal prosecution of routine immigration violations—have made the entanglement between the immigration and criminal justice systems a defining and unprecedented feature of modern immigration enforcement.<sup>122</sup>

### B. *Dramatic Expansion of Scale*

Enabled in significant part by the new entanglement with the criminal justice system, a second novel feature that has come to characterize ICE's enforcement model has been an unprecedented and dramatic expansion of scale. During the twentieth century, the United States deported an average of under twenty-five thousand people per year.<sup>123</sup> In the twenty-first century, the nation has averaged over three hundred thousand deportations per year—a startling 1100 percent increase.<sup>124</sup> The scale up was not a gradual change over the century but rather a precipitous and unprecedented jump in enforcement beginning in the 1990s.<sup>125</sup> As recently as the 1980s, the United States deported an average of twenty-two thousand people per year.<sup>126</sup> In the 1990s the annual average jumped to seventy-eight thousand, and in the first decade of the twenty-first century it jumped again to over two hundred fifty thousand.<sup>127</sup> As a

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120. *Compare* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-160089, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1993, at 15 (1996), *with* MOTIVANS, *supra* note 119, at 3.

121. *See, e.g.*, Chacón, *supra* note 117, at 637.

122. This is not to say that there have not been isolated incidents of federal and state coordination on immigration enforcement at other times in United States history. *See, e.g.*, Chacón, *supra* note 117, at 640–41 (discussing localities involvement in “Operation Wetback”).

123. *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2017*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/yearbook/2017/table39> (last published Apr. 9, 2019). This table includes both removals, which are formal deportations, and returns, which are when individuals encountered at the border are apprehended and allowed to leave the United States without a formal order. The analysis in this paragraph focuses on removals because they are employed in interior enforcement by ICE.

124. *Id.*

125. Marc R. Rosenblum, *Shifts in the US Immigration Enforcement System*, HOOVER INST. (July 14, 2015), <https://www.hoover.org/research/shifts-us-immigration-enforcement-system>.

126. *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2017*, *supra* note 123.

127. *Id.*

result, we have now deported more than twice as many people in the first two decades of the twenty first century as we did in the entire previous history of the United States.<sup>128</sup>

The unprecedented scale of deportation is, not surprisingly, driven by an unprecedented scale of funding. In 1980, the INS budget was \$349 million.<sup>129</sup> Last year, ICE's budget was \$7.5 billion.<sup>130</sup> That is an increase of over 2000 percent since 1980.<sup>131</sup> Moreover, this astronomical increase understates the actual increase, because many of the functions of the former INS are now housed in the USCIS and CBP. If you factor in the current budget of those agencies, the spending increase is over 3000 percent.<sup>132</sup> The scale of modern immigration funding and, as a result, enforcement is wildly out of proportion with historic norms.

### C. *The Rise of Mass Detention*

Just as with deportations, the shift toward large scale interior enforcement in the 1980s and 1990s has triggered a dramatic rise in immigration detention, now reaching a scale well beyond historic norms. In 1985, the daily population of detained immigrants was roughly two thousand.<sup>133</sup> By 1994, the population rose to about six thousand; by 2001, the population surpassed twenty thousand; and by 2008, the population reached thirty-three thousand individuals in immigration detention on any given day in the United States.<sup>134</sup> In 2019, ICE established a new record daily population of fifty-two

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128. *Id.*; Alex Nowrasteh, *Deportation Rates in Historical Perspective*, CATO INST. (Sept. 16, 2019, 3:43 PM), <https://www.cato.org/blog/deportation-rates-historical-perspective>.

129. JUSTICE MGMT. DIV., U.S. DEP'T OF JUSTICE, BUDGET TREND DATA: FROM 1975 THROUGH THE PRESIDENT'S 2003 REQUEST TO THE CONGRESS 106 (2002).

130. U.S. DEP'T OF HOMELAND SEC., *supra* note 63, at 27.

131. 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 2018, the federal budget grew by 637 percent. See OFFICE OF MGMT. & BUDGET, MAJOR SAVINGS AND REFORMS HISTORICAL TABLES: DONALD J. TRUMP 332–33 (2019), <https://www.govinfo.gov/content/pkg/BUDGET-2020-TAB/pdf/BUDGET-2020-TAB.pdf>.

132. This analysis includes the 1980 budget of the U.S. Customs (\$460 million) as well as the INS (\$350 million), see JUST. MGMT. DIV., *supra* note 129, at 104, 128, as compared to the 2018 budgets of ICE (\$7.45 billion), USCIS (\$4.48 billion), and CBP (\$16.32 billion), see U.S. DEP'T OF HOMELAND SEC., *supra* note 63, at 21, 27, 59.

133. DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 70 (2011) (citing Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in IMMIGR. STORIES 343, 347 (David A. Martin and Peter H. Schuck eds., 2005)).

134. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44 (2010).

thousand—a startling 2500 percent increase since 1985.<sup>135</sup> Annually, ICE now regularly detains hundreds of thousands of people each year.<sup>136</sup> Meanwhile, the average length of time individuals spend in detention has also spiked, and conditions have deteriorated dangerously.<sup>137</sup>

In some way, the dramatic escalation in the use of detention is simply reflective of the overall explosion in the scale and funding of interior immigration enforcement. However, scale is just part of the story. Mass detention in the age of ICE is not just ahistorical in scale but also in kind. For the vast majority of the history of the United States, detention played no significant role in interior enforcement.<sup>138</sup> There were some notable and deplorable wartime exceptions to this norm,<sup>139</sup> but to the extent detention was a significant feature at all, it has historically been limited almost exclusively to border apprehensions and not used against individuals living in the United States.<sup>140</sup> At the outset of the 1980s, there were no significant permanent immigration detention facilities at all.<sup>141</sup> Today, ICE jails not only individuals apprehended at the border by CBP but also individuals it arrests who have been living, often for many years, in the United States.<sup>142</sup> Last year, ICE detained over 150,000 individuals who were living in the United States.<sup>143</sup> The expansion of detention was enabled not just by the funding spike but also by the advent of statutory mandatory detention provisions, most notably in the 1996 laws,<sup>144</sup> and by cynical profit-driven lobbying campaigns by the private prison industry and state and local government who

135. Dominique Mosbergen, *ICE Has A Record-Breaking 52,000 Immigrants in Detention, Report Says*, HUFFINGTON POST (May 21, 2019), [https://www.huffpost.com/entry/ice-detainees-record\\_n\\_5ce39a0fe4b0877009939c17](https://www.huffpost.com/entry/ice-detainees-record_n_5ce39a0fe4b0877009939c17).

136. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 41, at 8.

137. See WILSHER, *supra* note 133, at 70; Kalhan, *supra* note 134, at 47–49; TRAC SYRACUSE, LEGAL NONCITIZENS RECEIVE LONGEST ICE DETENTION (2013), <https://trac.syr.edu/immigration/reports/321/>; see also discussion *supra* notes 50–56 and accompanying text.

138. García Hernández, *supra* note 23, at 248.

139. *Korematsu v. United States*, 323 U.S. 214, 217–19 (1944); WILSHER, *supra* note 133, at 29 (discussing the arrest and detention without trial of German-American legal residents during World War I).

140. 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); García Hernández, *supra* note 23, at 248; Daniel Kanstroom & M. Brinton Lykes, *Introduction: Migration, Detention, and Deportation: Dilemmas and Responses*, in THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES 1, 20 (Daniel Kanstroom & M. Brinton Lykes eds., 2015).

141. 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/>.

142. See García Hernández, *supra* note 23, at 253.

143. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 41, at 8.

144. See, e.g., 8 U.S.C. § 1226(c) (2018).

contract with ICE to jail immigrants.<sup>145</sup> The immigration detention system is now vast, with 70 percent of immigrant detainees held in private prisons and with a statutory mandate to detain at least 30,913 immigrants on any given day.<sup>146</sup> The shift towards mass detention is now central to ICE's interior enforcement strategy.

Collectively, these three components—the entanglement with criminal justice systems, the massive ahistorical scale, and the advent of mass detention—make ICE's enforcement paradigm a dramatic break from the historic approach the United States has taken toward interior immigration enforcement. Thus, the perception some have that ICE's system of mass detention and deportation is the only realistic way to enforce immigration law is simply not supported by the historical record.

#### IV. ALTERNATIVE EXISTING ENFORCEMENT PARADIGMS

Having identified ICE's irredeemable defects and the ahistorical nature of its mass deportation regime, we must now confront and evaluate the alternatives. There have been two primary alternative enforcement theories that have been utilized in recent years that some have suggested as substitutes for ICE's current approach: robust border enforcement and large-scale prosecutorial discretion programs.<sup>147</sup> However, as discussed below, these approaches lack promise as tools that can replace ICE or its failed enforcement paradigm. In contrast, two other enforcement approaches have shown significant promise in both the immigration and other administrative realms: moves toward addressing the drivers of immigration—the central push and pull factors that motivate migration—and a shift away from punitive enforcement toward cooperative enforcement techniques.<sup>148</sup> These approaches could be features of an effective and humane immigration enforcement scheme. Ultimately, however, these features alone are unlikely to effectively increase compliance with immigration laws.

##### A. *Border Enforcement*

Assessing the efficacy, humanity, and wisdom of our current border enforcement paradigm is beyond the scope of this Article, which instead focuses on identifying an alternative *interior* enforcement scheme. However, some have suggested enhanced border security could substitute for, or at minimum greatly reduce the

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145. Chacón, *supra* note 117, at 632–33, 646–47; García Hernández, *supra* note 23, at 259.

146. JENNIFER CHAN, NAT'L IMMIGRANT JUSTICE CTR., IMMIGRATION DETENTION BED QUOTA TIMELINE 4 (2017); *see* Ghosh, *supra* note 141.

147. *See* discussion *infra* Subparts IV.A, IV.B.

148. *See* discussion *infra* Subparts IV.C, IV.D.

need for, interior enforcement.<sup>149</sup> Accordingly, a limited exploration of border enforcement to assess this possibility is required.

As discussed above, punitive immigration enforcement in the United States has historically focused almost exclusively on the border.<sup>150</sup> In recent decades, as the nation built its first mass interior enforcement system, it also doubled down on border enforcement. In 1990, there were approximately 3700 border patrol officers.<sup>151</sup> Today, there are over nineteen thousand.<sup>152</sup> Since its creation, CBP's budget has grown from \$5.9 billion to over \$16.3 billion, dwarfing even ICE's budget.<sup>153</sup> Unlike ICE, there is some data to suggest that the nation's investment in border enforcement has helped CBP achieve its stated enforcement goal: to reduce unauthorized entrances. Unauthorized border crossings reached a modern peak in 2000, when the INS apprehended 1.7 million people attempting to unlawfully enter the United States.<sup>154</sup> Since that time, apprehensions (which are generally viewed as a measure of the volume of unauthorized entrances) have declined sharply and have stabilized in recent years with three hundred thousand–four hundred thousand apprehensions annually.<sup>155</sup>

It is important, however, not to overstate the efficacy of border enforcement efforts. The recent decline in unauthorized entrances is generally understood as primarily attributable to two factors that are unrelated to CBP's enforcement efforts: the economic stabilization in Mexico, which led to a sharp reduction in Mexican migration, and the Great Recession in the United States, which greatly reduced the domestic economy's hunger for migrant labor.<sup>156</sup> In fact, there is a significant body of empirical scholarship suggesting that border enforcement efforts have only a limited impact on the rates of unauthorized entrances, which are much more a function of these

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149. See, e.g., JENA BAKER MCNEILL, HERITAGE FOUND., *FIFTEEN STEPS TO BETTER BORDER SECURITY: REDUCING AMERICA'S SOUTHERN EXPOSURE* (Mar. 9, 2009), <https://www.heritage.org/homeland-security/report/15-steps-better-border-security-reducing-americas-southern-exposure>.

150. See discussion *supra* notes 73–77 and accompanying text.

151. Frost, *supra* note 23, at 11.

152. *Id.*

153. Compare *id.* (noting CPB's budget grew from \$5.9 billion in 2003 to \$11.9 billion in 2013), with U.S. DEP'T OF HOMELAND SEC., *supra* note 63, at 18 (noting the budget for CPB for FY 2020 as \$20.85 billion).

154. PASSEL & COHN, *supra* note 68.

155. *Id.* But see Caitlin Dickerson, *Border at 'Breaking Point' as More Than 76,000 Unauthorized Migrants Cross in a Month*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/us/border-crossing-increase.html>.

156. PASSEL & COHN, *supra* note 68; PEW RESEARCH CTR., *supra* note 95, at 93 (“With the onset of the Great Recession of 2007–2009, immigration dropped dramatically after 2007, largely due to a decrease and then a reversal of unauthorized immigration from Mexico . . .”); see also MEISSNER ET AL., *supra* note 64, at 3; Martin, *supra* note 23, at 418–19.

traditional immigration push and pull factors.<sup>157</sup> The unprecedented border enforcement build up is thus of questionable utility. What is not questionable is the suffering, pain, and death that the modern border build-up has caused. As the border has become increasingly militarized, crossing it has become more dangerous. Over the past two decades, thousands have died annually while trying to cross.<sup>158</sup>

Moreover, even if robust border enforcement was effective at driving down unlawful entrances, it has proven ineffectual and even counterproductive in other respects. Unlike earlier periods in U.S. history, a significant portion (between 25 percent and 40 percent) of the current undocumented population entered the United States lawfully and later overstayed their visas.<sup>159</sup> In fact, in this decade, a large majority of undocumented immigrants arrived lawfully.<sup>160</sup> Border enforcement can do nothing to address such non-compliance with immigration law. The hardening of the border has also had a number of counterproductive, unintended consequences. It has disrupted the previous patterns of circular migratory flow, where undocumented immigrants would regularly leave the United States voluntarily.<sup>161</sup> The heavily militarized border has effectively locked undocumented immigrants in the United States. It has also

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157. See Scott Berger & Leah Muse-Orlinoff, *Economic Crisis vs. Border Enforcement: What Matters Most to Prospective Migrants?*, in MEXICAN MIGRATION AND THE U.S. ECONOMIC CRISIS: A TRANSNATIONAL PERSPECTIVE 95, 97–102 (Wayne A. Cornelius et al. eds., 2010); Jezmin Fuentes et al., *Impacts of U.S. Immigration Policies on Migration Behavior*, in IMPACTS OF BORDER ENFORCEMENT ON MEXICAN MIGRATION: THE VIEW FROM SENDING COMMUNITIES 53, 53 (Wayne A. Cornelius & Jessa M. Lewis eds., 2007); Wayne A. Cornelius & Idean Salehyan, *Does Border Enforcement Deter Unauthorized Immigration? The Case of Mexican Migration to the United States of America*, 1 REG. & GOVERNANCE 139, 149–50 (2007); Christina Gathmann, *Effects of Enforcement on Illegal Markets: Evidence from Migrant Smuggling Along the Southwestern Border*, 92 J. PUB. ECON. 1926, 1938 (2008); Hing, *supra* note 6, at 279–80; Ryo, *supra* note 23, at 652–53; see also discussion *supra* Subpart III.C & *infra* note 206.

158. MARIA JIMENEZ, ACLU & MEX. NAT'L COMM'N OF HUMAN RIGHTS, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S. – MEXICO BORDER 12 (2009), [http://www.aclu.org/sites/default/files/pdfs/immigrants/humanitarian\\_crisis\\_report.pdf](http://www.aclu.org/sites/default/files/pdfs/immigrants/humanitarian_crisis_report.pdf); see Pia M. Orrenius, *The Effect of U.S. Border Enforcement on the Crossing Behavior of Mexican Migrants*, in CROSSING THE BORDER: RESEARCH FROM THE MEXICAN MIGRATION PROJECT 281, 281–82 (Jorge Durand & Douglas S. Massey eds., 2004).

159. Martin, *supra* note 23, at 425.

160. Jeffery S. Passel & D'Vera Cohn, *Mexicans Decline to Less Than Half the U.S. Unauthorized Immigrant Population for the First Time*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/>.

161. Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1153 (2008); Passel & Cohn, *supra* note 160; Ryo, *supra* note 23, at 637.

“increased demand for human smugglers” and expanded organized crime’s involvement in smuggling efforts.<sup>162</sup>

The unprecedented militarization of our border, and the enormous growth in resources allocated to border enforcement are of questionable utility. As recent experience has demonstrated, the pushes—like brutal domestic and gang violence—and pulls—like the ability to access work that can sustain one’s family—that drive unauthorized migration are so strong that even the most inhumane border enforcement strategies are unlikely to have their desired deterrent effect.<sup>163</sup> For years, Democratic and Republican Administrations alike have been engaged in an escalating one-way ratchet, ramping up border enforcement and inflicting ever greater hardship on refugees and economic migrants.<sup>164</sup> Such migrants have been subjected to criminal prosecution, jailed in freezing cold facilities without access to basic hygiene, and separated from their children.<sup>165</sup> But even as the brutality has reached previously unthinkable levels under the current Administration, the number of migrants who cross the border without authorization has once again begun to rise, reaching an eleven-year high.<sup>166</sup> More robust border enforcement, which has no application to the majority of recent undocumented immigrants, carries unacceptable human costs, is of limited deterrent value, and is thus not a viable alternative to ICE’s failed interior enforcement paradigm.

#### B. Prosecutorial Discretion

Prosecutorial discretion has been touted by some as a critical enforcement tool that can both mitigate the harshest aspects of ICE’s enforcement scheme and enhance its effectiveness by focusing its resources on prioritized targets.<sup>167</sup> However, while prosecutorial discretion has, at times, proven to be a powerful tool to protect sympathetic communities in the face of legislative paralysis, its benefits have been marginal and unreliable.<sup>168</sup> It is unlikely that

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162. Ryo, *supra* note 23, at 637.

163. Cornelius & Salehyan, *supra* note 157, at 149–50; Dickerson, *supra* note 155.

164. See Frost, *supra* note 23, at 11–13, 19–20.

165. See Jordan, *supra* note 48; Reade Levinson & Kristina Cooke, *Migrants in U.S. Custody Describe Life in ‘Ice Boxes’ and ‘Dog Pounds’*, REUTERS (July 18, 2018, 6:05 PM), <https://www.reuters.com/article/us-usa-immigration-conditions/migrants-in-u-s-custody-describe-life-in-ice-boxes-and-dog-pounds-idUSKBN1K82X1>; Richard Marosi, *Feds Plan Mass Prosecution of Illegal Border-Crossing Cases in San Diego, Attorneys Say*, L.A. TIMES (June 6, 2018, 6:50 PM), <https://www.latimes.com/local/lanow/la-me-ln-operation-streamline-san-diego-20180606-story.html>.

166. Dickerson, *supra* note 155.

167. Frost, *supra* note 23, at 13–14; Martin, *supra* note 23, at 426; Nugent, *supra* note 23, at 247.

168. Martin, *supra* note 23, at 415, 461.

prosecutorial discretion can be a central component of an effective and humane immigration enforcement scheme.

The enormous role that prosecutorial discretion plays in the modern immigration enforcement scheme has been well-documented.<sup>169</sup> There are well over twenty million noncitizens (both documented and undocumented) living in the United States.<sup>170</sup> With the vast expansion of removal grounds,<sup>171</sup> even a large percentage of documented noncitizens are now potentially subject to deportation.<sup>172</sup> ICE has the capacity to target, “at most, a few hundred thousand” people per year.<sup>173</sup> Accordingly, prosecutorial discretion is necessarily a prominent feature of the modern immigration enforcement scheme. For decades, ICE (and the INS before it) has set forth guidelines for the exercise of discretion by line-level officers in a series of memoranda that shift priorities with the politics of the moment.<sup>174</sup> In addition, in recent years, categorical prosecutorial

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169. See SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 14–32 (2015); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1066–67 (2013); Cox & Rodríguez, *President and Immigration Law*, *supra* note 23, at 464; Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 492, 508 (2017); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 614–17 (2006); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759–61 (2014).

170. See BRYAN BAKER, U.S. DEP'T HOMELAND SEC., POPULATION ESTIMATES: ESTIMATES OF THE ILLEGAL ALIEN POPULATION RESIDING IN THE UNITED STATES: JANUARY 2015, at 3 (2018), [https://www.dhs.gov/sites/default/files/publications/18\\_1214\\_PLCY\\_pops-est-report.pdf](https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf) (stating that there were approximately twelve million undocumented non-citizens living in the United States in January 2015); NANCY RYTINA, U.S. DEP'T HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2012, at 3 (2013), <https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202012.pdf> (stating that there were approximately 13.3 million documented non-citizens living in the United States in January 2012).

171. See *supra* text accompanying notes 104–05.

172. See Cox & Rodríguez, *President and Immigration Law*, *supra* note 23, at 463, 513.

173. See Markowitz, *supra* note 169, at 508.

174. See, e.g., (LEGACY) IMMIGRATION NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, OI § 103.1(a)(1)(ii) (1975); *INS on Cancellation of Operations Instructions*, 2 BENDER'S IMMIGR. BULL. 867 (1997) (containing the full text of INS Acting Executive Associate Commissioner Paul Virtue's June 27, 1997, memorandum to regional directors); Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enft, to Chief Counsels 2 (Oct. 6, 2005), <https://www.aila.org/infonet/ice-prosecutorial-discretion-to-dismiss-adjustment>; Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enft, et al. 3–5 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf); Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv., to Reg'l Dirs. et al. 1 (Nov. 17, 2000), <https://perma.cc/2DEH-8TLB>; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft, to All Field Office Dirs. et al. 2, 4–5 (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from Julie L. Myers, Assistant

discretion has become an increasingly important feature of immigration enforcement<sup>175</sup>—most notably with DACA, which defers the deportation of certain undocumented immigrants who came to the United States as children.<sup>176</sup> In theory, prosecutorial discretion could be used to protect large classes of immigrants from deportation,<sup>177</sup> which others have suggested would allow enforcement resources to be more effectively utilized against a smaller category of immigration law violators.<sup>178</sup>

Implementation problems and legal challenges have, however, largely undermined this potential. The prosecutorial discretion guidance the agency has historically provided to line-level officers is widely understood as ineffectual.<sup>179</sup> Officers have generally refused to follow such guidance, and, as a result, they have had minimal impact on actual enforcement practices.<sup>180</sup> The most effective categorical prosecutorial discretion programs—DACA and its planned expansion to parents of U.S. citizens and permanent residents—have been stymied by political resistance and legal challenges.<sup>181</sup> Most importantly, prosecutorial discretion programs, even at their most ambitious, fail to address the core injustices that

Sec’y, U.S. Immigration & Customs Enf’t, to All Field Office Dirs. & All Special Agents in Charge (Nov. 7, 2007), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/custody-pd.pdf>.

175. See Markowitz, *supra* note 169, at 511, 513.

176. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al. 1–3 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

177. See Markowitz, *supra* note 169, at 508–09; Peter L. Markowitz & Lindsay Nash, *Pardoning Immigrants*, 93 N.Y.U. L. REV. 58, 96, 99 (2018).

178. See Memorandum from Jeh Charles Johnson to Thomas S. Winkowski et al., *supra* note 174, at 2–4.

179. See Cox & Rodriguez, *President and Immigration Law*, *supra* note 23 at 530; Frost, *supra* note 23, at 15–16; Martin, *supra* note 23, at 461; Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 230–34, 230 n.150 (2014); Julia Preston, *Deportations Under New U.S. Policy Are Inconsistent*, N.Y. TIMES (Nov. 12, 2011), <http://www.nytimes.com/2011/11/13/us/politics/president-obamas-policy-on-deportation-is-unevenly-applied.html>. *But see* Hing, *supra* note 6, at 313–15.

180. See Preston, *supra* note 179. A notable exception occurred during the final two years of the Obama Administration when there was unusually robust implementation of a newly enacted prosecutorial discretion memorandum. See *Immigration Court Dispositions Drop 9.3 Percent Under Trump*, TRAC SYRACUSE (July 17, 2017), <https://trac.syr.edu/immigration/reports/474/>.

181. Frost, *supra* note 23, at 16; *see, e.g.*, *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015) (upholding the preliminary injunction upon a determination that plaintiffs were likely to succeed on the merits of the claim that the President’s order violated the Administrative Procedure Act), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016); Price, *supra* note 169, at 760–61; Press Release, Nat’l Immigration Law Ctr., ALERT: Supreme Court Grants Cert in Three DACA Cases (June 28, 2019), <https://www.nilc.org/wp-content/uploads/2019/06/Alert-SCOTUS-Cert-Granted-DACA-2019.pdf>.

infect our current enforcement scheme. The DACA program is a critical stop-gap measure, protecting an exceedingly sympathetic group of immigrants from deportation. Ultimately, however, it applies to a tiny fraction of the millions of noncitizens who are subject to ICE enforcement. Moreover, as DACA recipients have learned in recent years, prosecutorial discretion delivers only unstable benefits and leaves people, at best, in a perpetual state of legal limbo.<sup>182</sup> In addition, insofar as the goal of prosecutorial discretion is to shrink the proverbial hay stack by removing sympathetic individuals and allowing ICE to focus its enforcement resources on “high value” targets,<sup>183</sup> such programs also risk exacerbating ICE’s documented brutality by focusing on an increasingly vilified target population.

Ultimately, prosecutorial discretion is an insufficient substitute for the needed enforcement reform. Prosecutorial discretion has had only a limited impact, fails to deliver stable benefits, and does nothing to address the abuse and illegality of the tactics ICE uses against those it continues to target.

### C. *Focusing on Immigration Push and Pull Factors*

Periods of significant change in the flow or size of the undocumented population have generally not been tied to changes in traditional enforcement schemes. Rather, these fluctuations are tied to macro societal or economic forces that either motivate or necessitate that migrants leave their countries of citizenship (push factors) or that attract them to the United States as a destination (pull factors).<sup>184</sup> In the modern era, this was true of the increase in unauthorized immigration starting in the 1980s, which was tied to the economic turmoil in Mexico and the robust economy in the United States. This was also true of the 2000s, with the precipitous drop in unauthorized immigration driven by the economic stabilization in Mexico and the Great Recession in the United States, and of today, with the increasing flow of migrants fleeing brutal violence in Central America.<sup>185</sup> As a result, there are many who suggest addressing push

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182. Frost, *supra* note 23, at 10–11, 16–19.

183. Memorandum from Jeh Charles Johnson to Thomas S. Winkowski et al., *supra* note 174, at 2.

184. See NAT’L ACADS. OF SCIS., ENG’G, AND MED., *supra* note 72, at 40–46.

185. See JEFFREY S. PASSEL ET AL., PEW RES. CTR., NET MIGRATION FROM MEXICO FALLS TO ZERO—AND PERHAPS LESS 11, 17, 19–20 (2012), <https://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/>; Francisco Alba, *Mexico: A Crucial Crossroads*, MIGRATION POL’Y INST. (Feb. 25, 2010), <https://www.migrationpolicy.org/article/mexico-crucial-crossroads>; Julian Borger, *Fleeing a Hell the US Helped Create: Why Central Americans Journey North*, GUARDIAN (Dec. 19, 2018, 3:00 AM), <https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy>; Kevin Sieff, *Why Is Mexican Migration Slowing While Guatemalan and Honduran Migration Is Surging?*, WASH. POST (Apr. 29, 2019, 6:00 AM), [https://www.washingtonpost.com/world/the\\_americas/why-is-mexican-](https://www.washingtonpost.com/world/the_americas/why-is-mexican-)

and pull factors may be the most promising avenue available to increase compliance with immigration law.<sup>186</sup>

At times, federal immigration authorities have experimented with enforcement strategies that focus on immigration pull factors.<sup>187</sup> The assumption underlying such efforts was that a large portion of unauthorized immigration is driven by the perception of better economic opportunities in the United States. Accordingly, the theory is that if we can effectively cut off unauthorized immigrants' access to jobs, we will eliminate the incentive for migration and thereby drive down noncompliance.<sup>188</sup> This was the concept behind one of the central innovations of the 1986 Immigration Reform and Control Act ("IRCA"), which criminalized hiring unauthorized immigrants.<sup>189</sup> IRCA, however, is generally understood to have failed in its effort to stem such hiring, as market forces motivated employers to turn a blind eye to the widespread use of fraudulent employment authorization documents.<sup>190</sup> Other attempts to address the pull factor of American jobs have included large scale workplace ICE raids and attempts to create an automatic employment verification system (known as "E-Verify") to allow employers to check the authenticity of workers' employment documents.<sup>191</sup> Ultimately, none of these efforts have been shown to have had any meaningful impact on the flow or population of undocumented immigrants.<sup>192</sup>

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migration-slowing-while-guatemalan-and-honduran-migration-is-surgin/2019/04/28/fad52432-6493-11e9-a698-2a8f808c9cfb\_story.html.

186. See, e.g., Wayne A. Cornelius, *Controlling 'Unwanted' Immigration: Lessons from the United States, 1993-2004*, 31 J. ETHNIC & MIGRATION STUD. 775, 785-89 (2005); Martin, *supra* note 23, at 427; Ed Pilkington, *Julian Castro: The US Should Launch a Marshall Plan in Central America*, GUARDIAN (Mar. 14, 2019, 1:00 AM), <https://www.theguardian.com/world/2019/mar/14/julian-castro-interview-central-america-marshall-plan>; see also *People First Immigration*, JULIÁN CASTRO 2020, <https://issues.juliancastro.com/people-first-immigration/> (last visited Mar. 29, 2020) (explaining Julian Castro's plan to minimize illegal immigration by revitalizing Central American countries).

187. Martin, *supra* note 23, at 413-14, 427.

188. *Id.* at 427.

189. Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (1986).

190. Martin, *supra* note 23, at 427-28.

191. *Id.* at 428-29; Cox & Rodríguez, *Redux*, *supra* note 23, at 129-30; see also ANDORRA BRUNO, CONG. RESEARCH SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 6 (2015), (explaining that "[d]uring each year from FY2003 to FY2008 . . . the number of administrative and criminal arrests in worksite enforcement operations increased").

192. See BRUNO, *supra* note 191, at 9-10 (noting that all relevant measures captured from worksite enforcement tactics "seem quite small relative to the estimated size of the unauthorized workforce"); Cox & Rodríguez, *Redux*, *supra* note 23, at 129 ("While we know that millions of unauthorized immigrants have long been employed by hundreds of thousands of employers, for years during the Bush Administration, DHS fined fewer than one hundred employers for violating IRCA.").

Moreover, given the critical role that undocumented workers play in the United States' economy, it is not at all clear that we can, or should want to, cut off their access to jobs.<sup>193</sup> Unauthorized immigrants play a critical role in several significant sectors of the economy, most notably agriculture and construction.<sup>194</sup> Even if we could effectively cut off access to jobs, we run the very real risk of inflicting significant domestic economic harm in the process.<sup>195</sup> Moreover, there are real fiscal dangers to such a strategy, as some critical federal programs, like Social Security, are sustained in important ways by the large category of current young immigrant workers who often pay into such programs, even when working without authorization.<sup>196</sup> The lessons of IRCA and subsequent efforts to address pull factors should leave us skeptical about the ability of enforcement to overcome the market forces that motivate both employers and workers.<sup>197</sup>

Strategies to address immigration push factors do not always fit neatly with traditional conceptions of "enforcement," but, insofar as they can also reduce non-compliance with immigration law, they likewise deserve full consideration.<sup>198</sup> In many instances, push factors overwhelm and render ineffectual any strategy aimed at pull factors.<sup>199</sup> If someone cannot keep themselves and their families safe

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193. See NAT'L ACADS. OF SCIS., ENG'G, AND MED., *supra* note 72, at 80.

194. Taylor Blatchford, *NC Businesses Feel the Pain of Cuts to Seasonal Worker Visas*, CHARLOTTE OBSERVER (July 3, 2017, 11:38 AM), <http://www.charlotteobserver.com/news/business/article159412859.html>; Kevin Murphy, *American Farmers Need Immigration Reform*, WALL STREET J. (May 30, 2019, 7:25 PM), <https://www.wsj.com/articles/american-farmers-need-immigration-reform-11559258759>; Passel & Cohn, *supra* note 68, at 28, 29; Julia Preston, *Immigrants Aren't Taking Americans' Jobs, New Study Finds*, N.Y. TIMES (Sept. 21, 2016), <https://www.nytimes.com/2016/09/22/us/immigrants-arent-taking-americans-jobs-new-study-finds.html>.

195. Annie Baxter, *How an Immigration Raid Threw a Small Iowa Town Into Economic Crisis*, MARKETPLACE (Aug. 3, 2017), <https://www.marketplace.org/2017/08/03/economy/postvilles-long-recovery-after-raid>; Blatchford, *supra* note 194; Shikha Dalmia, Opinion, *Actually, The Numbers Show That We Need More Immigration, Not Less*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/opinion/trump-immigration-myth.html>; Kate Morrissey, *Lack of Immigrant Workers Could Hobble Racing Industry*, SAN DIEGO UNION-TRIB. (Nov. 7, 2017, 4:40 PM), <http://www.sandiegouniontribune.com/news/immigration/sd-me-horseracing-workers-20171106-story.html>.

196. See Hong, *supra* note 35, at 59–60; Heather Long, *Over 200 Economists Say Trump is Wrong on Immigration*, CNN (Mar. 6, 2017, 7:58 AM), <http://money.cnn.com/2017/03/06/news/economy/donald-trump-immigration/index.html>.

197. Mike Allen, *Immigration Reform on Bush Agenda*, WASH. POST (Dec. 24, 2003), <https://www.washingtonpost.com/archive/politics/2003/12/24/immigration-reform-on-bush-agenda/147eec7-2392-4128-8152-dc70a5aaaf65/> (explaining President Bush's admonition that our system cannot realistically stand in the way of "any willing employer and any willing employee").

198. See discussion *supra* note 14.

199. See Ryo, *supra* note 23, at 650–53.

from physical violence and persecution in their country of origin, the difficulty of finding employment in the United States is unlikely to deter their migration. The current trend of migration from the Northern Triangle countries of Central America is very much a story of immigration push factors, with unprecedented societal violence and a breakdown in basic economic and political structures of civil society.<sup>200</sup> Many in the Abolish ICE movement point to the United States' culpability in creating many of the push factors that drive unauthorized migration, arguing against punitive enforcement strategies and in favor of good neighbor policies.<sup>201</sup>

The story of MS-13, the gang terrorizing the people of El Salvador and driving the current wave of migrants to the United States is a case in point.<sup>202</sup> The gang was born in the United States, grew in strength and ruthlessness in the 1980s and 1990s as a result of U.S. mass incarceration policies, and was then exported to El Salvador with the rise of mass deportation.<sup>203</sup> U.S. military exploits and neo-colonialist policies have had similar destabilizing effects in other countries, which have also become significant sources of unauthorized migration.<sup>204</sup>

Some policymakers and scholars have called for ambitious investments in our neighboring countries, akin to our post-World War II investment in Europe, which they argue would help stabilize those countries, allow them to thrive, and drive down the push factors underlying a substantial portion of unauthorized migration.<sup>205</sup> Such proposals are worthy of strong consideration and

200. RALPH ESPACH & DANIEL HAERING, MIGRATION POLICY INST., BORDER INSECURITY IN CENTRAL AMERICA'S NORTHERN TRIANGLE 1 (2012); PETER J. MEYER & MAUREEN TAFT-MORALES, CONG. RESEARCH SERV., IF11151, CENTRAL AMERICAN MIGRATION: ROOT CAUSES AND U.S. POLICY 1 (2019); Cindy Huang & Jimmy Graham, *Responding to Northern Triangle Immigration with Policies that Benefit Both Migrants and Hosts*, CTR. FOR GLOBAL DEV. (May 14, 2019), <https://www.cgdev.org/blog/responding-northern-triangle-immigration-policies-benefit-both-migrants-and-hosts>; Danielle Renwick & Rocio Cara Labrador, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/central-americas-violent-northern-triangle> (last updated Oct. 1, 2019).

201. See, e.g., García Hernández, *supra* note 23, at 276, 293; CAL. IMMIGRANT YOUTH JUSTICE ALL., *supra* note 15.

202. Dara Lind, *MS-13, Explained*, VOX (Feb. 5, 2019, 9:45 PM), <https://www.vox.com/policy-and-politics/2018/2/26/16955936/ms-13-trump-immigrants-crime>.

203. *Id.*

204. See, e.g., García Hernández, *supra* note 23, at 275–76; *Iraqi Refugees*, WATSON INST. INT'L & PUB. AFF.: COSTS OF WAR, <https://watson.brown.edu/costsofwar/costs/human/refugees/iraqi> (last updated Dec. 2016); Suketu Mehta, Opinion, *Why Should Immigrants 'Respect Our Borders'? The West Never Respected Theirs*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2019/06/07/opinion/immigration-reparations.html>.

205. See, e.g., Ryo, *supra* note 23, at 666 (discussing the benefits of “increas[ing] U.S. investment in employment-generating economic development of sending communities”); Pilkington, *supra* note 186 (discussing Democratic

may well be worthwhile investments. However, foreign aid is not a new idea—while it could be done better and at grander scale, our ability to control the internal economic and societal conditions of foreign countries is, and should be, limited.<sup>206</sup>

Although it certainly makes sense to reform U.S. policy to stop destabilizing neighbors and to increase cooperative foreign aid for many reasons, including our desire to address immigration push factors, we must be realistic about the limits of our power to address both push and pull factors.

#### D. Cooperative Enforcement Strategies

Cooperative enforcement involves strategies by which agencies seek to increase compliance through education and assistance to regulated entities, helping them comply with the law, rather than through punishing non-compliance.<sup>207</sup> Cooperative enforcement stands in stark contrast to the punitive command and control type of enforcement that ICE employs. The goal of cooperative enforcement is to “encourage greater compliance at lower cost—both to the agency and to the regulated entities.”<sup>208</sup> Recently, some have suggested that cooperative enforcement could be a promising addition to ICE’s immigration enforcement strategy.<sup>209</sup>

In other arenas of administrative law, scholars have been urging regulators to adopt more cooperative approaches to enforcement for decades.<sup>210</sup> They argue that being flexible and minimizing punitive interventions increases productive engagement between regulated parties and the agency and thereby allows for more efficient and effective compliance promotion.<sup>211</sup> To a large extent, many agencies have heeded these scholarly urgings and shifted away from coercive enforcement strategies.<sup>212</sup> Cooperative enforcement is the approach

presidential candidate Julian Castro’s proposal for a Marshall Plan in Central America).

206. See Ali Watkins & Meridith Kohut, *MS-13, Trump and America’s Stake in El Salvador’s Gang War*, N.Y. TIMES (Dec. 10, 2018), <https://www.nytimes.com/2018/12/10/us/el-salvador-ms-13.html>.

207. Frost, *supra* note 23, at 1, 9.

208. *Id.* at 27.

209. See, e.g., *id.* at 1.

210. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 5 (1992); Freeman, *supra* note 24, at 4–7; Robert L. Glicksman & Dietrich H. Earnhart, *Depiction of the Regulator-Regulated Entity Relationship in the Chemical Industry: Deterrence-Based vs. Cooperative Enforcement*, 31 WM. & MARY ENVTL. L. & POL’Y REV. 603, 611–44 (2007); Karkkainen, *supra* note 24, at 557–59; Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 YALE J. ON REG. 535, 537–39 (1996); Shapiro & Rabinowitz, *supra* note 24, at 715–16.

211. AYRES & BRAITHWAITE, *supra* note 210, at 5; Glicksman & Earnhart, *supra* note 210, at 617; Karkkainen, *supra* note 23, at 558; Michael, *supra* note 210, at 554; Shapiro & Rabinowitz, *supra* note 24, at 715–16.

212. Frost, *supra* note 23, at 3–4, 21.

now favored by federal agencies like the Occupational Safety and Health Administration (“OSHA”), the Food and Drug Administration (“FDA”), the Environmental Protection Agency (“EPA”), and the Securities and Exchange Commission (“SEC”).<sup>213</sup>

There are ample unrealized opportunities to employ the same cooperative enforcement techniques in the immigration arena. There are large categories of undocumented individuals who are eligible to obtain lawful status—for example, as family members of citizens or lawful residents; as crime victims; as victims of persecution; or as abused, abandoned, or neglected children.<sup>214</sup> These individuals are currently out of compliance with immigration law for failing to obtain or maintain lawful status, and could be subject to deportation. Alternatively, they could be allowed to obtain status through existing lawful pathways. The agencies have a choice. The current enforcement approach is to favor punishing non-compliance through deportation rather than to work cooperatively to help the individual come into compliance.<sup>215</sup> It is an approach that is out of step with the larger administrative law trend and scholarly consensus in favor of cooperative enforcement.

The potential of a cooperative approach is, however, bounded in the immigration context by the substantive grounds for obtaining status created by Congress. Professor Amanda Frost has estimated that approximately 10 percent of undocumented individuals could obtain lawful status if cooperative approaches were vigorously pursued under existing law.<sup>216</sup> However, a core component of cooperative enforcement is seeking flexible interpretations of law to enhance opportunities for compliance.<sup>217</sup> The federal immigration enforcement agencies have been steadily moving in the opposite direction, enacting ever more stringent interpretations of statutes in an effort to restrict access to legal pathways.<sup>218</sup> Reversal of this trend

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213. *Id.* at 3–4, 21–22, 26–27; *see also* Glicksman & Earnhart, *supra* note 210, at 609, 611; Karkkainen, *supra* note 24, at 555, 561–62; Michael, *supra* note 210, at 568–71; Shapiro & Rabinowitz, *supra* note 24, at 715–16.

214. *See, e.g.*, 8 U.S.C. §§ 1101(a)(15)(U), 1101(a)(27)(J), 1255, 1158(a) (2018).

215. U.S. CITIZENSHIP & IMMIGRATION SERVS., 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 (2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>; Noah Lanard, *Married Immigrants Seeking Green Cards Are Now Targets for Deportation*, MOTHER JONES (Apr. 20, 2018), <https://www.motherjones.com/politics/2018/04/married-immigrants-seeking-green-cards-are-now-targets-for-deportation/>.

216. Frost, *supra* note 23, at 8 (“[C]ooperative enforcement is not a cure-all for the nation’s unauthorized immigration crisis. . . . [This is because it] would likely legalize no more than 10% of the unauthorized population, leaving millions in the same illegal status.”).

217. *Id.* at 27.

218. *See, e.g.*, Matter of L-E-A-, 27 I&N Dec. 581 (A.G. 2019); Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019); Matter of S-O-G- & F-D-B-, 27 I&N Dec. 462 (A.G.

could open up additional pathways and expand the potential of cooperative enforcement. There are other significant categories of people who are presently deportable but who will, with the passage of time, become eligible for lawful status—such as individuals with approved relative petitions awaiting a current priority date to apply for adjustment of status.<sup>219</sup> And of course, substantive immigration reform has the potential to open up new pathways and greatly expand the impact of a cooperative approach to immigration enforcement.<sup>220</sup>

Notably, there have been times when cooperative strategies played a more significant role in our immigration enforcement scheme. Eligible individuals used to be able to apply for lawful status without fear that their applications would trigger deportation proceedings.<sup>221</sup> Deportation proceedings used to be set over long periods of time to allow legal pathways to ripen.<sup>222</sup> ICE (and the INS before it) used to decline to initiate deportation proceedings against some categories of individuals to allow them to affirmatively pursue lawful status.<sup>223</sup> A return to and expansion of these past practices could be a significant component of an effective and humane immigration enforcement system after ICE. However, such an approach has its limits. Even the most aggressive cooperative enforcement strategies will not address large categories of individuals who have no legal pathway to status available. Thus, cooperative enforcement, while a potentially important component, is not alone a sufficient replacement for ICE's current approach.

While others have proposed some promising components of a humane and effective enforcement system, none alone or in combination seem sufficient to offer as a full alternative to ICE's system of detention and mass deportation. Accordingly, a more comprehensive approach is needed.

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2018); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *see also* Adam Liptak, *Supreme Court Allows Trump's Wealth Test for Green Cards*, N.Y. TIMES (Jan. 27, 2020) <https://www.nytimes.com/2020/01/27/us/supreme-court-trump-green-cards.html>.

219. *See, e.g.*, 8 U.S.C. § 1153(a) (2018); 8 C.F.R. § 245.1(g) (2019).

220. The perceived illegitimacy of the current statutory scheme and ICE's enforcement approach is itself an impediment to greater compliance. Accordingly, substantive reform and a cooperative approach also has the potential to promote law-abiding behavior. Ryo, *supra* note 23, at 628.

221. *See* Lanard, *supra* note 215. *Compare* U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0050, REVISED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND REMOVABLE ALIENS (2011), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf), *with* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 215.

222. *See, e.g.*, Memorandum from Jeh Charles Johnson to Thomas S. Winkowski et al., *supra* note 174, at 4–6.

223. *See id.*

V. A NEW HUMANE & EFFECTIVE IMMIGRATION ENFORCEMENT  
PARADIGM

We know our immigration enforcement system is not working. ICE has proven itself to be a lawless, brutal, and ineffectual agency.<sup>224</sup> We also know that the vast scale of interior enforcement under ICE, its use of mass detention, and the criminalization of immigrants diverges significantly from historic norms.<sup>225</sup> In the face of ICE's deplorable record, the calls to abolish ICE seem eminently sensible. But the Abolish ICE movement seeks more than just the end of ICE. It rejects calls for mere rebranding, bureaucratic reorganization, or even agency reform.<sup>226</sup> The goal of the Abolish ICE movement is not only the end of ICE but the end of a dedicated agency of immigration police altogether. This goal has led some critics to argue the movement to abolish ICE is really a movement to abolish borders and to abandon immigration enforcement altogether.<sup>227</sup> But it does not have to be so, and that is not the way the majority of Abolish ICE leaders have articulated their goals.<sup>228</sup>

The dismantling of ICE would mean an end to the terror, dehumanization, and family destruction that the agency has caused in immigrant communities. But how would we effectively enforce our immigration laws in a world without a dedicated agency of immigration police?<sup>229</sup> Scholars and policymakers have explored alternative enforcement models in the context of the current agency structure, and while some alternatives contain promising elements, none alone present a realistic alternative to ICE.<sup>230</sup> This Part draws on lessons from our own and other nations' immigration enforcement

224. See discussion *supra* Part I.

225. See discussion *supra* Part II.

226. Sean McElwee, *It's Time to Abolish ICE*, NATION (Mar. 9, 2018), <https://www.thenation.com/article/its-time-to-abolish-ice/>.

227. Hinkle & Levinson-Waldman, *supra* note 7.

228. To be clear, many in the Abolish ICE movement call for a moratorium on deportations. See, e.g., *The History of the #NOT1MORE Campaign*, #NOT1MORE DEPORTATION, <http://www.notonemoredeportation.com/the-history-of-the-not1more-campaign/> (last visited Mar. 29, 2020). However, calls for a moratorium should not be confused with calls for open borders. The argument for deportation moratoriums is that our current substantive laws are so unjust and due process protections so lacking, that presently no deportation can be justified. See discussion *supra* Subpart IV.A. A moratorium is aimed at preventing the injustice guaranteed by the current system and at creating the needed pressure to unlock legislative paralysis. That aim is a far cry from a call for open borders and a permanent end to immigration enforcement.

229. Efficacy is, of course, only one potential way to evaluate an enforcement scheme. There are others, for example human rights norms, that should prevail over efficacy concerns. However, insofar as the primary critique of the Abolish ICE movement is that it is an unrealistic proposal, I focus primarily on addressing the question of efficacy, though I have limited myself to consideration of tools that remain within the boundaries of overriding humanitarian considerations.

230. See discussion *supra* Part III.

schemes, from mechanisms employed by other federal agencies, and from the expertise of the “Abolish ICE” and immigrant rights movement leaders interviewed to construct a blueprint for a new immigration enforcement paradigm that could follow the dismantling of ICE. It is a model that would be both humane and effective. Thus, the proposal below seeks to increase compliance with immigration law without detention, without mass deportation, and without ICE.

A. *Pre or Co-Requisites for a Just Immigration System*

A humane and effective enforcement model is a critical component of a just immigration system, but it is not the only component. Abolish ICE leaders are clear that enforcement reform, while important and necessary, cannot alone deliver the justice they seek.<sup>231</sup> Identifying the full scope of additional needed reforms is well beyond the scope of this Article. However, in order to understand the viability of the proposal that follows, a brief discussion of some critical complementary reforms is necessary.

By far, the most critical pre or co-requisite to enforcement reform is reform of substantive immigration laws—the rules about who is allowed to enter the United States and who must leave. Perhaps the greatest driver of immigration violations today is the misalignment between the U.S. economy’s hunger for immigrant labor and the lack of lawful pathways for low-wage workers.<sup>232</sup> The growth of the undocumented population over the last half century has been driven primarily by the end of a temporary worker program with Mexico and the 1965 introduction of the first real limits on lawful immigration from Western Hemisphere countries, most notably from Mexico.<sup>233</sup> Anti-immigrant activists are fond of saying they don’t oppose legal immigration.<sup>234</sup> They claim they just want undocumented immigrants to be forced to wait their place in line for lawful entry.<sup>235</sup>

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231. See McElwee, *supra* note 226.

232. See *supra* notes 193–97 and accompanying text.

233. PEW RESEARCH CTR., *supra* note 95; Madeleine Sumption & Demetrios G. Papademetriou, *Legal Immigration Policies for Low-Skilled Foreign Workers*, 2 MPI ISSUE BRIEF 1, 1 (2013).

234. Alan Fram & Jill Colvin, *Reaction to Trump’s Immigration Offer Casts Doubt on a Deal*, DAILY HERALD (Feb. 1, 2018, 7:00 AM), <https://www.dailyherald.com/article/20180201/news/302019943> (Republican Senator Mike Rounds: “I favor legal immigration, I want to eliminate illegal immigration”); Louise Radnofsky, *Trump Signals Shift on Legal Immigration*, WALL STREET J. (Feb. 10, 2019, 12:45 PM) <https://www.wsj.com/articles/trump-signals-shift-on-legal-immigration-11549820702> (“President Trump has repeatedly expressed support for legal immigration”); *Sen. Rubio On Immigration: We Can’t Accept Everyone*, NPR (Nov. 11, 2015, 7:42 AM), <https://www.npr.org/2015/11/11/455588845/sen-rubio-on-immigration-we-cant-accept-everyone> (Republican Senator Marco Rubio: “We favor legal immigration”).

235. John Wagner, *Trump Touted Obama’s 2005 Remarks on Immigration. Here’s What Obama Actually Said*, WASH. POST (Oct. 24, 2018, 8:37 AM),

However, the reality is that there is no line for most low-wage workers. For the vast majority of economic migrants who enter or remain unlawfully in the United States, there is no lawful mechanism for immigration.<sup>236</sup> Accordingly, we must realign the law with our economy's hunger for immigrant labor by creating new lawful pathways for low-wage workers to immigrate.<sup>237</sup>

In addition, the increasingly light triggers for deportation and limitations on discretionary relief from deportation have generated an unprecedented wave of family separations.<sup>238</sup> The human imperative to maintain family unity has become an increasingly important driver of efforts to resist deportation and, in some cases, to illegally reunite with family in the United States after deportation. A repeal of the misguided 1996 laws, which are an important component of this dynamic, is thus a good place to start for substantive reform.<sup>239</sup> However, as of yet, neither immigrant rights advocates nor immigration scholars have been able to coalesce around an affirmative vision for a humane and effective set of proposed rules regarding who can be subject to deportation and what defenses should apply. A fair and effective set of such rules is an essential co-requisite for a well-functioning enforcement system.

Finally, a mechanism for the legalization of the present large undocumented population and a pathway for them to obtain citizenship has long been recognized as a central component of needed reform.<sup>240</sup> While this list is not exhaustive, these core substantive reforms are essential because no enforcement scheme can deliver justice if the rules it seeks to enforce are themselves unjust. Moreover, on an operational level, absent such reforms, it is unlikely that any enforcement system can operate effectively.<sup>241</sup>

In addition, enforcement reform is insufficient and likely politically unachievable until we reverse the trend of criminalizing

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[https://www.washingtonpost.com/politics/trump-touted-obamas-2005-remarks-on-immigration-heres-what-obama-actually-said/2018/10/24/1ed845c0-d782-11e8-aeb7-ddcad4a0a54e\\_story.html](https://www.washingtonpost.com/politics/trump-touted-obamas-2005-remarks-on-immigration-heres-what-obama-actually-said/2018/10/24/1ed845c0-d782-11e8-aeb7-ddcad4a0a54e_story.html).

236. See Sumption & Papademetriou, *supra* note 233, at 2; Alexia Fernández Campbell, *The Mississippi ICE Raids Expose the Biggest Problem with US Immigration Laws*, VOX (Aug. 8, 2019, 4:10 PM), <https://www.vox.com/policy-and-politics/2019/8/8/20791508/mississippi-ice-immigration-raids>.

237. Tamar Jacoby, *Immigration Nation*, 85 FOREIGN AFF. 50, 60 (2006) (arguing that “[t]he best way to regain control” of immigration is to “liberalize” the system so that immigration levels line up with U.S. labor needs); Ryo, *supra* note 23, at 665 (same).

238. See discussion *supra* notes 44–45, 83–85 and accompanying text.

239. See discussion *supra* notes 87–92 and accompanying text.

240. See, e.g., Martin, *supra* note 23, at 458–59; Camilo Montoya-Galvez, *George W. Bush Urges Politicians to “Dial Down Rhetoric” on Immigration*, CBS NEWS (Mar. 18, 2019, 1:22 PM), <https://www.cbsnews.com/news/george-w-bush-speech-george-w-bush-says-immigration-is-a-blessing-and-a-strength-urges-politicians-to-dial-down-rhetoric-today/>.

241. See discussion *supra* notes 160, 168, 173, 175–76 and accompanying text.

immigrants and of framing our immigration system as a component of the national security apparatus. Others have convincingly demonstrated how the trend toward criminalization has hindered the development of immigration law and policy.<sup>242</sup> The national security frame operates similarly. The narrative, no matter how divorced from reality, that immigration enforcement is a critical anti-terror tool is a primary driver of the unwarranted scale and the abusive tactics that characterize our immigration enforcement regime.<sup>243</sup> Immigration enforcement has proven to be an exceedingly ineffectual tool in anti-terror efforts. ICE has initiated over four million deportation proceedings since its creation, and only sixty-four of those cases involved charges of terrorism.<sup>244</sup> Indeed, even by ICE's own estimates, its civil immigration enforcement mission has nothing to do with national security. It recently reported that 0 percent of its civil immigration enforcement work contributes to DHS's national security/anti-terror mission.<sup>245</sup> In many ways, ICE has made it more difficult to address serious crime and national security threats because it has diverted critical resources from true national security work,<sup>246</sup> and its entanglement with the nation's criminal justice system<sup>247</sup> has made immigrants much less likely to cooperate with law enforcement.<sup>248</sup>

Other critically needed justice reforms involve implementing basic due process protections for those facing deportation and reorienting our foreign policy to end our practice of punishing individuals who are fleeing dangers that we had a hand in creating.<sup>249</sup>

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242. See, e.g., Chacón, *supra* note 56, at 626; Angélica Cházaro, *Challenging The "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 594 (2016); García Hernández, *supra* note 23, at 257; Stumpf, *supra* note 38, at 408.

243. See Cházaro, *supra* note 242, at 660.

244. Calculated through the Transactional Records Access Clearinghouse ("TRAC") data tool: *New Deportation Proceedings Filed in Immigration Court by Nationality, State, Court, Hearing Location, Year and Type of Charge*, TRAC SYRACUSE, [https://trac.syr.edu/phptools/immigration/charges/deport\\_filing\\_charge.php](https://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php) (data through August 2019).

245. U.S. DEP'T OF HOMELAND SEC., *supra* note 42.

246. See Rebecca Klar, *McAleenan Says DHS Doesn't Have Resources to Fight Rising White Supremacy*, HILL (Aug. 6, 2019, 11:08 AM), <https://thehill.com/homenews/administration/456345-mcaleenan-says-dhs-doesnt-have-resources-to-fight-rising-white>; Caitlin Dickerson and Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html>.

247. See discussion *supra* notes 93–101 and accompanying text.

248. 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/>.

249. See, e.g., JENNIFER STAVE, PETER MARKOWITZ, ET AL., VERA INST. OF JUSTICE, *EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY* 31–47 (2017), <https://storage.googleapis.com/vera-web-assets/downloads>

These reforms are necessary for their own sake but are also critical to creating an effective enforcement system.<sup>250</sup> There are, of course, many more changes that are required to create a just immigration system, but these core examples can help one conceptualize how the proposal that follows could interact with such reforms to create a workable system that reliably delivers justice.

### *B. Pillars of a Humane and Effective Immigration Enforcement System*

Below are four pillars of a proposal to radically reshape our immigration enforcement paradigm and to create a humane system that could be both more effective and dramatically less expensive. It is a proposal that I have sketched out elsewhere and which I build upon here.<sup>251</sup>

#### *1. Pillar One: Optimal Enforcement Scaling*

DHS was founded with the mission to achieve 100 percent immigration enforcement.<sup>252</sup> ICE's goal from the outset was, and remains, to deport every person potentially subject to deportation.<sup>253</sup> This approach, which has driven the extraordinary increase in ICE's funding, is both wildly impractical<sup>254</sup> and dramatically out of step with historical norms.<sup>255</sup> Accordingly, the first inquiry is to determine whether the current extraordinary levels of punitive enforcement are justified. In short, they are not.

A smart enforcement scheme must identify its optimal scale by balancing the societal costs of enforcement against the marginal additional compliance such enforcement can achieve, and the societal benefits associated with that additional compliance. For example, extremely high levels of enforcement are justified by the Nuclear Regulatory Commission because even low levels of non-compliance

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/Publications/new-york-immigrant-family-unity-project-evaluation/legacy\_downloads/new-york-immigrant-family-unity-project-evaluation.pdf (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); 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>.

250. See discussion *supra* Subpart III.C (discussing the enforcement value of addressing push factors); discussion *supra* Subpart IV.B.4 (discussing the enforcement value of implementing due process protections).

251. See Markowitz, *supra* note 34.

252. U.S. DEP'T OF HOMELAND SEC., *supra* note 31.

253. See *id.*; Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017); Secure Fence Act, § 2(b), Pub.L. 109-367 (2006).

254. Julia Preston et al., *What Would It Take for Donald Trump to Deport 11 Million and Build a Wall?*, N.Y. TIMES (May 19, 2016), <http://www.nytimes.com/2016/05/20/us/politics/donald-trump-immigration.html>.

255. See discussion *supra* Subpart II.B.

risk grave societal harm. In other areas, such as the regulation of marijuana, sex work, or quality of life crimes, there is a growing consensus that the cost and collateral harms of high levels of enforcement, the low deterrent value of heavy-handed enforcement, and the relatively minor societal injuries associated with non-compliance, militate in favor of low enforcement levels.<sup>256</sup>

In the administrative arena, the Internal Revenue Service's ("IRS") approach stands out as an example of an intentional low-level punitive enforcement strategy. Initially, the IRS was required to audit all tax returns.<sup>257</sup> Over time, its enforcement approach came to be seen as overzealous.<sup>258</sup> In response, Congress implemented reforms that caused punitive enforcement activity to decline significantly.<sup>259</sup> The IRS now employs a notably low level of punitive enforcement, annually auditing under 1 percent of returns and prosecuting only a couple of hundred people for failure to file.<sup>260</sup> As discussed below, the IRS's reduction in punitive enforcement was accompanied by an increase in cooperative enforcement strategies, and the shift has been effective.<sup>261</sup> The United States now enjoys one of the highest tax compliance rates in the world.<sup>262</sup>

In the immigration arena, the societal costs of the current high levels of punitive enforcement are profound. The destruction of family units, deaths, mistreatment, and traumatization of entire communities are well-documented.<sup>263</sup> Furthermore, the fiscal costs are extraordinary.<sup>264</sup> On the other side of the equation, the harms associated with non-compliance are hotly contested in the political arena.<sup>265</sup> Immigration restrictionists point principally to three categories of alleged harm: criminality of undocumented immigrants, the cost of providing public benefits and services to undocumented

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256. See, e.g., Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315, 320 (2019); 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>.

257. Revenue Act of 1918, Pub. L. No. 65-254, § 250(b), 40 Stat. 1057, 1083 (1919); J.T. Manhire, *What Does Voluntary Tax Compliance Mean?: A Government Perspective*, 164 U. PA. L. REV. ONLINE 11, 14 n.17 (2015).

258. Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 972, 999 (2003).

259. *Id.* at 972, 983–1008.

260. INTERNAL REVENUE SERV., DATA BOOK, 2013, at 21–24 (2013), <https://www.irs.gov/pub/irs-soi/13databk.pdf>; *Statistical Data – Non-Filer Investigations*, IRS (last updated Oct. 28, 2019) <https://www.irs.gov/compliance/criminal-investigation/statistical-data-nonfiler-investigations>.

261. See discussion *supra* Subpart IV.B.2.

262. See Lederman, *supra* note 258, at 974 n.17; see also discussion *supra* Subpart II.B.

263. See discussion *supra* Part I.

264. See *supra* notes 53–54 and accompanying text.

265. See, e.g., *supra* note 234 and accompanying text.

immigrants, and the harms that may flow from labor competition with undocumented workers.<sup>266</sup> However, the social science data establishes that these alleged harms are either non-existent or minor. Study after study has concluded that undocumented immigrants pose no heightened risk of criminality.<sup>267</sup> Undocumented immigrants are also ineligible for virtually all federal benefits programs.<sup>268</sup> Indeed, many undocumented workers pay taxes and pay into the Social Security and other benefits systems—notwithstanding their ineligibility to receive such benefits—leading some to argue that they are a net benefit to the public coffers, especially on the federal level.<sup>269</sup> Evidence regarding whether undocumented workers create increased labor competition in low-wage fields is more contested.<sup>270</sup> But the overwhelming weight of the evidence demonstrates that, in the long run, undocumented workers are a critical net benefit to the U.S. economy.<sup>271</sup> Indeed, the greatest harms that flow from non-compliance in the immigration arena are unquestionably suffered by

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266. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 436 (2012) (Scalia, J., dissenting).

267. *See, e.g.*, RUBÉN G. RUMBAUT & WALTER A. EWING, *THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN*, AM. IMMIGRATION LAW FOUND.: IMMIGRATION POLICY CTR. (2007); Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, MARSHALL PROJECT (May 13, 2019), <https://www.themarshallproject.org/2019/05/13/its-there-a-connection-between-undocumented-immigrants-and-crime>.

268. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

269. *See, e.g.*, Hong, *supra* note 35, at 52–54. Discussion of whether immigration has a net positive or net negative impact on state and local economies is more mixed. *See* LISA CHRISTENSEN GEE ET AL., *INST. ON TAX'N & ECON. POL'Y, UNDOCUMENTED IMMIGRANTS' STATE & LOCAL TAX CONTRIBUTIONS 2* (2017), <https://itep.org/wp-content/uploads/immigration2017.pdf> (noting that in 2014, undocumented immigrants paid \$11.7 billion in state and local taxes). *But see generally* ROBERT RECTOR & JASON RICHWINE, HERITAGE FOUND., *THE FISCAL COST OF UNLAWFUL IMMIGRANTS AND AMNESTY TO THE U.S. TAXPAYER* (2013), [http://thf\\_media.s3.amazonaws.com/2013/pdf/sr133.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/sr133.pdf) (arguing that undocumented immigrants receive more government benefits than the taxes they pay).

270. *Compare* Preston, *supra* note 179, *with* Christoph Albert, *The Labor Market Impact of Undocumented Immigrants: Job Creation vs. Job Competition 1* (Universitat Pompeu Fabra, Working Paper, 2017), [https://www.upf.edu/documents/2963149/3253728/The\\_Labor\\_Market\\_Impact\\_of\\_Undocumented\\_Immigrants\\_Christoph\\_Albert\\_April2017.pdf](https://www.upf.edu/documents/2963149/3253728/The_Labor_Market_Impact_of_Undocumented_Immigrants_Christoph_Albert_April2017.pdf).

271. *See* NAT'L ACADS. OF SCIS., ENG'G, AND MED. ET AL., *THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION* 80 (Francine D. Blau & Christopher Mackie eds., 2017); GEE ET AL., *supra* note 269, at 2; *see also* Baxter, *supra* note 195; Dalmia, *supra* note 195; Long, *supra* note 196; Kevin Murphy, *American Farmers Need Immigration Reform*, WALL ST. J. (May 30, 2019, 7:25 PM), <https://www.wsj.com/articles/american-farmers-need-immigration-reform-11559258759?mod=flipboard>.

the undocumented population themselves.<sup>272</sup> Moreover, even if we were to assume some significant level of harm from non-compliance, high levels of punitive enforcement are only justified if they actually work at reducing non-compliance. In fact, the weight of the evidence suggests that ICE's heavy-handed tactics are of limited deterrent value.<sup>273</sup>

The ahistorical levels of punitive immigration enforcement are of limited utility in increasing compliance and carry significant fiscal and human costs, which outweigh the relatively minor societal harms associated with the deterrable non-compliance. Accordingly, the first pillar of a humane and effective immigration enforcement scheme requires a radical reduction in the scale of punitive interior immigration enforcement. Much of this change could be made administratively or through appropriations mechanisms.

## 2. *Pillar Two: Mandatory Preferences for Compliance Assistance*

However, reducing the unprecedented and ineffectual punitive enforcement scheme will not alone increase compliance. An alternative enforcement paradigm must be implemented in its place. The heart of that new paradigm is mandatory preferences for compliance assistance.

As discussed above, there are large categories of undocumented immigrants who are both potentially subject to deportation and also eligible to obtain lawful status.<sup>274</sup> Accordingly, immigration authorities often have a choice between two enforcement pathways: punish the non-compliance through deportation or allow the individual to come into compliance by applying for some form of legal status that Congress has chosen to make available.

Administrative law scholars have widely praised the trend toward "cooperative enforcement," where administrative agencies outside the immigration context increasingly tend to favor efforts to help entities come into compliance through education, outreach, and flexible implementation over traditional punitive measures.<sup>275</sup> When OSHA, the FDA, the EPA, or the SEC encounter a corporation violating the law, their approach is generally to work with that corporation to help it come into compliance.<sup>276</sup> These agencies use

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272. See Regina Day Langhout et al., *Statement on the Effects of Deportation and Forced Separation on Immigrants, their Families, and Communities*, 62 AM. J. COMMUNITY PSYCHOL. 3, 3–4 (2018); see also Brenda Eskenazi et al., *Association of Perceived Immigration Policy Vulnerability With Mental and Physical Health Among US-Born Latino Adolescents in California*, 173 J. AM. MED. ASS'N PEDIATRICS 744, 759–50 (2019).

273. See Ryo, *supra* note 23, at 635–38; see also *supra* notes 67–69 and accompanying text.

274. See discussion *supra* Subpart IV.D.

275. See discussion *supra* Subpart IV.D.

276. See discussion *supra* Subpart IV.D.

cooperative enforcement because it tends to be less expensive and more efficient, while avoiding the societal harms associated with heavy-handed punitive enforcement.<sup>277</sup> When the regulated parties are corporations rather than immigrants, the government seems comfortable with this approach. There is no reason to believe that the same benefits from cooperative enforcement could not be realized when the regulated entity is a person. In fact, the approach has also shown significant promise for agencies, like the IRS, that directly regulate individuals.<sup>278</sup> The IRS's shift toward cooperative enforcement has been a critical factor in its successful transition away from heavy-handed punitive enforcement.<sup>279</sup>

But when it comes to immigration, we have it exactly upside down.<sup>280</sup> Instead of diverting people out of the punitive enforcement stream (ICE's deportation machine) into compliance assistance or cooperative enforcement mechanisms (USCIS's application processes), we do the reverse.<sup>281</sup> When an eligible but deportable individual applies for an immigration benefit, USCIS frequently declines to grant their application and diverts them into the deportation system.<sup>282</sup> There are large categories of undocumented individuals eligible to obtain lawful status right now but who are being deprived of a fair chance to access the legalizations pathways Congress has made available.<sup>283</sup> There are other significant categories of people being pushed through the deportation pipeline who will, with the passage of time, become eligible for lawful status.<sup>284</sup> In addition, there are many more people eligible to obtain or maintain status through mechanisms that are currently only available defensively in deportation proceedings.<sup>285</sup>

We could dramatically reduce our reliance on punitive enforcement mechanisms by allowing eligible individuals the opportunity to come into compliance. We could expand the utility of compliance assistance programs further by making those mechanisms, presently only available defensively, available on an

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277. See Frost, *supra* note 23, at 5, 50–51.

278. See INTERNAL REVENUE SERV., IR-2018-174, IRS ANNOUNCES ADJUSTMENTS TO THE COMPLIANCE ASSURANCE PROCESS (CAP) PROGRAM (2018) (describing the Compliance Assurance Process (CAP) program instituted at the IRS in 2005).

279. See Internal Revenue Serv., IR-2014-3, National Taxpayer Advocate Delivers Annual Report to Congress: Focuses on Taxpayer Bill of Rights and IRS Funding (2014) (“[T]he U.S. tax system is built on voluntary compliance.”); see also discussion *supra* Subpart V.B.1.

280. See Frost, *supra* note 23, at 1.

281. See *id.* at 28.

282. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 215; see also Lanard, *supra* note 215.

283. See discussion *supra* Subpart IV.D.

284. See, e.g., 8 U.S.C. § 1153(a) (2018); see also 8 C.F.R. § 245.1(g) (2019).

285. See, e.g., 8 U.S.C. § 1229b (2018); see also 8 U.S.C. § 1231(b)(3) (2018); 8 C.F.R. § 1208.16(c)(2) (2019).

affirmative basis. Most dramatically, we could address the majority of non-compliance by the substantive reform suggested above to create new affirmative pathways to citizenship for undocumented individuals, as we have done in the past.<sup>286</sup>

The outcome of a successful cooperative enforcement scheme would not only be reduced non-compliance but also increased legalization. This approach will thus be predictably unsatisfying to those who disfavor immigration in all its forms, regardless of legality. However, even most immigration hawks purport to favor legal immigration.<sup>287</sup> While there is reason to be skeptical whether such rhetoric is genuine, if bipartisan support for lawful immigration is to be believed, then widespread support for cooperative enforcement should follow.<sup>288</sup>

Prosecutorial discretion is the mechanism that has been used in the modern era to determine which enforcement pathway—punitive or cooperative—to pursue, and it has failed to deliver a reliable preference for compliance assistance.<sup>289</sup> Accordingly, the second pillar of a humane and effective immigration enforcement scheme is to enact mandatory rules that give people the right to affirmatively pursue pathways to lawful status before they can be subject to any punitive enforcement action. ICE's mass deportation agenda is often justified by rhetoric about an obligation to enforce the law. However, if we are to take seriously the obligation to enforce the law, we must include in that mandate the obligation not to deprive people of the legal pathways that Congress has chosen to make available.<sup>290</sup> With a reduced investment in punitive enforcement, we could increase compliance by redirecting resources to speed up processing times, expand legal assistance, and reduce application fees for immigration benefits. Notably, this change—at least in regard to people with current affirmative pathways to legal status—could be enacted administratively under the current statutory regime.<sup>291</sup> Making defensive relief mechanisms available affirmatively and opening up

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286. See, e.g., Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986); see also Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, §§ 202–03, 111 Stat. 2160, 2193–2200 (1997); Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), Pub. L. No. 105-277, § 902, 112 Stat. 2681, 2681–538 to 2681–542 (1998).

287. See, e.g., *supra* note 234.

288. See, e.g., Nicole Goodkind, *Donald Trump's Likely USCIS Pick 'Spells the End of Legal Immigration as it Currently Exists' Says Union Chief*, NEWSWEEK (May 28, 2019, 5:06 PM), [https://www.newsweek.com/trump-legal-immigration-agency-head-1437611?utm\\_source=GoogleNewsstandUS&utm\\_medium=Feed&utm\\_campaign=Partnerships](https://www.newsweek.com/trump-legal-immigration-agency-head-1437611?utm_source=GoogleNewsstandUS&utm_medium=Feed&utm_campaign=Partnerships).

289. See discussion *supra* Subpart III.B.

290. See *You Xiu Qing v. Nielsen*, 321 F. Supp. 3d 451, 466 (S.D.N.Y. 2018) (interpreting the INA to forbid the use of unadjudicated affirmative application as a mechanism to initiate removal and suggesting that an alternative reading of the statute would raise serious constitutional questions).

291. *Id.*

new pathways to legal status for undocumented individuals would likely require an act of Congress.

### 3. *Pillar Three: A System of Proportional Consequences*

Even if we dramatically reduce the scale of punitive enforcement and rely principally on compliance assistance, there will still be situations where individuals have no affirmative mechanism to obtain legal status and where enforcement is warranted. Accordingly, punitive enforcement will still have some role and there must be some consequences that can be triggered by non-compliance. The current problem is that we have only a single penalty in our immigration toolbox—deportation—and that penalty is grossly disproportionate to the overwhelming majority of immigration offenses.<sup>292</sup> The Supreme Court has characterized deportation as “the loss of all that makes life worth living.”<sup>293</sup> Yet, deportation is the penalty that the law proscribes for a lawful permanent resident who has lived in the United States for decades, who may have a family or business, who may have served in the U.S. military, or who may have committed offenses as minor as simple possession of small amounts of marijuana, turnstile jumping, or petty shoplifting.<sup>294</sup> It is also the penalty proscribed by law for a person who was brought unlawfully into this country as a child decades ago, regardless of the contributions they have made to U.S. society in the interim or their lack of connection, or even means of survival, in their country of origin.<sup>295</sup> Having represented hundreds of people in removal proceedings, I have heard judges say countless times that they do not believe deportation is warranted but that they have no other choice. 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. Our immigration system functions like a medieval criminal justice system, where the only two choices were no penalty or the death penalty.

In order to create a humane and effective immigration enforcement system, we need to broaden the scope of the consequences that may flow from non-compliance to include a set of scalable penalties.<sup>296</sup> In all cases where punitive enforcement is pursued, immigration judges should have available to them a set of

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292. Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 417 n.19, 427 (2012).

293. *Bridges v. Wixon*, 326 U.S. 135, 147 (1945).

294. 8 U.S.C. § 1227(a)(2)(A)–(B) (2018).

295. Luz Lazo, *For Kids, Crossing the U.S. Border Illegally Involves Fear and Hope*, WASH. POST (Oct. 1, 2019), [https://www.washingtonpost.com/lifestyle/kidspost/for-kids-crossing-the-us-border-illegally-involves-fear-and-hope/2019/10/01/5618ed00-e131-11e9-be96-6adb81821e90\\_story.html](https://www.washingtonpost.com/lifestyle/kidspost/for-kids-crossing-the-us-border-illegally-involves-fear-and-hope/2019/10/01/5618ed00-e131-11e9-be96-6adb81821e90_story.html).

296. See Cristina M. Rodríguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125, 135–45 (2010); Wishnie, *supra* note 292, at 416.

scalable penalties that could be imposed in lieu of deportation when warranted. The penalties short of deportation would then create pathways to permanent status after the penalty was fulfilled. Fines are the most obvious option and are widely used across the administrative state.<sup>297</sup> Fines, of course, can become overly punitive, particularly when imposed on a generally low-income population, and excessive fines would render the tool unhelpful.<sup>298</sup> Accordingly, fines would need to be tailored to an individual's ability to pay.<sup>299</sup> There is precedent for such fines in immigration enforcement. As recently as 2001, fines were also a critical part of the United States' immigration enforcement system; certain individuals who entered the United States unlawfully, and were not otherwise eligible for lawful status, were permitted to obtain lawful permanent residency if they paid a \$1000 penalty.<sup>300</sup> Other scalable penalties could include, for example, delayed access to immigration or other public benefits, lengthened pathways to citizenship, or mandated community service obligations. Implementing a new system of scalable penalties, which would then unlock a pathway to lawful status, is the third pillar of a humane and effective immigration enforcement scheme. This change would likely require a modification of the statutory scheme by Congress.

#### 4. *Pillar Four: Minimizing the Use of Physically Coercive State Power*

Even with the reforms outlined above, there will be outlier cases where the agency is unsuccessful in bringing individuals into compliance and where the proportional punishment is deemed to be deportation.<sup>301</sup> In such cases, we have a legal and moral obligation to find mechanisms to ensure people appear and comply with deportation orders, without unnecessarily severe deprivations of liberty.

The first step in that effort must be to eliminate the use of preventative immigration detention and the vast and unprecedented detention system that has arisen in recent decades. Virtually every other federal agency in the administrative state has found a way to enforce its civil administrative scheme without putting people in cages. For the majority of U.S. history, detention was not a

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297. Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 53 (2017).

298. *Id.*

299. *Id.*

300. *See, e.g.*, 8 U.S.C. § 1255(i) (2018) (no longer in effect, as of Apr. 30, 2001).

301. For some in the Abolish ICE movement, deportation is never a proportionate penalty. They view the freedoms to move, stay, work and thrive as sacrosanct and inviolable human rights. There is a strong case to be made that deportation is inherently inhumane and, like banishment, has no place in our modern society. However, as long as deportation remains a reality, we have an obligation to mitigate its brutality to the greatest extent possible. This final pillar is aimed at that goal.

significant feature of interior immigration enforcement.<sup>302</sup> There is no reason why deportation proceedings, or even the deportation process itself, must begin with handcuffs. For most of U.S. history, these processes began with notices, and we can return to that norm.<sup>303</sup> However, the question then becomes, how can we ensure people's appearance in immigration court and ultimately, compliance with deportation orders?

The answer begins with due process. The data demonstrate that the most important thing we can do to improve appearance rates in immigration court is to provide lawyers. Unlike criminal court, there is no recognized legal right to appointed counsel in immigration court.<sup>304</sup> The most recent publicly available data show that virtually every family (99 percent) released from immigration detention that had a lawyer showed up for all of their immigration court hearings.<sup>305</sup> In contrast, those without lawyers were significantly less likely (76 percent) to consistently appear.<sup>306</sup> Lawyers help ensure that individuals have accurate information about the time and place of hearings.<sup>307</sup> Lawyers also remove the terror of walking into an unfamiliar courtroom alone and of litigating in one of the most complex arenas of American law, against trained government prosecutors, without any legal training, and often in a language they do not understand. In addition, there is a wealth of empirical research about how the perception of procedural fairness enhances compliance, which also helps explain the impact that lawyers can

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302. See discussion *supra* Subpart II.C.

303. Lenni B. Benson, *By Hook or by Crook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813, 815 n.12, 832 (1994); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 130 (2013); García Hernández, *supra* note 23, at 248; David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1319 (1990).

304. *Debeatham v. Holder*, 602 F.3d 481, 485 (2d Cir. 2010) (“Because immigration proceedings are of a civil rather than criminal nature, aliens in removal proceedings ‘enjoy[ ] no specific right to counsel’ under the Sixth Amendment to the Constitution.”) (quoting *Jian Yun Zheng v. U.S. Dep’t of Justice*, 409 F.3d 43, 46 (2d Cir. 2005)); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) (“It is well-settled that, while there is no Sixth Amendment right to counsel, aliens have a statutory right to counsel at their own expense. . . .”) (citation omitted); *Castaneda-Suarez v. Immigration & Naturalization Serv.*, 993 F.2d 142, 144 (7th Cir. 1993) (“Deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment.”); *Lozada v. Immigration & Naturalization Serv.*, 857 F.2d 10, 13 (1st Cir. 1988) (“Because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment.”).

305. *Most Released Families Attend Immigration Court Hearings*, TRAC SYRACUSE (June 18, 2019), <https://trac.syr.edu/immigration/reports/562/>.

306. *Id.*

307. *Id.*

have.<sup>308</sup> Moreover, the feasibility of a publicly-funded assigned immigration counsel program has been robustly demonstrated in the City and State of New York, which have had universal appointed counsel programs dating back to 2013.<sup>309</sup> Providing lawyers to every person facing deportation who cannot afford private counsel is thus the first step toward ensuring that individuals know and comply with their obligations in immigration court.<sup>310</sup> The benefits of counsel can be enhanced further by providing the type of case management support, which the recent trend of non-profit bail funds have used to impressively increase appearance rates.<sup>311</sup>

In addition, other countries, such as Canada, have engaged in promising experiments with inducements to improve compliance with deportation orders.<sup>312</sup> Canada used financial inducements of up to \$2000 to encourage voluntary compliance with removal orders.<sup>313</sup> With the United States spending on average \$12,000 per deportation, the cost saving opportunities of such a program are significant.<sup>314</sup> The incentivizing force of money is self-evident but could be particularly powerful in this context, where low-income individuals are often extremely scared about returning to countries when they lack any means of economic survival.<sup>315</sup> Such a system would, of course, need to be structured to ensure that the financial inducements were not so significant as to incentivize breaches of immigration law. Other inducements for those who promptly comply with deportation orders—such as reduced wait times for readmission and continued

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308. See, e.g., Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231,231 (2008).

309. See generally STAVE ET AL., *supra* note 249 (analyzing the impact of legal representation for immigrants).

310. There are, of course, very good reasons to provide appointed counsel that are wholly unrelated to ensuring appearance in court. See, e.g., Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN'S L. REV. 915, 917 (2016).

311. Tina Rosenberg, Opinion, *Assisting the Poor to Make Bail Helps Everyone*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/opinion/bail-assistance-poverty.html>.

312. RICHARD BLACK ET AL., MIGRATION POLICY INST., PAY-TO-GO SCHEMES AND OTHER NONCOERCIVE RETURN PROGRAMS: IS SCALE POSSIBLE? 1–2 (2011), <https://www.migrationpolicy.org/research/pay-go-schemes-and-other-noncoercive-return-programs>.

313. *Id.*

314. Frost, *supra* note 23, at 5; Ben Gitis, *The Personnel and Infrastructure Needed to Remove All Undocumented Immigrants in Two Years*, AM. ACTION F. (Feb. 28, 2016), <https://www.americanactionforum.org/research/the-personnel-and-infrastructure-needed-to-remove-all-undocumented-immigrants-in-two-years/>.

315. BLACK ET AL., *supra* note 312, at 1.

access to earned domestic benefits like Social Security—could also be powerful tools to promote compliance.<sup>316</sup>

Finally, the immigration system can draw upon lessons from the criminal justice reentry movement. It is accepted wisdom that if we want individuals leaving prison to successfully reintegrate into society, we need to invest in reentry services.<sup>317</sup> Those services include, for example, job training, housing assistance, health care planning, and mental health treatment. We provide these services to people coming out of prison because it is inhumane to deposit individuals on the street without the skills to survive and thrive.<sup>318</sup> But we also deliver these services because they are critical to ensuring that individuals do not reoffend.<sup>319</sup> Reentry services for individuals being deported could serve these same purposes. They could be powerful tools to help individuals reintegrate into their countries of origin, thereby reducing the brutality of deportation and easing the terror that leads some to resist compliance with deportation orders. Successful integration, in turn, is critical to reducing the chances of unlawful returns to the United States.

Providing counsel, case management services, inducements, and reentry services will collectively come with a significant price tag. However, those costs should pale in comparison to the \$7.5 billion we are now spending annually on ICE. Collectively, with this package of programs to promote compliance, we could end immigration detention and reduce costs while still maintaining sufficient incentives for individuals to appear in immigration court and to comply with any penalties a court may impose.

## VI. CONCLUSION

The four pillars outlined above would bring our immigration enforcement system in line with most other federal agencies insofar as they would eliminate the use of physically coercive state power in civil administrative enforcement efforts and would obviate the need for a dedicated agency of immigration police. ICE could be abolished. The cooperative enforcement scheme outlined above would become the primary mission of USCIS or some successor service-focused agency. That agency would work to help individuals obtain or

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316. See Social Security Act § 202(n), 42 U.S.C. § 402(n) (2018) (terminating Social Security benefits upon the deportation of the primary beneficiary).

317. See, e.g., Joan Petersilia, *What Works in Prisoner Reentry? Reviewing and Questioning the Evidence*, 68 FED. PROB. 4, 4–8 (2004); Matt McKillop, *Health Care Continuity After Prison Protects Investments and Progress*, PEW CHARITABLE TR. (June 22, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/06/22/health-care-continuity-after-prison-protects-investments-and-progress>; John Roman & Aaron Chalfin, *Does it Pay to Invest in Reentry Programs for Jail Inmates?*, URB. INST. (June 27, 2006), [https://www.urban.org/sites/default/files/roman\\_chalfin.pdf](https://www.urban.org/sites/default/files/roman_chalfin.pdf).

318. See Petersilia, *supra* note 317, 4–8.

319. *Id.*; Roman & Chalfin, *supra* note 317.

maintain compliance with immigration law through education, outreach, legal assistance, and flexible interpretations of immigration law. It would be housed in a department, like Health and Human Services and unlike DHS, that has a mission to advance the well-being of the immigrants it serves as well as the nation as a whole. In those instances where an individual has been afforded available opportunities under the law but could not be brought into compliance with immigration law, the same agency would consider the wisdom of punitive enforcement with a goal of maintaining low overall punitive enforcement levels. If such punitive enforcement was warranted, an immigration judge would be empowered to consider a range of scalable penalties to ensure that any penalty imposed is proportionate to the individual and the violation. Instead of detention, we would use appointed counsel, support services, inducements, and reentry services to ensure appearance in court and compliance with court orders. In those rare instances where that system fails to achieve compliance and physically coercive state power is needed, the immigration services agency could, like most federal agencies, include a small cohort of enforcement officers.

The obstacles to reforming our immigration enforcement system are daunting. In the modern era, our political system has proven unable to deliver even the most modest steps forward on immigration. Some of the reforms suggested above could be enacted administratively but others would require congressional action. In recent decades, Congress has vacillated between legislative paralysis and enacting harsher and more misguided reforms, which only exacerbate the ineffectual and draconian nature of our immigration enforcement system.<sup>320</sup> Theories alone will not be enough to reverse this trend. Doing so will require a long arc, sustained, grassroots movement. But a workable and humane vision of what a just immigration enforcement system can look like is an essential prerequisite to progress. The absence of such a theory stymies support for reform. In addition, the lesson from past abolitionist movements demonstrates the danger of undertheorizing the post-abolitionist path forward.<sup>321</sup> Accordingly, whether one's goal is the abolition or the reform of ICE, it is critical that activists, impacted communities, policymakers, and scholars engage now.

This Article is a starting point for others to critique and improve upon. The four pillars set forth above provide a blueprint for how a radically new vision for immigration enforcement could increase compliance while simultaneously reducing the human and fiscal costs

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320. See, e.g., *U.S. Congress: Reject Draconian Anti-Immigrant Bill*, HUM. RTS. WATCH (May 18, 2017, 1:30 PM), <https://www.hrw.org/news/2017/05/18/us-congress-reject-draconian-anti-immigrant-bill>.

321. Liat Ben-Moshe, *The Tension Between Abolition and Reform*, in *THE END OF PRISONS* 83, 84–85 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013); García Hernández, *supra* note 23, at 267–68.

of enforcement. This scheme would obviate the need for a dedicated agency of immigration police and allow us to create an effective and humane enforcement system without mass detention and deportation.