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# Moving Beyond Comprehensive Immigration Reform and Trump: Principles, Interests, and Policies to Guide Long-Term Reform of the US Immigration System

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## Executive Summary

This paper introduces a special collection of 15 papers that chart a course for long-term reform of the US immigration system. The papers look beyond recent legislative debates and the current era of rising nationalism and restrictionism to outline the elements of a forward-looking immigration policy that would serve the nation's interests, honor its liberal democratic ideals, promote the full participation of immigrants in the nation's life, and exploit the opportunities offered by the increasingly interdependent world. This paper highlights several overarching themes from the collection, as well as dozens of proposals for reform. Together, the papers in the collection make the case that:

- Immigration policymaking should be embedded in a larger set of partnerships, processes, and commitments that respond to the conditions that force persons to migrate.
- The US immigration system should reflect liberal democratic values and an inclusive vision of national identity.
- It is incumbent on policy and opinion makers to publicize the broad national interests served by US immigration policies.
- Policymakers should, in turn, evaluate and adjust US immigration policies based on their success in furthering the nation's interests.
- The United States should prioritize the gathering and dissemination of the best available evidence on migration and on the nation's migration-related needs and programs, and should use this information to respond flexibly to changing migration patterns and new economic developments.
- Immigrant integration strengthens communities and represents an important, overarching metric for US immigration policies.

- The successful integration of the United States' 43 million foreign-born residents and their progeny should be a national priority.
- An immigration federalism agenda should prioritize cooperation on shared federal, state, and local priorities.
- An immigration federalism agenda should recognize the federal government's enforcement obligations; the interests of local communities in the safety, well-being and participation of their residents; the importance of federal leadership in resolving the challenges posed by the US undocumented population; and the need for civil society institutions to serve as mediators of immigrant integration.
- Immigration reform should be coupled with strong, well-enforced labor standards in order to promote fair wages and safe and healthy working conditions for all US workers.
- Fairness and due process should characterize US admission, custody, and removal decisions.
- Family unity should remain a central goal of US immigration policy and a pillar of the US immigration system.
- The United States should seek to craft "win-win" immigration policies that serve its own interests and that benefit migrant-sending states.
- US immigration law and policy should be coherent and consistent, and the United States should create legal migration opportunities for persons uprooted by US foreign interventions, trade policies, and immigration laws.
- The United States should reduce the size of its undocumented population through a substantial legalization program and seek to ensure that this population never again approximates its current size.

## Introduction

In July 2016, the Center for Migration Studies of New York (CMS) initiated its US immigration reform project to provide an evidence base, vision, and policy framework to guide long-term reform of the US immigration system.<sup>1</sup> An advisory group conceptualized the project and helped to identify themes and issues for a special collection of papers.<sup>2</sup> This

1 In this paper, the term "US immigration system" encompasses the US refugee protection system.

2 The group included Edward Alden, Bernard L. Schwartz senior fellow, Council on Foreign Relations; Kevin Appleby, senior director of international migration policy, Center for Migration Studies (CMS), who also served as a special co-editor of the collection; Michael Doyle, university professor and director, Columbia Global Policy Initiative, Columbia University; Joanna Dreby, associate professor, University at Albany, State University of New York; Douglas Gurak, professor emeritus, Cornell University and Editor, *International Migration Review*; Jacqueline Hagan, professor of sociology, The University of North Carolina at Chapel Hill; Josiah Heyman, director, Center for Interamerican and Border Studies, professor of anthropology and endowed professor of border trade issues, The University of Texas at El Paso; Donald Kerwin, executive

## Moving Beyond Comprehensive Immigration Reform and Trump

introduction to the collection will highlight the findings, themes, and policy ideas from 15 papers published in CMS's *Journal on Migration and Human Security (JMHS)* and as *CMS Essays*.

The collection does not constitute a blue ribbon commission report, or an expert consensus on immigration reform. Instead, the papers outline important aspects of a forward-looking immigration policy that would serve the nation's interests, honor its liberal democratic ideals, promote the full participation of immigrants in the nation's life, and exploit the opportunities offered by an increasingly interdependent world.

This paper discusses the papers in this collection, while also drawing on select papers from *JMHS* special collections on the US refugee protection system on the 35th anniversary of the Refugee Act of 1980<sup>3</sup>; the US immigration enforcement system on the 20th anniversary of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>4</sup>; and the global refugee protection system.<sup>5</sup>

The papers in this collection cover a large number of topics, including the conditions driving migration, the national interests served by US immigration policies, nationalism, nativism,

director, CMS; Ellen Percy Kraly, William R. Kenan, Jr. professor of geography and environmental studies, Colgate University; Tara Magner, director of the Chicago commitment, The John D. and Catherine T. MacArthur Foundation; Susan Martin, Donald G. Herzberg professor emerita of international migration, Georgetown University; Cecilia Menjivar, foundation distinguished professor, The University of Kansas; Tyler Moran (serving in personal capacity); Cristina Rodríguez, Leighton Homer Surbeck professor of law, Yale Law School; Emily Ryo, assistant professor of law and sociology, University of Southern California Gould School of Law; Todd Scribner, education outreach coordinator, Migration and Refugee Services, United States Conference of Catholic Bishops; Lynn Shotwell, executive director, Council for Global Immigration; Roberto Suro, professor of journalism at the Annenberg School for Communication and Journalism and the School of Policy, Planning and Development, and director of the Tomás Rivera Policy Institute, University of Southern California; Robert Warren, senior fellow, CMS; Charles Wheeler, director, training and legal support, Catholic Legal Immigration Network, Inc.; and Julia Young, assistant professor and director of undergraduate studies, The Catholic University of America.

3 The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), established the US refugee resettlement program and sought to bring US asylum law into compliance with international law, particularly the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. The papers in the US refugee protection collection examine compliance with the letter and spirit of international and domestic law, barriers to protection, individual protection program, and due process issues. In his introduction to the collection, Kerwin (2015) outlines and contextualizes the findings and recommendations from these papers. In other *JMHS* articles, Tara Magner (2016) and Melanie Nezer (2014) analyze the refugee, asylum, and temporary protection provisions in bills taken up by Congress in recent years.

4 The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), did as much to create the legal and programmatic infrastructure of the US immigration enforcement system as any legislation in the last century. It laid the groundwork for new federal/local immigration data-sharing and enforcement programs; increased border and interior enforcement; expanded expedited and summary removals; established bars to admission based on past undocumented status; restricted relief from removal based on family ties and other equities; expanded mandatory detention; and created new income and support requirements for visa petitioners.

5 The papers seek to present new and promising ideas to strengthen the global system of refugee protection. CMS's US immigration reform initiative arose out of a three-day event that joined officials from the United Nations, regional bodies, and states with scholars, researchers, and nongovernmental organizations (NGOs) in anticipation of the UN Summit on Addressing Large Movements of Refugees and Migrants on September 19, 2016.

citizenship, immigrant integration, legal immigration reform, family-based immigration, seasonal farm workers, undocumented residents, immigration enforcement, labor standards enforcement, the discontinuities in the US immigration system, due process, and migration governance issues. This paper highlights the collection's major findings, themes, and proposals for reform.

## Findings, Themes, and Proposals for Reform

**Immigration policymaking should be embedded in a larger set of partnerships, processes and commitments that respond to the conditions that force persons to migrate.**

Nations bear the primary responsibility for creating the conditions that allow their residents to flourish and, thus, for abating conditions like poverty, persecution, violence, and social upheaval. These conditions, as well as natural and manmade disasters, upend people's lives, spur large-scale migration, and place migrants in situations of great vulnerability. They also make it more difficult for migrants to find a permanent home. To address the causes of forced migration, US immigration policymaking should be situated within a broader set of diplomatic, development, rule of law, and security partnerships and processes.<sup>6</sup>

Over the last decade, more than 150 UN member states and thousands of civil society representatives have convened through the Global Forum on Migration and Development — a state-led, nonbinding process — to discuss how to maximize the benefits of migration and reduce its inevitable tensions and costs. From these discussions, a consensus has emerged on the need to support the disaster relief and development initiatives of expatriate communities, leverage the positive effects and reduce the costs of migrant remittances, and otherwise realize migration's development potential. The United States should participate fully in the migration and development dialogue and in similar processes that treat migrants as development actors<sup>7</sup> and that champion development as a way to obviate the necessity to migrate. It should also seek to promote processes like circular migration that facilitate migration-related development inputs.

In that vein, Philip Martin argues for migration-related investments in communities of origin and destination. In "Immigration Policy and Agriculture: Possible Directions for the Future," Martin explains that farm employers, especially in the western United States, have historically relied heavily on immigrant workers, including the undocumented. An estimated 17 percent of those employed in the agriculture industry lack legal status (Martin

6 The global crisis in refugee protection, for example, can be attributed to refugee-producing situations like armed conflict, terrorism, and breakdowns in the rule of law. The overarching need in these circumstances is to anticipate, prevent, forego, and mitigate refugee-producing conditions, which cannot be accomplished by refugee and immigration policies alone (Kerwin 2016, 86, 118).

7 Scholars have long recognized migration as an essential development and anti-poverty strategy. A modest "relaxation of barriers" to labor migration can lead to immense wage gains for persons moving from developing to developed states (Clemens, Montenegro, and Pritchett 2008). Increased income would, in turn, allow expatriates to contribute to poverty reduction and economic development in their communities of origin (Porter 2017).

2017, 253). Seventy percent of US crop workers — not counting those with H-2A visas<sup>8</sup> — were born in Mexico and 70 percent of foreign-born crop workers lack immigration status (*ibid.*, 254). The steady, decade-long decrease in Mexican immigration to the United States has led to a shortage of immigrants who can supplement and replace the “aging and settling” US farm labor work force (Warren 2017; Martin 2017, 258), which may be further diminished by increased immigration enforcement.

Farm labor employers are responding to this labor shortage by resorting to “4-S” strategies: (1) “satisfying” current workers by offering them bonuses; (2) “stretching” the work force by using mechanical aids and increasing productivity through management changes; (3) “substituting” workers through increased mechanization; and (4) “supplementing” the current workforce with H-2A workers (Martin 2017, 258-59). Martin proposes using the monies not paid for Social Security and unemployment insurance taxes under the H-2A program to fund mechanization of the US agricultural sector and economic development in migrant-sending communities (*ibid.*, 261). One idea would be to provide H-2A workers with tax refunds upon leaving the United States, which could be matched by governments in migrant-sending communities to promote development. Martin also proposes investment in US commodity-specific boards as a way to develop strategies to reduce dependence on agricultural hand labor over time.

The World Economic Forum’s 2016 report on global risk found conflict, violence, water crises, climate change, and economic factors to be strongly associated with rising involuntary migration (WEF 2016, 15). In “Mainstreaming Involuntary Migration in Development Policies,” John Harbeson (2016) argues that “state fragility” produces more involuntary migrants than even civil war and conflict.<sup>9</sup> State fragility results from the absence or breakdown in the “social contract” between individual citizens and groups, which undermine the “government contract” or the agreement over the terms by which governments can act on behalf of their citizens.

In response, Harbeson proposes that development policies should address “socioeconomic, cultural, and political distress” in migrant-sending states. In addition, the United States and other developed states should help to “lay the groundwork for building stronger, more durable states,” characterized by their citizen’s engagement in “consensual problem solving.” US development policies, Harbeson argues, should contribute to citizen empowerment and inclusion in fragile states, which will allow their members to flourish and to migrate (if at all) by choice, not necessity.

### **The US immigration system should reflect liberal democratic values and an inclusive vision of national identity.**

From an historical perspective, the election of a nativist president who has consistently denigrated immigrants might be understood in light of:

<sup>8</sup> The H-2A program allows petitioning employers or agents to bring foreign workers to the United States to fill temporary agricultural jobs. Among other requirements, petitioners must show that there is a shortage of able, willing, qualified and available US workers for the position, and that the foreign worker will not have an adverse effect on the wages and working conditions of US workers.

<sup>9</sup> Harbeson (2016) attributes mass migration from Syria, Afghanistan, Iraq, Kosovo, Albania, Pakistan, Eritrea, Nigeria, Iran, Ukraine, and Russia to state fragility. He defines fragile states as those “so weakened and tenuously held together that the very possibility of there being effective government within them is at risk.”

- the record US foreign-born population of 43 million;
- the changed composition (since 1965) of the states of origin of immigrants;
- the 9/11 attacks and near daily terrorist atrocities throughout the world;
- the economic hardship caused by the great recession and its aftermath;
- the struggles of many Americans who feel that their prospects and their children's prospects are diminishing, and that they are on the losing side of globalization; and
- the perceived lack of responsiveness by US political parties to these concerns.

Yet, not all of these considerations align with the profile of Trump supporters. One pre-election analysis, for example, found “no clear picture between social and economic hardship and support for Trump” and “no link whatsoever between greater exposure to trade competition or competition from immigrant workers and support for nationalist policies in America” (Rothwell and Diego-Rosell 2016, 19). However, Trump attracted higher levels of support from persons in racially and culturally isolated communities, “with worse health outcomes, lower social mobility, less social capital, greater reliance on social security income and less reliance on capital income.” (ibid., 1,19). The need to understand and respond to the concerns of these Americans may be a pre-requisite to positive immigration reform (Young 2017).

Two papers in this collection address the bitter divisions in the nation, which have made it difficult to forge political consensus or even speak a common language on immigration reform. In “You Are Not Welcome Here Anymore: Restoring Support for Refugee Resettlement in the Age of Trump,” Todd Scribner examines the ideology and worldview that underlies opposition to the US refugee resettlement program, despite its extraordinary success in resettling more than 3.2 million refugees since 1975 and saving countless lives.<sup>10</sup> He observes that, until the collapse of the Soviet Union, the US refugee resettlement program operated under a Cold War paradigm. However, Trump administration officials, advisors and supporters view the program from a pre-political world view that includes many of the features of Samuel Huntington's Clash of Civilizations hypothesis.<sup>11</sup>

Compelling policy arguments, Scribner avers, will not convince these skeptics to support resettlement. Rather, he urges refugee advocates to place “less emphasis on advocacy efforts aimed at Congress and the administration” and more on engaging individuals, on “cultural and personal formation,” and rethinking “the fundamental narratives that guide our decision making and thus our self-understanding as a nation” (Scribner 2017, 279).

In “Making America 1920 Again? Nativism and US Immigration, Past and Present,” Julia Young (2017) finds an historical analogue to Trump-era hostility towards immigrants in

10 In an earlier paper, Anastasia Brown and Todd Scribner (2014) attributed diminished support for the US refugee resettlement program to poor information sharing, a one-size-fits-all integration metric (self-sufficiency through early employment), the changed composition of refugee flows, federal funding shortages, insufficient support for communities that experienced rapid refugee influxes, and large-scale secondary migration.

11 Huntington argued that culture and religion, rather than ideology or political or economic systems, would increasingly be the source of global conflict.

the late 19th and early 20th century. The earlier era experienced conditions including the Depression of 1893, five years of double-digit unemployment, the Russian revolution, the homeland security fears engendered by World War I, industrialization and its “losers,” and three decades (by 1920) of large-scale immigration of “new” and different immigrants.

Young also identifies recurrent nativist tropes. Today’s nativists characterize undocumented Mexicans as rapists, drug dealers, and prostitutes; Muslims as a national security threat; Mexicans and Central Americans as unassimilable; and refugees as both a security threat and unassimilable. In the late 19th and early 20th centuries, nativists vilified southern and eastern Europeans, Asians (particularly Chinese and Japanese), and Mexicans, arguing they were unassimilable due to “race, ethnicity, and culture” (ibid, 219).<sup>12</sup>

Nativist policy prescriptions have converged over time as well. As Alan Kraut (2016a) puts it: “Over fourteen million arrived in the United States between 1900 and the 1920s before Congress built a wall – not of bricks and mortar, but of laws and procedures.” The Immigration Act of 1924 (the Johnson-Reed Act)<sup>13</sup> established an annual limit of 150,000 immigrants from Europe, and set annual admission quotas by nationality at two percent of the number of a nation’s residents in the United States in 1890, a time of low numbers of southern and eastern European residents. It also barred Japanese immigration. Today’s immigration restrictionists set impossible-to-meet enforcement goals, propose ever harsher enforcement programs, seek massive cuts in legal migration, and would substantially cut and permanently cap refugee resettlement numbers.

Young concludes that nativism never completely disappears and, unfortunately, immigrants and their ancestors can and do adopt nativist attitudes themselves. However, nativism can subside and proposed nativist legislation can be defeated. That said, she sees Donald J. Trump as a *sui generis* nativist president and champion of the nativist agenda. “Today’s nativists,” she writes, “have an outlet that earlier generations did not: a president who not only seems to agree with many of their argument, but who also stokes the flames of his nativism so explicitly and aggressively” (Young 2017, 228).

To counteract nativism, Young proposes that proponents of strong immigration policies should:

- “publicize the economic, social, and cultural contributions” of “groups targeted by nativist policies”;
- develop a greater understanding of the concerns of Trump supporters and “respond to nativism within that group”;
- educate a broader audience on the “social, cultural, financial, and moral” costs of nativism;
- publicize the manifold contributions of immigrants and the benefits of robust immigration policies; and

<sup>12</sup> In “Nativism, An American Perennial,” Alan Kraut (2016b) writes: “Even as the promise of affordable land and abundant jobs lured foreigners, native-born Americans, some only a generation or two themselves from arrival or even less, sought to slam shut the door in fear of job competition, the distortion of their cultural values, challenges to their religious beliefs, or even the dilution of their gene pool by amalgamation.”

<sup>13</sup> Pub. L. No. 68–139, 43 Stat. 153 (1924).

- promote the ideals and interests that would be served by sound immigration reform legislation (ibid., 224, 229-31).

**It is incumbent on policy and opinion makers to publicize the broad national interests served by US immigration policies. Policymakers should, in turn, evaluate and adjust US immigration policies based on their success in furthering the nation's interests.**

The US immigration system should serve the nation's interests. Yet, a large swath of the US public questions the interests served by this system, as well as the ability of the federal government to administer and enforce its laws. In "National Interests and Common Ground in the US Immigration Debate: How to Legalize the US Immigration System and Permanently Reduce Its Undocumented Population," Donald Kerwin and Robert Warren seek to clarify the purpose and goals of US immigration policies by analyzing presidential signing statements on seminal immigration reform legislation over nearly a century. They begin with the Johnson-Reed Act of 1924, end with the Homeland Security Act of 2002<sup>14</sup> which created the US Department of Homeland Security (DHS), and include President Truman's veto of the Immigration and Nationality Act of 1952 (the McCarran-Walter Act).<sup>15</sup> They find broad consensus on the following interests and propositions regarding the US immigration and refugee laws:

- "Families constitute the fundamental building block of society and their integrity should be preserved.
- Admissions policies based on national origin, race or privilege offend the US creed and civic values.
- Fairness and process should characterize admission and removal decisions.
- Providing haven to persons fleeing persecution and violence reflects US history, tradition, and its core commitment to liberty, freedom and dignity.
- Immigrants embody the US tradition of self-sufficiency, hard work and drive to succeed, and further the nation's economic competitiveness.
- All US residents deserve access to 'the benefits of a free and open society' (Reagan 1986).
- A system characterized by 'fair, orderly and secure' migration upholds the rule of law (ibid.).
- Illegal migration challenges US sovereignty, threatens US security, and devalues citizenship.
- Criminals and security threats flout US ideals, should not be admitted, and forfeit the right to remain." (Kerwin and Warren 2017, 299)

The political branches of the federal government should publicize the national interests advanced by US immigration policies and should evaluate and adjust these policies in light of these interests. At the same time, they should acknowledge that "none of the interests

14 Pub. L. No. 107-296, 116 Stat. 2135 (2002).

15 Pub. L. No. 82-414, 66 Stat. 163 (1952).

served by immigration policies — family, economic, or humanitarian — can be achieved *only*” by these policies (Kerwin and Warren 2017, 303). The success and integrity of immigrant families, for example, depends not only on the ability of their members to live together, but also on a range of domestic policies, public and private institutions, affiliations, and personal attachments. Socioeconomic attainment by immigrants and their progeny depends, in large part, on educational opportunity, the state of the economy, and an open job market. US refugee and humanitarian programs invariably “depend upon collaboration from other states, local communities, nongovernmental actors, and the affected populations themselves” (ibid.). “Temporary” protection will extend indefinitely without development, diplomatic, and rule of law initiatives in sending states that create the conditions that allow their residents to stay or return (Kerwin 2014a, 63).

These insights affirm the need to “mainstream” immigration and refugee concerns in development policies and in a range of other foreign and domestic policymaking processes as well. At present, “mainstreaming” does not occur (even within DHS) to the degree necessary to meet the national interests that the US immigration system is intended to serve (Kerwin and Warren 2017, 305; Meissner and Kerwin 2009, 92-95).

**The United States should prioritize the gathering and dissemination of the best available evidence on migration and on the nation’s migration-related needs and programs, and should use this information to respond flexibly to changing migration patterns and new economic developments.**

This collection does not take on the difficult and speculative task of projecting long-term trends that might influence US employment, family, and humanitarian admissions. However, it makes the case that US immigration and refugee policies need to rely on credible and timely research and data to meet their underlying goals. As it stands, the US employment-based immigration system has not been overhauled for 52 years or substantially revised for 27 years. Moreover, US law does not currently include a mechanism (short of new legislation) to adjust visa levels or categories based on changed US needs or priorities. “[T]he system’s lack of flexibility and responsiveness” represents “a glaring deficiency” (Kerwin and Warren 2017, 309).

Over the last decade, there have been several proposals to align US immigration policies with its labor needs. At least two proposed an independent commission to produce research on labor needs and economic trends that would inform adjustments in immigration admissions (Meissner et al. 2006, 41-43; Marshall 2009, 22).

The United Kingdom has established an independent advisory body to analyze and report on labor shortages and the impacts of immigration.<sup>16</sup> However, the political branches of the US government lack a formal, independent body which could:

- “identify the nation’s evolving labor, family or humanitarian needs that might be met through immigration, including on a state and local level;
- identify shortages in skills and occupations necessary to promote that nation’s economic competitiveness;

16 The Migration Advisory Committee, <https://www.gov.uk/government/organisations/migration-advisory-committee/about>.

- assess the labor market contributions and other trajectories of those who enter via different categories of admission, including family-based visas;
- propose adjustments in legal admission levels and categories to reflect the nation's needs and interests;
- conduct research on the views of immigrants of the US immigration system in order to strengthen legal immigration programs and better understand and address non-compliance with the law (Ryo 2017); and
- champion access by researchers to relevant datasets in order to build a more extensive evidence-base on which Congress and the executive can make policy judgments in this area.” (Kerwin and Warren 2017, 309-10)

Pia Orrenius and Madeline Zavodny argue that the status quo undermines US competitiveness: “Rigid caps for permanent residents and some categories of temporary foreign workers have resulted in tremendous backlogs and inefficient lotteries and have discouraged countless potential would-be immigrants from applying or staying in the United States; they may even encourage some companies to open or expand operations overseas instead of domestically” (Orrenius and Zavodny 2017, 189). The misalignment between US labor needs and available workers also incentivizes illegal migration and hiring.

By contrast to US legal immigration policies, the US refugee resettlement program provides for annual adjustments in the numbers and origin of resettled refugees based on US priorities, changed country conditions, and protection needs.<sup>17</sup> Beyond refugee admissions, the US immigration system should have more flexibility and options for admitting imperiled persons who do not meet the narrow refugee standard (Kerwin 2014a, 51-53, 62-63). The United States should also rely on the growing body of data, indices, and state performance rankings to direct its development and diplomatic interventions;<sup>18</sup> to anticipate and plan for large-scale migrations; and to inform refugee admission and humanitarian parole priorities (Kerwin and Warren 2017, 310-11).

Scholarly papers and human rights reports have extensively documented the US immigration enforcement system's growth, strategies, constituent parts, legal underpinnings, criminalization, informalization, privatization, rule of law alignment, misuse of detention, and failed reforms (von Sternberg 2014; ACLU 2014; MRS/USCCB and CMS 2015; Kerwin 2014b; Schriro 2017). Other reports have focused on the effects of enforcement, particularly removals, on children and families (Chaudry et al. 2010). A recent article detailed the effect of mass deportation policies on US mixed-status families, communities, the housing market, and the broader economy (Warren and Kerwin 2017a).

Only in recent years has the effectiveness of US border enforcement efforts received significant scrutiny. In “Is Border Enforcement Effective? What We Know and What it Means,” Edward Alden points out that Congress, the Immigration and Naturalization Service (INS), and DHS traditionally employed apprehensions as the primary metric for

17 Each year, the president, in consultation with Congress, sets refugee admission levels and allocates refugee numbers by region and to an unallocated reserve.

18 These important resources cover development, human rights, the rule of law, civil rights, receptivity to business, corruption, transparency, human capital, state fragility, poverty, and religious liberty.

## Moving Beyond Comprehensive Immigration Reform and Trump

assessing border control, with the Border Patrol citing both high and low numbers of arrests as evidence of their effectiveness (CLINIC 2001, 10). As Alden observes, however, this metric does not count multiple arrests of the same person (“recidivism”) or actual entries. Since 2006, the Border Patrol has used data on “turn backs” (people who illegally cross and return to Mexico), “got aways” (those who enter and elude capture), and apprehensions to measure “known unauthorized entries” (Argueta 2016, 22). However, with the exception of apprehensions, DHS has never made this data publicly available. Congress and the Trump administration have agreed upon the politically advantageous, but unachievable goal for border enforcement of “no unlawful entries.”<sup>19</sup> Alden (2017, 485) argues that the best metric would be total illegal entries.

In 2015, the Institute for Defense Analysis (IDA) produced “the first serious estimates of successful illegal entries,” finding that entries through the US-Mexico border had fallen from 1.8 million in FY 2000 to less than 200,000 in FY 2015 (*ibid.*, 486). During this period, the “deterrence rate,” the percentage of unsuccessful border crossers who plan to cross again, fell from 90 percent to 60 percent, while the likelihood of apprehension rose from 40 percent to 55 percent. Moreover, these trends persisted over “the strongest period of job creation in the post-World War II era” when the unemployment fell below 5 percent (*ibid.*, 484).<sup>20</sup> Alden concludes that the IDA study provides “the first compelling evidence that enforcement” — in particular, the strategy of imposing distinct consequences (including criminal prosecutions) based on the severity of the violation — significantly contributed to a reduction in illegal entries across the southern border (*ibid.*, 484-85).

At the same time, he argues that increased border enforcement investments and harsher consequences for illegal entries and re-entries may produce diminishing returns for three reasons.<sup>21</sup> First, Mexican migration to the United States has decreased sharply since 2007, and a high percentage of the Central American border crossers over the last several years have been asylum seekers, who have different incentives than economic migrants and require different treatment under domestic and international law. Second, many deportees seek to re-enter the United States to live with their families. Deterrence strategies will be less successful in these circumstances. Third, roughly two-thirds of the newly undocumented have overstayed visas, rather than illegally crossed a border (Warren and Kerwin 2017b). Moreover, overstays leave the undocumented population at relatively high rates (40 percent between 2008 and 2015), compared to 24 percent of undocumented border crossers (Warren 2017, 505). Thus, the growing proportion of overstays “could portend” further declines in the US undocumented population (*ibid.*).

Combined, these three developments seem to obviate the need for significant new border commitments, and particularly cast doubt on the wisdom of building a 2,000 mile wall. The US-Mexico border is, and will likely remain, far more secure than when Congress initiated its enforcement build-up a quarter century ago. Rather than make questionable new investments in border enforcement, Alden proposes that DHS should instead release

19 Secure Fence Act of 2006, Pub. L. No. 109- 367, 120 Stat. 2638 (2006); Border Security and Immigration Enforcement Improvements, Executive Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

20 In addition, illegal entries had begun to fall before the Great Recession (Warren 2017).

21 As the Institute for Defense Analysis study showed, marginal increases in apprehension rates have led to substantial decreases in recidivism rates and illegal entries.

its enforcement data and research to allow for a more grounded and vigorous public debate on the future of border enforcement.

In “The Promise of a Subject-Centered Approach to Understanding Immigration Noncompliance,” Emily Ryo (2017) makes the case for “subject-centered” research to inform immigration policy. This research seeks to assess how those most affected by immigration enforcement experience and view these policies.<sup>22</sup> Ryo’s earlier work found that undocumented residents see themselves as “law-abiding individuals who valued legal order and respected national sovereignty notwithstanding their violations of US immigration law” and who migrated because it was “the only morally appropriate way to fulfill their deeply felt personal responsibility to provide for their families” (ibid., 290).

Ryo (ibid., 292) argues that subject-centered research contributes to a recognition of the “basic humanity and moral agency” of the undocumented. It can also lead to an appreciation of the human costs of US enforcement policies, the adoption of strategies to promote “voluntary compliance” with the law, and the creation of more effective and humane policies (ibid.). As it stands, migrants will not likely abide by laws that they think impede family survival.

**Immigrant integration strengthens communities and represents an important, overarching metric for US immigration policies. The successful integration of the United States’ 43 million foreign-born residents and their progeny should be a national priority.**

From the perspective of immigrants and their families and communities, integration might be the best metric for determining the success of the immigration experience.<sup>23</sup> The nation’s well-being will increasingly turn on the success of its 43 million foreign-born residents and their children.

In “Working Together: Building Successful Policy and Program Partnerships for Immigrant Integration,” Els de Graauw and Irene Bloemraad (2017, 117) report that while immigrants continue to integrate successfully (albeit with large variations by group), the United States lags behind other developed states in important indicia of integration like naturalization rates, voter registration, metrics of economic self-sufficiency, homeownership, workplace equality, and poverty rates.

To improve immigrant integration outcomes in the United States, de Graauw and Bloemraad propose the creation of a national integration program, led by a national immigrant affairs office that would build on the work of the Bush and the Obama administrations to coordinate immigrant and refugee integration initiatives across all relevant federal agencies and levels of government.<sup>24</sup> Such an office would need to be “vertically integrated to include different

22 Josiah Heyman (2013) has written persuasively on the need to engage border residents in the design and implementation of enforcement policies that largely take place in their communities. Community members are uniquely situated to understand the consequences of enforcement programs on the well-being and vitality of their communities.

23 US immigration and refugee protection policies also serve a range of other foreign and domestic policy interests.

24 Over the last 60 years, federal integration efforts have focused on citizenship, English-language services, and a patchwork of additional programs that do not amount “to a coherent national program of immigrant

levels of government and horizontally applied across public and private sector actors” (ibid.,118).

The authors see the “growing activism by cities and states” as particularly promising, including in 44 cities with formal offices dedicated to immigrant affairs and immigrant communities and in the 90 municipalities with “commissions, committees, councils, task forces, boards, initiatives, and programs dedicated to immigrant issues or immigrant communities (ibid., 111-12).<sup>25</sup> They also highlight public-private partnerships and immigrant advocacy networks that prioritize and advance integration. A central component of a coherent, national policy would be the ability of immigrants, refugee and grassroots organizations to help shape and implement integration policies (ibid., 117).

Integration depends on the skills, talents, and human capital of immigrants, as well as the resources, characteristics, and reception of the receiving community. In “Citizenship After Trump,” Peter Spiro (2017) writes that “as a general matter, the United States is culturally oriented to the assimilation of immigrants” and “assimilation has been enabled by the [nation’s] lack of a hard ethnic or religious national identity.” However, the issue of national identity has been strongly contested over the last few years, particularly during the long presidential campaign and in the early months of the Trump administration.

In his first inaugural address, George W. Bush characterized the United States as the “story of flawed and fallible people united across the generations by grand and enduring ideals. The grandest of these ideals is an unfolding American promise that everyone belongs, that everyone deserves a chance, that no insignificant person was ever born” (Bush 2001). The question arises: Is this still the nation’s prevailing vision? Is the United States a nation bound by a set of civic ideals — dignity, equality, freedom and opportunity — and to the institutions that preserve them, or does it define itself by race, ethnicity, religion, and other characteristics that make citizenship inaccessible to large categories of immigrants? If the latter, then nothing that immigrants without these characteristics bring, build, or contribute to the nation will lead to their membership. While exclusionary nationalism is often seen as a revolt against globalization, Spiro (2017) observes that “right-wing and restrictionist” movements have become transnational.

During the presidential campaign, Trump proposed rescinding the 14th amendment’s guarantee of birthright citizenship, which has been an essential expression of the nation’s identity and commitment to immigrant integration. Yet Spiro does not believe that the Trump administration is likely to attempt this radical change or otherwise to make citizenship a priority. Nor, he argues, should pro-immigrant groups provoke a debate they might lose over citizenship law and policies. The “deficits” of US citizenship policy, he writes, “are minor,” the sole exception being the \$725 application fee, “and there is good reason to expect them to stay that way, Trump’s radicalism notwithstanding.”

Spiro recommends that immigrants pursue citizenship for instrumental reasons (protection and benefits). However, he foresees that Trump will continue to “devalue citizenship as

integration” (de Graauw and Bloemraad 2017, 111)

<sup>25</sup> These entities seek to “facilitate interaction between immigrants and native-born residents, highlight the economic contributions of immigrants, streamline services to immigrants and support immigrant civic engagement and entrepreneurial activity” (ibid.,114).

a bond of social solidarity, by exacerbating and exploiting US political polarization.”<sup>26</sup> The “erosion of citizenship solidarities,” he writes, should lead individuals and groups to pursue local, regional, and global alliances that can safeguard their rights and that more strongly reflect their social identities.

**An immigration federalism agenda should prioritize cooperation on shared federal, state and local priorities. It should also recognize the federal government’s enforcement obligations; the interests of local communities in the safety, well-being, and participation of their residents; the importance of federal leadership in resolving the challenge posed by the US undocumented population; and the need for civil society institutions to serve as mediators of immigrant integration.**

Immigration federalism is a permanent feature of the US immigration landscape.<sup>27</sup> Indeed, US immigration policy necessarily emerges from the tensions and interplay between federal, state, local, and civil society institutions.

While the federal government establishes and implements immigration law, states and localities play important and often contested roles in immigration enforcement and immigrant integration. At present, some states and localities seek to enhance federal enforcement policies, and others to promote safe and welcoming communities for all their residents. Some civil society groups, in turn, have promoted whole-of-community responses to the needs of immigrants, including the undocumented (Kerwin et al. 2017), while others have championed “self-deportation” policies and supported local police participation in immigration enforcement.

In “Enforcement, Integration, and the Future of Immigration Federalism,” Cristina Rodriguez(2017) maintains that federalism — both “enforcement” and “integration” federalism<sup>28</sup> — provides a framework for considering the extent to which local immigration priorities can diverge from federal policy, the tension between immigrant control and inclusion, and the scope of permissible conflict between the federal government, states and localities on these issues.<sup>29</sup>

In its first decision on immigration federalism in 30 years, the Supreme Court in *Arizona v. United States*<sup>30</sup> “substantially curtailed (without eliminating) autonomous local enforcement measures that diverged from the federal enforcement agenda” (ibid., 516). The court invalidated provisions of Arizona’s SB 1070 that supported federal goals (like preventing unauthorized work), but that adopted different means for achieving them (making unauthorized work a misdemeanor under state law). It also articulated a theory of preemption that treated federal enforcement *priorities* as federal law.

26 Similarly, Alan Kraut (2016a) argues that Trump’s “America first” rhetoric seeks to marginalize large sectors of society and fray the bonds of citizenship.

27 This term speaks to the distinct responsibilities and contributions of the federal government, states, localities, and civil society to US immigration policy.

28 These two forms of federalism overlap in that enforcement invariably affects integration, and integration policies can work at cross purposes to enforcement initiatives.

29 Immigration federalism disputes increasingly involve states and localities (Rodriguez 2017, 536).

30 567 U.S. \_\_\_, 132 S.Ct. 2492 (2012).

The case for local cooperation with the federal government may be strongest when federal law has established a role for states and localities in enforcement, as IIRIRA did in creating the Section 287(g) program.<sup>31</sup> Perhaps the most consequential area of intergovernmental cooperation involves information sharing. Under the Secure Communities program, states, counties, and localities send the fingerprints of persons they arrest to the FBI's Integrated Automated Fingerprint Identification System (IAFIS) database. As required by federal statute, the Federal Bureau of Investigation forwards this information for screening by DHS's biometric identification system (IDENT) to detect immigration violations. In addition, the federal government can use its spending power to incentivize localities "to serve federal objectives [on immigration] by conditioning federal funds on compliance with certain terms" (*ibid.*, 523).<sup>32</sup>

On the other hand, a DHS mandate that local officials detain persons (to allow federal officials time to take custody of them) beyond their normal release dates "fits comfortably within" the prohibition against commandeering (forced participation) set forth in the Tenth Amendment to the US Constitution (*ibid.*). And, several lower courts have held that honoring federal detainer requests that require holding detainees beyond the period they would otherwise be released constitutes an unconstitutional seizure under the Fourth Amendment (*ibid.*, 520).

Rodriguez writes that an "enforcement détente" might be in the mutual interests of the federal government and localities, given the importance of maintaining functional, cordial intergovernmental relations, and given the value of federal-local cooperation not only with respect to law enforcement writ large, but also across other domains." (*ibid.*, 526).<sup>33</sup> In fact, most localities already respond favorably to detainer requests that involve violent criminals. Moreover, "enforcement cooperation extends well beyond local assistance of federal deportation policy and can include joint efforts that even enforcement skeptics could support, such as cooperation to target smuggling rings" (*ibid.*).

To further a coordinated approach to integration, Rodriguez proposes an "intergovernmental strategy that plays to the institutional competencies of the different levels of government," in which the federal government would "provide a strong integration scaffolding, which would include sharing information, coordinating best practices, and providing robust resource support," while localities would administer "the institutions most vital to immigrant integration" (*ibid.*, 531-33). Like de Graauw and Bloemraad, Rodriguez argues that public/private partnerships and the active participation of civil society will be vital to such a system.

She sets forth several principles that should guide a US federalism agenda. First, the federal government should "acknowledge the reasons for local resistance to federal enforcement" (*ibid.*, 512).<sup>34</sup>

31 This program permits DHS to train and partner with state and local law enforcement agencies on federal immigration enforcement priorities.

32 As a caveat, only Congress — not the Executive — can place restrictions on federal grants.

33 To that end, as Rodriguez observes, states and localities can opt to avoid federalism disputes, while achieving their preferred policy outcomes. For example, if they seek to minimize the deportation of their residents due to minor criminal violations, they can amend their criminal laws and charging practices.

34 It would also behoove policymakers to recognize how immigrants and immigrant communities see and

Second, it is inevitable that complications will arise from immigration federalism, as it seeks to reconcile “the federal government’s constitutional and statutory responsibilities” to enforce the law, with the “lived realities of immigrant communities” (ibid., 510). Moreover, immigration federalism’s government actors have distinct institutional imperatives which influence their views on immigration and integration, apart from their ideological or political orientations.<sup>35</sup>

Third, resolving the challenge of a large undocumented population is ultimately a task for the political branches of the federal government. States and localities have substantial influence over immigration policy: they can adopt policies and enter public/private partnerships that seek to treat the undocumented and their families as full community members, or they can make life so difficult for the undocumented that they will be forced to leave. However, the question of status and a possible path to citizenship must ultimately be addressed by the federal government.

Fourth, federalism is not served by instrumental legal claims — like on the scope of executive discretion on how to enforce the law — that might further “preferred policy objectives in one context,” but “might do the opposite in another” (ibid., 512).

Although counterintuitive in light of the volume of federal litigation in the first months of the Trump administration, immigration federalism highlights the importance of democratic processes and the hard work of citizenship. Federal, state, and local governments each occupy important space in our federal system, and can significantly influence the treatment of immigrants, and the well-being of their communities.

**Immigration reform should be coupled with strong, well-enforced labor standards in order to promote fair wages and safe and healthy working conditions for all US workers.**

An extensive literature documents gaps in US labor standards and workplace health and safety laws, under-resourced enforcement strategies, the use of immigration enforcement to suppress labor organizing, and the exploitation of undocumented and other vulnerable workers to drive down wages and working conditions.<sup>36</sup> Combined, these factors subvert one of the core goals of US immigration policy, to meet US labor needs without diminishing the job prospects, wages, or working conditions of natives.

In “Segmentation and the Role of Labor Standards Enforcement in Immigration Reform,” Janice Fine and Gregory Lyon argue that this goal cannot be met without strengthened labor standards enforcement, comprised of “vertical” enforcement (strong, government-enforced standards) and “lateral” mechanisms that enlist affected workers, worker centers, and other community-based institutions. Fine and Lyon observe that these individuals and institutions have both direct knowledge of labor standards violations and a strong incentive to remedy them.

experience integration policies (Ryo 2017).

35 Even ideologically aligned federal, state, and local administrations may differ on immigration enforcement and integration issues, given their distinct institutional imperatives.

36 For a slightly dated review of the relevant literature, see Kerwin and McCabe (2011).

Fine and Lyon (2017, 434) argue that firm management practices, outdated laws, and insufficient labor standards enforcement—rather than immigrants themselves—undermine labor markets and working conditions. At the same time, immigrant laborers, particularly the undocumented, endure widespread exploitation, with negative implications for other workers. “In a well-functioning immigration system,” they write, “migrant workers should not be used as a strategy for employers to evade basic labor and employment laws” (ibid., 437).

A legalization program would remove one area of vulnerability (lack of status) for low-wage workers. However, it would need to be coupled with strengthened and well-resourced labor standards enforcement. The authors endorse recent bills that would increase the penalties for unpaid wages, unpaid overtime wages, and retaliatory discrimination or whistle-blowing (ibid., 445). In addition, they support measures that would allow immigrants to report violations of the law and participate in investigations without fear of reprisal (ibid.). They also propose that temporary visa holders should receive the same labor rights as citizens, so that employers can no longer use “immigration status as leverage against workers to hold down wages” (ibid.). They conclude that “[e]xpanding the scope of immigration reform to include labor standards enforcement is fundamental to ensuring that the rights of immigrants are upheld and all workers, immigrants or otherwise, stand on equal footing not just with each other, but with their employers as well” (ibid., 446).

### **Fairness and due process should characterize US admission, custody and removal decisions.**

In the US immigration debate, politicians and other opinion makers regularly describe illegal entries as a failure of “rule of law” and a breach of sovereignty. Yet the rule of law speaks to the aspiration that legal systems protect fundamental rights, ensure accessible, full, and fair processes, and impartially adjudicate claims (Kerwin 2014b). While the immigration courts offer a modicum of due process, the removal adjudication system does not honor the rule of law, protect rights, or impartially adjudicate claims to remain. Of primary concern, the overwhelming majority of persons removed never see the inside of a court, but are subject to summary, non-court removal processes (ACLU 2014).<sup>37</sup>

In her article “Immigration Adjudication: The Missing ‘Rule of Law,’” Lenni Benson points out that summary, non-court removal procedures make access to an impartial adjudicator and legal counsel nearly impossible. As such, these processes deny persons facing removal an opportunity to present their claims. Moreover, they have created a “vulnerable and trapped class of residents” who will not leave the country due to their fear of the criminal consequences of re-entry and “who have few ways to correct or regularize their status” (Benson 2017, 343).

<sup>37</sup> “Expedited removal,” for example, applies to noncitizens who attempt to enter the United States without or with improper documents. Reinstatement of removal applies to persons who were ordered removed or departed voluntarily while under a removal order, and who re-entered the United States. DHS no longer publicly releases yearly data on summary or expedited removals. However, in 2013, these two processes alone accounted for 83 percent of all removals (Simansky 2014, 5). Administrative removals apply to noncitizens who are not legal permanent residents (LPRs) and who committed an “aggravated felony,” a broad class of crimes that includes crimes that are neither aggravated or felonies. To receive a stipulated order of removal, a noncitizen must admit the factual claims against him or her, concede deportability or inadmissibility, and waive his or her right to appeal the removal order (ACLU 2014, 29). An immigration judge must sign off on stipulated orders, but not afford a hearing.

An unfortunate effect of the division of the former INS into three DHS agencies has been diminished appreciation by immigration enforcement agents of the agency's protection responsibilities. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) agents tend to view protection as a barrier to performing their jobs, not one of their statutory responsibilities. Of particular concern, border officials are required to refer persons subject to expedited removal to a "credible fear" interview by an asylum officer if they ask to apply for asylum or express a fear of persecution.<sup>38</sup> If deemed to have a credible fear, an asylum seeker is referred to immigration court where he or she can seek asylum in removal proceedings.

However, many CBP officials refuse to refer asylum seekers to "credible fear" interviews, and produce intentionally false "sworn" statements from them (Human Rights First 2017). They also seek to dissuade asylum seekers from pursuing a claim by mischaracterizing US asylum standards and threatening them with lengthy periods of detention and separation from their family members.

Procedural requirements also serve to block access to asylum. The one-year (from entry) asylum filing rule, for example, bars the claims of high percentages of bona fide asylum seekers (Schrag et al. 2010).<sup>39</sup>

The perennially under-resourced US immigration court system struggles under a backlog of nearly 600,000 cases, which have been pending an average of 670 days. This backlog presents another rule of law and due process challenge (TRAC 2017). The US immigration court system is a branch of the Department of Justice (DOJ). The American Bar Association (ABA), National Association of Immigration Judges, and other groups have raised concerns related to the system's fairness, professionalism, funding, and even (on occasion) its independence. The latter concern will likely be more acute in the Trump administration.

US immigration law lacks sufficient options for resolving cases. Removal proceedings tend to be all or nothing affairs, leading either to removal or, less commonly, legal status and the ability to remain. Exacerbating this problem, DHS officials fail to exercise discretion in referring cases (or not) to this system. In addition, immigration judges cannot weigh and act on the individual circumstances in the cases before them, which contributes to case backloads and exacerbates resource deficiencies (ibid., 335). As Benson points out: "If immigration policies allowed people to regularize their status, had a mechanism for correcting errors of judgment, or contained fines or punishments for immigration rules that were proportionate to the interests at stake, it is very likely that it would not be under the current strain" (ibid., 337).

The lack of court-appointed counsel for indigent or other vulnerable immigrants also looms large as a barrier to the full and fair adjudication of claims. Legal representation facilitates more informed decisions in removal cases, increases court efficiency, and operates as a check on the treatment of detainees in custody (ibid., 351). As several studies have demonstrated,

38 Immigration and Nationality Act (INA) §235(b)(1)(A)(ii).

39 The provision was enacted to address concerns related to fraudulent asylum claims, which it has failed to do (Schrag et al. 2010). Similarly, expedited removal started as a tool to "weed out weak claims with little likelihood of success on the merits," but it has become a pillar of the immigration enforcement system (Benson 2017, 344).

legal representation also makes it several times more likely that asylum seekers and others in removal proceedings will prevail in their claims (Ramji-Nogales, Schoenholtz, and Schrag 2009). The adversarial nature of removal proceedings, their substantive and procedural complexity, and the immense (sometime life and death) consequences of adverse decisions make effective *pro se* representation virtually impossible (Kerwin 2005).

The manifest need to reform the US detention system, to minimize the use of detention, and to rid the system of privately owned and administered prisons have been well-documented (MRS/USBBC and CMS 2015). The pervasive use of immigration detention also undermines due process. Detention burdens the ability of persons in removal proceeding to corroborate their claims or to secure counsel. An exhaustive study of 1.2 million removal cases between 2007 and 2012 found that only 14 percent of detainees obtained legal representation, compared to two-thirds of non-detainees (Eagly and Shafer 2016). The lack of representation, confusion over the status of their cases and seemingly indefinite confinement in dismal conditions leads many to abandon their claims.

The civil removal adjudication system inappropriately provides fewer substantive and procedural protections than the US criminal justice system (Ahmed, Appelbaum, and Jordan 2017). DHS can, in theory, exercise discretion in deciding which undocumented persons to apprehend and place in removal proceedings. However, unlike criminal prosecutors who have broad discretion in negotiating plea agreements, the discretion of ICE trial attorneys and DOJ immigration judges is tightly circumscribed. In addition, the absence of *mens rea* (knowledge and intent to break the law) cannot be invoked as a defense to removal, even in the cases of undocumented persons brought to the United States as children.

Strong immigration enforcement policies should be accompanied by an equally strong commitment to due process, fairness, and the rule of law. If adopted, the following proposals would create a more rights respecting and efficient removal adjudication system.

- Congress should broaden the equitable relief from removal, affording particular weight to the claims of persons who have not knowingly or intentionally violated the law, and it should provide options short of removal (like fines) that would allow government attorneys to settle cases.
- Congress and DHS should substantially limit, if not abandon entirely, expedited removal, and should instead either deny noncitizens admission or provide them with full removal proceedings in immigration court. (Benson 2017, 342)
- All removal cases should be adjudicated or reviewed by an immigration judge (MRS/USCCB and CMS 2016, 194).
- Congress should significantly increase funding to the immigration court system and should establish a funding benchmark for the immigration courts at roughly 5 percent of the budget of the two DHS enforcement agencies, CBP and ICE.
- Congress should create an independent Article 1 immigration court<sup>40</sup> like the US Tax Court or US Bankruptcy Court, or an independent adjudicatory agency for immigration

40 Article 1, Section 8 of the US Constitution grants Congress the right to establish “Tribunals inferior to the supreme Court.”

like the National Labor Relations Board or the Occupational Safety and Health Review Commission (ABA 2010, 6-4 to 6-40).

- DHS officials should be afforded the resources and responsibility to investigate and review the files of persons who are subject to removal prior to referring them for removal (Benson 2017, 340-341). In deciding whether to place a noncitizen in removal proceedings, they should assess the individual equities in the case, including US family ties, length of residence, business ties, blameworthiness, and the severity of the immigration violation.
- DHS officials should be allowed to grant stays of removal based on a similar set of equitable considerations (Benson 2017, 340).
- ICE attorneys should be given the legal authority and “bargaining tools” — to grant temporary work authorization, conditional residency, and legal status in limited cases — that permit the settlement of cases, short of removal (*ibid.*, 341).
- CBP and ICE agents should not be granted authority to screen asylum seekers or to make removal decisions.
- Congress should establish a statute of limitations for civil immigration violations, which would contribute to a fairer adjudicatory process and “afford a sense of finality and security to persons who have built strong equitable ties and have lived in the United States for many years” (*ibid.*, 348).
- Congress should eliminate mandatory detention, use detention only as a last resort (not the default option) when no other less restrictive alternatives can ensure the immigrant’s appearance throughout the removal adjudication process, and subject custody decisions to court review, regular hearings, and reasonable bond levels.
- Congress and DHS should substantially invest in effective, community-based alternative to detention programs (MRS/USCCB and CMS 2015, 186-89, 192-93; Noferi 2015).
- DHS should disinvest in private prisons, which provide less transparency and accountability in carrying out a function that implicates fundamental liberty interests and that should thus be met by government officials (MRS/USCCB and CMS 2015, 184-86, 192).
- Congress should rescind the one-year asylum filing deadline (Schrag et al. 2010).
- The federal government should provide for government-funded counsel for indigent and particularly vulnerable persons (like children and the mentally ill), and sufficient funding to advise everybody in removal proceeding of their legal rights and options.

**Family unity should remain a central goal of US immigration policy and a pillar of the US immigration system.**

Family unity has been the cornerstone of US legal immigration policies since 1965, and family-based visas account for two-thirds of immigrant (permanent) visas awarded each year. The US refugee program and several non-immigrant (temporary) programs

also prioritize the admission of family members. However, family-based immigration is disfavored by the Trump administration and many in Congress, in comparison to “merits-based” policies that favor skilled workers.

In “US Immigration Policy and the Case for Family Unity,” Zoya Gubernskaya and Joanna Dreby argue that family-based immigration brings economic benefits, and operates as a de facto immigrant support and integration policy at no cost to the government. While family-based immigrants are often viewed as a social burden, the differences in human capital between employment-based and family-based visa beneficiaries disappear over time (Gubernskaya and Dreby 2017, 423). Unlike employment-based immigrants, the authors report that the status of family-based immigrants “does not depend on their employers.” (ibid., 424). This “gives them more freedom to make the best use of their skills and experiences” and “motivates them to invest in education,” increasing their employment opportunities and income (ibid.). Family-based immigrants also benefit from the assistance provided by their US family members in the areas of “housing, healthcare access, transportation, school enrollment, and enrichment activities for children,” which facilitate their integration (ibid.).

The authors propose that family unity remain a centerpiece of US immigration policy due to the “[p]ositive socioeconomic outcomes of family immigrants and their children and evidence of [the] economic, social, and psychological benefits of family support” (ibid., 426). They conclude that the family serves as a “buffer that aids immigrant integration, provides a social and economic safety net for new Americans, helps to incorporate [them], and builds new businesses in the United States” (ibid.).

Gubernskaya and Dreby also underscore how US policies undermine, divide, and stress US families, particularly those with undocumented members. For example, many potential visa beneficiaries who have a qualifying relationship with a US citizen or legal permanent resident (LPR) must live apart from their petitioning family member for years due to visa backlogs, which vary based on family preference category and nationality. Undocumented border crossers living in the United States who have a qualifying family relationship to a US citizen or LPR must leave the country for consular processing when their visa priority date becomes current. In departing, however, they become subject to multi-year bars to re-entry based on unlawful presence. These bars operate as a disincentive to leaving the country and, thus, securing status (Kerwin, Meissner, and McHugh 2011). The Obama administration established a procedure to pre-adjudicate waivers to the bars (USCIS 2016), but even if the waiver is pre-approved, consular processing can lead to long-term separation from US family members.<sup>41</sup>

Beyond these well-documented provisions, US citizens with undocumented spouses must often forego many of the benefits of citizenship, including travel and (often) the right to live with their spouse in the United States. In addition, US children in mixed-status households experience unrelenting stress from the threat of a parent’s deportation and,

41 INA Section 245(i) allows undocumented persons who pay a substantial fine to adjust to LPR status in the United States, but this process is available only to the small minority of visa beneficiaries whose petitions were filed on or before April 30, 2001. As a result, very few persons who have illegally crossed US borders can adjust status under this provision. By contrast, persons who entered legally but overstayed the period of their temporary visas are considered to have been “admitted” and, thus, can adjust status in the United States.

when deportation occurs, immense emotional and financial hardship (Gubernskaya and Dreby 2017, 422). Minimum income requirements also discriminate against lower-income US citizens or LPRs who petition for and financially sponsor family members for visas (Lopez 2017, 240).

To address these problems, the authors propose ending the long-term separation of LPRs from their family members, allowing prospective visa recipients to join petitioning family members in the United States, and creating a new path to legal status for fathers and mothers of US citizen children (Gubernskaya and Dreby 2017, 425). These reforms would provide greater opportunities for gaining legal status and contesting removal based on family ties in the United States. Congress should also repeal the bars to re-entry based on unlawful presence or, in the alternative, allow potential family-based visa beneficiaries who illegally crossed a border to adjust status in the United States (Lopez 2017, 247). In addition, it should repeal the minimum income requirement for sponsorship of a family member (ibid.).

In “Separated Families: Barriers to Family Reunification After Deportation,” Deborah Boehm puts a human face on how US immigration policies and enforcement practices divide families (Boehm 2017, 403-04).<sup>42</sup> In three compelling case studies, Boehm illustrates the very limited relief from removal under US law based on family ties.<sup>43</sup> “Cancellation of removal,” the main form of equitable relief is available to non-LPRs who have been continuously present in the United States for at least 10 years, can demonstrate moral character, have not been convicted of a broad array of crimes, and can show demonstrate “exceptional and extremely unusual hardship” to a US citizen or LPR spouse, parent, or child.<sup>44</sup> Once removal occurs, family reunification “through legal channels” becomes even less likely (ibid, 402).

Boehm (ibid., 413) proposes that the United States “create policies with enough flexibility to facilitate family unity in the United States,” recognize the rights of US citizen children to family unity by liberalizing the standard for cancellation of removal, and accommodate “a path to authorized return after deportation.”

**The United States should seek to craft “win-win” immigration policies that serve its own interests and that benefit migrant-sending states. Such policies will enjoy broad acceptance and be more likely to achieve their purposes.**

The success of US immigration policies invariably depends on cooperation from other nations, “whether in responding to the causes of forced migration, promoting the humane treatment of migrants in transit, protecting migrants in destination states, or receiving returning nationals” (Kerwin and Warren 2017, 305). Cooperation will be more forthcoming when US policies benefit states of origin and their citizens. In responding to large-scale refugee and migrant movements, cooperation has been strongest on interception and immigration enforcement policies (Frelick, Kysel, and Podkul 2016). Yet US legal

42 Removals affect far more persons than those removed. For example, there are 6.6 million US citizens, including 5.7 million children, living in households with undocumented residents, mostly their parents (Warren and Kerwin 2017).

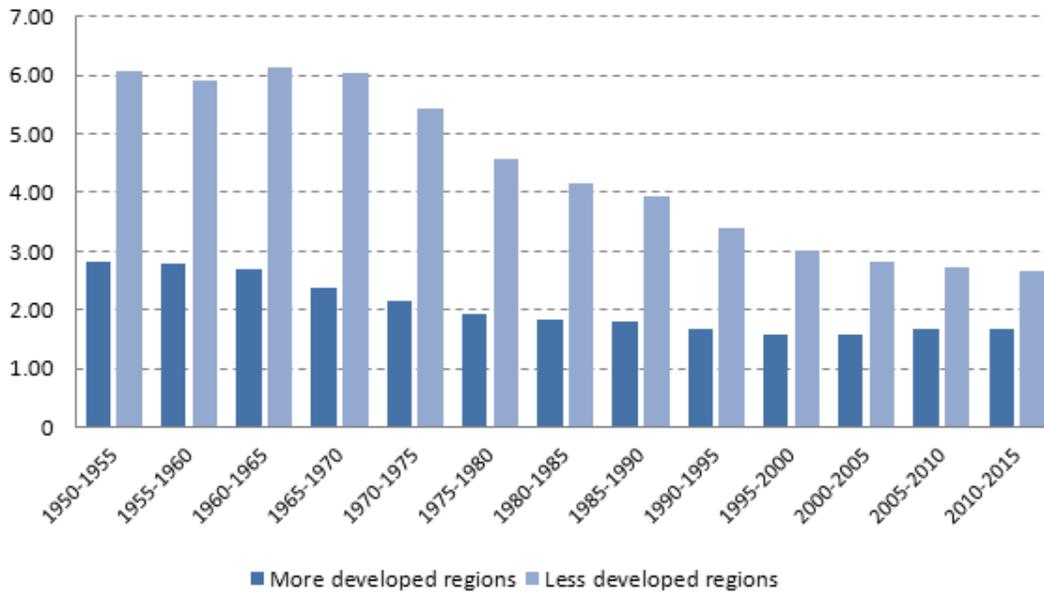
43 Boehm also points out the limited categories of family members for whom visas are available.

44 INA § 240A(b).

immigration policies can offer a more promising vehicle for meeting the diverse needs of migrant-sending states.

The outline of potential win-win “labor migration” policies can be seen in data on the aging and shrinking workforces in developed states, and younger populations in developing states. Fei Guo (2016) refers to global demographic realities as the “‘silent’ driving force” behind international migration. As Figure 1 illustrates, total fertility rates<sup>45</sup> have fallen well below the population replacement level in most developed regions and states. As a result, these states have experienced structural shortages in both the unskilled and skilled labor force.

**Figure 1. Total Fertility Rate, 1950-2015**



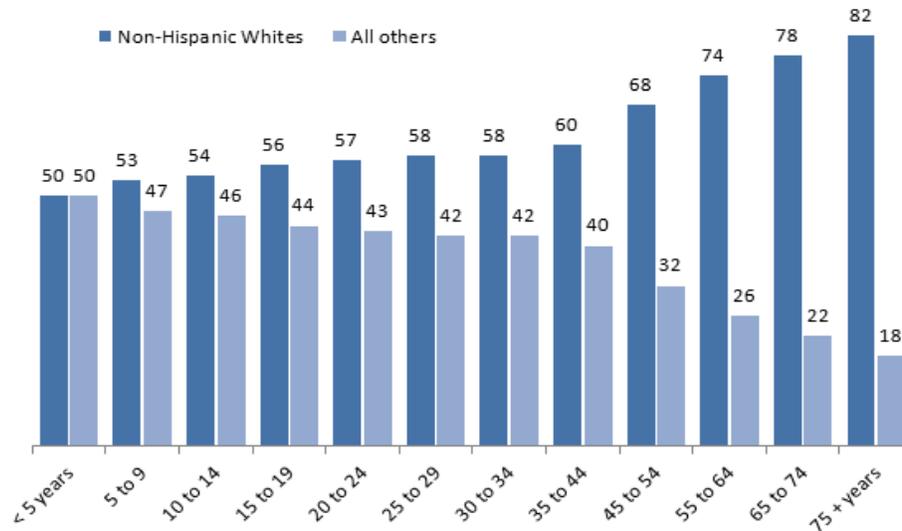
Source: Guo (2016, 4), using data from the UN Population Division’s *World Population Prospects 2015 Revision*.

Robust immigration policies cannot alone ensure sustainable working age populations and address unsustainable levels of aging. However, it is also the case that *without* more vigorous and pro-active immigration policies, developed states will be able to establish an acceptable ratio between retirement and working age residents.

This stark dynamic has been mitigated in the United States by the relative youth and high fertility rates of its large immigrant population (Reznik, Shoffner, and Weaver 2005-2006, 38). Nonetheless, the challenge remains immense. Each day until 2030, 10,000 members of the 76 million US Baby Boomer generation will turn 65. As evidence of the aging of “white” America, there are roughly an even number of non-Hispanic whites and “all other” ethnic groups represented among US children age five and below, but the percentages of whites rise steadily by age group, topping out at 82 percent among US residents age 75 and above (Figure 2).

45 Total fertility rate refers to the average number of children born to each woman in a nation.

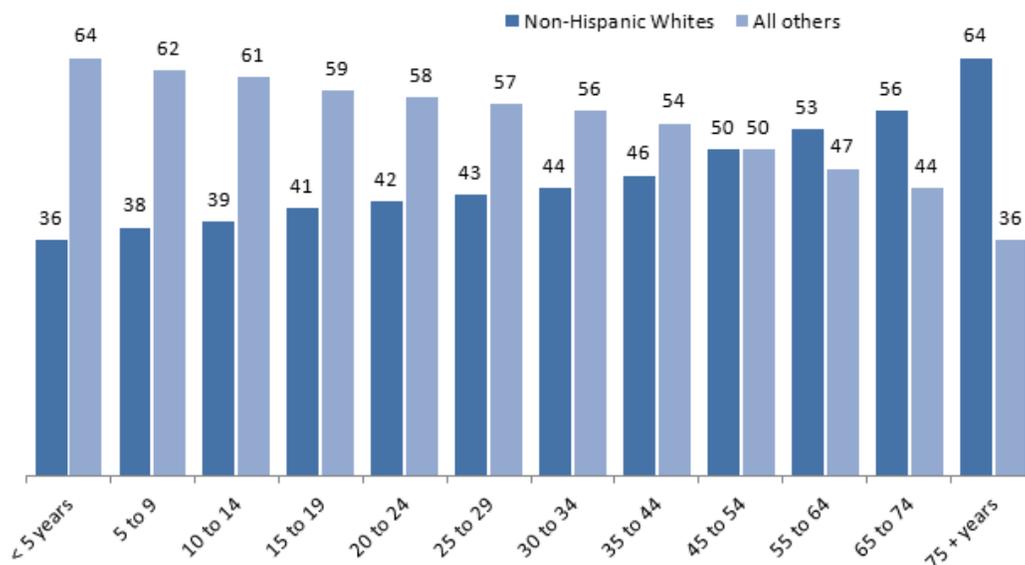
**Figure 2. The Current Population of the United States by Age Group and Ethnicity (ACS, 2009-2014)**



Source: Klineberg (2017, 16-17) using data from the US Census Bureau’s 2009-2013 American Community Survey 5-year estimates.

By 2050, non-Hispanic whites will constitute 36 percent of US children age 5 or below, but 64 percent of residents age 75 and above (Figure 3).

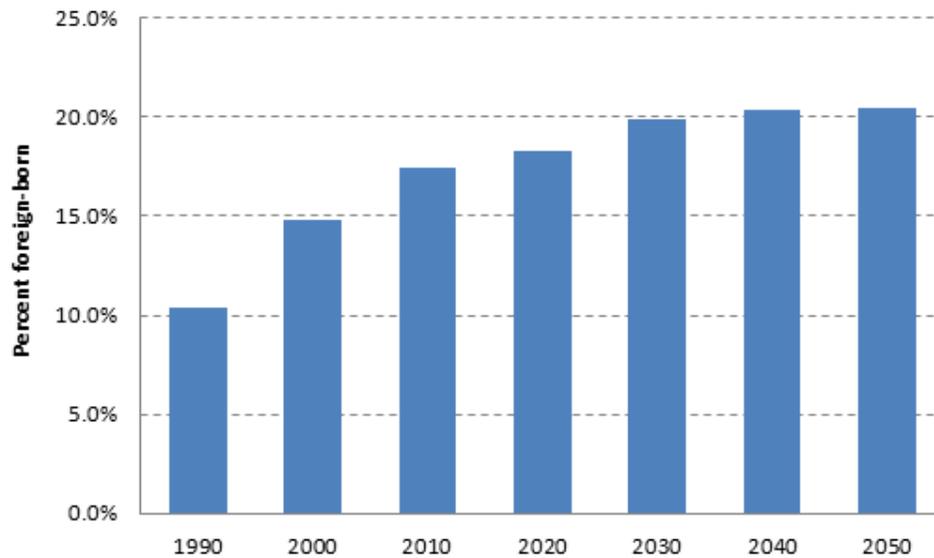
**Figure 3. The Projected Population of the United States by Age Group and Ethnicity in 2050**



Source: Klineberg (2017) using data from US Census Bureau’s 2012 National Population Projections, Alternative Net International Migration Series (Constant Series).

Between 1990 and 2030, the percent of the foreign-born population between the prime working ages of 18 and 64 is projected to double to 20 percent and it will continue to increase, although at a slower rate, from 2030 to 2050 (Figure 4). By contrast, the percentage of the US population age 65 and over is projected to increase from 13 to 20 percent between 2010 and 2030 (Ortman, Velkoff, and Hogan 2014, 2-3),

**Figure 4. Percent of Foreign-born in the Population Aged 18 to 64: 1990 to 2050**



*Source:* Kerwin and Warren (2017), using data from the US Census for 1990 to 2010, and Colby and Ortman (2014) for 2020 to 2050.

To address this emerging demographic crisis, the United States should reform its legal immigration policies and make it a national priority to attract necessary skilled and unskilled workers over the next three decades. If it fails to do so, policymakers and the public may well be looking back nostalgically on the era of large-scale undocumented migration from Mexico in the 1990s and early 2000s.

**US immigration law and policy should be coherent and consistent, and the United States should create legal migration opportunities for persons uprooted due to US foreign interventions, trade policies, and immigration laws.**

In “Creating Cohesive, Coherent Immigration Policy,” Pia Orrenius and Madeline Zavodny argue that the US immigration system often works at cross purposes with itself. Policymakers often fail to anticipate or account for the likely consequences of US immigration programs. US immigration laws, for example, have generated a need for visas for family members of primary program beneficiaries and others, but have often failed to meet this need.

The Immigration Reform and Control Act of 1986 (IRCA)<sup>46</sup> program legalized 2.7 million

<sup>46</sup> Pub. L. No. 99-603, 100 Stat. 3445 (1986).

persons,<sup>47</sup> but did not offer derivative status to their close family members, sowing the seeds of the current 4.26 million person family-based immigration backlog ( Orrenius and Zavodny 2017, 183; DOS-BCA 2016). Based on the experience of IRCA and other laws, Orrenius and Zavodny urge Congress to consider the ramifications of immigration laws and policies on future flows to the United States and provide for the legal admission of the family members of direct beneficiaries (Orrenius and Zavodny 2017, 189).

They also point to mismatches between temporary non-immigrant work visas and permanent employment-based visas that foreclose the possibility of permanent status for non-immigrants with US job offers and, thus, work at cross-purposes with US economic and labor needs (ibid., 184, 190). They propose that temporary workers who qualify for permanent employment-based visas should be able to apply and receive them in a timely manner, without having to meet additional burdensome requirements (ibid., 191).

Congress has also created temporary programs, like Temporary Protected Status (TPS), for populations that often need long-term protection (Bergeron 2014). Orrenius and Zavodny (2017, 190) propose that TPS recipients who cannot be safely returned home after one extension of status be allowed to apply for permanent status.

Kerwin and Warren (2017) argue that policy coherence also requires that the United States anticipate and take steps to minimize forced migration resulting from its foreign interventions, trade policies, and other international commitments. Because US military interventions, for example, can reasonably be expected to uproot large numbers of persons, the United States should take steps to minimize the dislocation and to secure refuge for the displaced, including through the US refugee resettlement and immigration programs. In addition, the North American Free Trade Agreement (NAFTA) uprooted large numbers of Mexican family farmers, but did not offer legal migration opportunities for most displaced workers (Fernández-Kelly and Massey 2007, 99).

**The United States should reduce the size of its undocumented population through a substantial legalization program and seek to ensure that this population never again approximates its current size.**

In recent years, it has become evident that the era of large-scale illegal immigration and undocumented population growth has come to a close and that the US legal immigration system must be reformed to preserve and build on this progress (Warren 2017).

The Trump administration has embarked on a mass deportation policy, which will devastate families, the economy, and the social fabric (Warren and Kerwin 2017a). By contrast, a broad legalization program will strengthen families, communities, and the economy. A legalization program would also acknowledge the transitional nature of immigration status (many undocumented persons will ultimately attain legal status under current laws), the high (and growing) percentage of undocumented residents with long tenure and strong

47 IRCA included four legalization programs: (1) a general program for persons who lacked status from January 1, 1982 to the date of the bill's enactment, and who met continuous presence and other requirements; (2) a Special Agricultural Worker (SAW) program that applied to persons who performed seasonal agricultural work for at least 90 days in a 12-month period in 1985 and 1986; (3) a registry program for persons who arrived in the United States prior to January 1, 1972; and (4) a small program for certain "Cuban-Haitian" entrants who arrived prior to January 1, 1982.

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equitable ties (including children) in the United States, the blamelessness of undocumented persons brought to the United States as children, and the large population eligible for status who do not know it or cannot afford to pursue it (Kerwin and Warren 2017, 320; Warren and Kerwin 2015, 99-100).<sup>48</sup>

Beyond an earned legalization program, Congress should substantially advance the registry cut-off date and automatically move the date forward by one year each year thereafter (Kerwin and Warren 2017, 322-23). The registry program offers status to long-term undocumented residents who entered by a statutorily set date, can demonstrate good moral character, are not ineligible for citizenship, and are not inadmissible on certain security and other grounds.<sup>49</sup> Since the program's inception in 1929, Congress has infrequently advanced the cut-off date for entry. Most recently, in 1986, IRCA set this date at January 1, 1972, meaning that virtually no undocumented persons now qualify for the program. However, if Congress advanced the date to January 1, 2002, five million persons would potentially be able to register.<sup>50</sup>

To many, IRCA offers positive proof that a legalization program will invariably spur high levels of illegal migration. However, IRCA's shortcomings need not be repeated in a future legalization program.<sup>51</sup> "Coherent, flexible, fact-based" policies that are "closely aligned to US interests" will help to keep this population in check,<sup>52</sup> as will the elimination of barriers to legal status like the three- and ten-year bars and the limited eligibility for the Section 245(i) program (Kerwin and Warren 2017, 321-22). A registry program that regularly advanced the qualifying date of entry would also minimize the size of this population.

In the meantime, US immigrant-serving agencies should initiate a massive legal screening program for low-income undocumented immigrants, accompanied by a public education

48 The US undocumented population includes: (1) a high percentage of the 4.26 million persons languishing in family-based visa backlogs; (2) a large number — in the 15 percent range — who may be eligible for an immigration benefit or relief, but do not know it or cannot afford the cost or have otherwise chosen not to pursue it (Wong et al. 2014; Kerwin et al. 2017, 9); (3) millions who will ultimately gain status under current laws (Jasso et al. 2008); (4) 1.9 million with 20 years or more of US residency, 1.6 million with 15 to 19 years of US residency, and 3.1 million with 10 to 14 years of US residency (Warren and Kerwin 2015, 98-100); (5) 3.9 million parents of US citizens or LPRs who would have qualified for the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program; and (6) 2.5 million brought to the United States at age 15 or under (Warren and Kerwin 2015, 95; Kerwin and Warren 2017, 321).

49 INA §249.

50 Another way to legalize long-term undocumented residents would be to allow them to apply affirmatively for "cancellation of removal," rather than to have to wait until they are in removal proceedings.

51 Among its shortcomings, IRCA failed to: (1) reform the US legal immigration system in ways that would have allowed it to accommodate the high demand for lower-skilled work (met by undocumented workers) in the 1990s and early 2000s; (2) provide derivative status to the close family members of its beneficiaries, thus laying the groundwork for the current multi-year backlogs in the family-based immigration system; (3) legalize sufficient numbers of undocumented persons; (4) account for the possibility (which quickly came to pass) that legalized agricultural workers would leave this work and be replaced by undocumented workers; and (5) meaningfully enforce IRCA's employer verification and sanctions program (Kerwin and Warren 2017, 315-16).

52 Immigration reform can occur without increasing the total number of visas granted per year if the federal government reissues the visas of persons who emigrate (Warren and Kraly 1985). Between 2010 and 2015, the average annual emigration of visa holders was 284,000 (Kerwin and Warren 2017). Re-issuing these visas could remove a political barrier to immigration reform.

and advocacy campaign to allow those who may qualify for legal status to pursue it (Wong et al. 2014, 300).

## Conclusions

The papers in CMS's US immigration reform collection outline an immigration system that furthers the nation's interests, reflects its values, and takes into account the perspectives of individuals and communities most affected by US policies. Several themes — along with dozens of policy proposals — emerge from these papers.

First, immigration policymaking should be embedded in a larger set of partnerships, processes, and commitments that respond to the conditions that force persons to migrate.

Second, the US immigration system should reflect liberal democratic values and an inclusive vision of national identity. Effective and humane policies require engaged and active citizens. As the papers illustrate, elected officials on national, state, and local levels, as well as civil society institutions, can all influence immigration policy for better or worse.

Third, it is incumbent on policy and opinion makers to publicize the broad national interests served by US immigration policies. Policymakers should, in turn, evaluate and adjust these policies based on their success in furthering the nation's interests. The United States cannot advance any of the interests served by its immigration system without sound legal immigration policies. Thus, legal immigration reform must be the cornerstone of the US immigration reform agenda.

Fourth, the United States should prioritize the gathering and dissemination of the best available evidence on migration and on the nation's migration-related needs and programs, and should use this information to respond flexibly to changing migration patterns and new economic developments. Such evidence would include research on the knowledge and perspectives of the most affected individuals and communities.

Fifth, immigrant integration strengthens communities and represents an important, overarching metric for US immigration policies. The successful integration of the United States' 43 million foreign-born residents and their progeny should be a national priority. The papers argue for a robust commitment to immigrant integration from the perspectives of immigrants, families, US workers, and host communities.

Sixth, an immigration federalism agenda should prioritize cooperation on shared federal, state, and local priorities. It should also recognize:

- the federal government's enforcement obligations;
- the interests of local communities in the safety, well-being, and participation of their residents;
- the importance of federal leadership in resolving the challenge posed by the US undocumented population; and
- the need for civil society institutions to serve as mediators of immigrant integration.

Seventh, immigration reform must be coupled with strong, well-enforced labor standards

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in order to promote that nation's interest in fair wages and safe and healthy working conditions for US workers.

Eighth, fairness and due process should characterize US admission, custody, and removal decisions. A system that honored due process and fundamental fairness would minimize the use of detention, provide legal representation at no cost to indigent and other vulnerable persons, create a well-funded Article I immigration court, and eliminate non-court removals.

Ninth, family unity should remain a central goal of US immigration policy and a pillar of the US immigration system. Family-based immigration furthers a core national interest (intact families), contributes necessary workers, and facilitates immigrant integration.

Tenth, the United States should seek to craft “win-win” immigration policies that serve its own interests and those of migrant-sending states. Such policies will enjoy broad acceptance and be more likely to achieve their purposes.

Eleventh, US immigration law and policy should be coherent and consistent, and the United States should offer legal migration opportunities to persons uprooted due to US foreign interventions, trade policies, and US immigration laws. Coherence also demands effective policymaking and good governance. To that end, the collection raises several governance imperatives, including the need to:

- mainstream immigration and refugee concerns into other policymaking processes;
- link immigration reform with strengthened labor standards enforcement;
- make immigrant integration a unifying national priority; and
- build an immigration federalism agenda rooted, in part, in shared federal, state, and local immigration priorities.

Twelfth, the United States should reduce the size of its undocumented population through a substantial legalization program, and seek to ensure that this population never again approximates its current size. This need represents a recurrent theme in this collection of papers. The authors support a legalization program to preserve US families, to strengthen the economy, to further immigrant integration, to promote labor standards enforcement, to reduce nativism, to create coherent laws, to ease the burdens on the immigration enforcement system, and to recognize the equitable ties of undocumented persons to the United States.

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# Making America 1920 Again? Nativism and US Immigration, Past and Present

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## Executive Summary

This paper surveys the history of nativism in the United States from the late nineteenth century to the present. It compares a recent surge in nativism with earlier periods, particularly the decades leading up to the 1920s, when nativism directed against southern and eastern European, Asian, and Mexican migrants led to comprehensive legislative restrictions on immigration. It is based primarily on a review of historical literature, as well as contemporary immigration scholarship. Major findings include the following:

- There are many similarities between the nativism of the 1870-1930 period and today, particularly the focus on the purported inability of specific immigrant groups to assimilate, the misconception that they may therefore be dangerous to the native-born population, and fear that immigration threatens American workers.
- Mexican migrants in particular have been consistent targets of nativism, immigration restrictions, and deportations.
- There are also key differences between these two eras, most apparently in the targets of nativism, which today are undocumented and Muslim immigrants, and in President Trump's consistent, highly public, and widely disseminated appeals to nativist sentiment.
- Historical studies of nativism suggest that nativism does not disappear completely, but rather subsides. Furthermore, immigrants themselves can and do adopt nativist attitudes, as well as their descendants.
- Politicians, government officials, civic leaders, scholars and journalists must do more to reach sectors of society that feel most threatened by immigration.
- While eradicating nativism may be impossible, a focus on avoiding or overturning nativist immigration legislation may prove more successful.

## Introduction

Scholars will spend decades debating the reasons for Donald Trump's stunning electoral victory in 2016, yet at least some of the credit must go to his campaign's famous slogan "Make America Great Again." Certainly, the phrase was one of the factors that inspired millions of people to elect Trump as 45th president of the United States. The first three words, after all, comprise a forward-looking call to action and a patriotic promise about the future, rolled into one.

Historians who wish to understand and analyze Trump's success, however, should perhaps focus on the last word of the slogan: "Again." This single word transforms the phrase into a commitment to revisit (if not recreate) a specific historical era — one when America was "great." Neither the candidate nor the campaign ever explicitly defined their concept of greatness (for whom was America great? when? and why?). Nevertheless, this was probably an effective technique: Voters were free to make their own assumptions, without too much information about a detailed policy agenda.

Throughout the campaign, however, Trump and his surrogates argued that one key problem has been preventing the America of today from being sufficiently "great." That problem is immigration.

Trump famously launched his campaign by calling Mexican immigrants rapists and criminals, and repeatedly promised a "big, beautiful" wall along the southern border. He also continuously linked immigration to terrorism, called for "a total and complete shutdown of Muslims entering the United States," and, after his inauguration, promising to give immigration preference to "persecuted" Christian refugees (Trump 2015; Brody 2017). Since the very first week of the new administration, when the president released three executive orders, two to crack down on undocumented immigration and one to restrict travel from Muslim-majority nations and to cut the US refugee admissions program, the Trump administration has made it very clear that its vision for American greatness is a nativist one.

In this nativist vision, the time period to which we return is one in which immigration is sharply restricted by national, ethnic, and religious criteria. Perhaps we have an answer, then, to the unanswered question within "Make America Great Again": Trump's America is looking more and more like the America of 1920.

In 1920, immigrants made up 13.2 percent of the population — making the demographic landscape analogous to today, when the foreign-born make up 13.5 percent of all Americans. Then, as now, both the masses and educated elites held deep suspicions, hostility, and fear of these immigrants. Many viewed them as being too different to assimilate into the majority culture. As a result, politicians and the press frequently portrayed immigration as a threat to the nation. By the early 1920s, these long-held nativist fears generated new restrictive legislation that would cause the number and percent of foreign-born in the United States to decline sharply for decades afterwards.

Once again, the United States finds itself in an era of nativism and exclusion, as our politicians contemplate immigration restrictions and deportation policies that are reminiscent of those enacted nearly a century ago. A detailed review of nativism and immigration policy in the

period of 1870-1940, then, can tell us much about where we are today, and may also help us answer questions about where we are going.

## **Nativism and Immigration Policy in the United States, 1870-1940**

There were several reasons for the massive wave of immigration that so changed the United States during the late nineteenth century. Historian Jose Moya pinpoints five major “revolutions” that pushed people away from Europe and towards the United States. These were: 1) rising growth rates and declining mortality rates in Europe; 2) the dominance of liberalism in European political thought, which allowed for the unrestricted movement of peoples; 3) the transition from subsistence to commercial agriculture, which created a surplus rural population and released peasants’ ties to the land; 4) the industrial revolution, which further mobilized the labor force by creating a demand for labor in industrial centers; and 5) developments in transportation that made ocean and land travel easier and cheaper, effectively shortening the distances between the Old and New World (Moya 1999, 13-44).

Such large-scale changes help explain why so many Europeans immigrated to the United States after the 1840s, and why — as industrialization spread across the continent — European migrants came mostly from Southern and Eastern Europe by the last quarter of the nineteenth century. To a certain extent, these factors were also applicable in Japan, which had modernized quickly in the nineteenth century; as well as China, Korea, and the Philippines (Hsu 2000; Choy 2003; Azuma 2005). Thus, after the 1870s, the United States (as well as other countries in the Western hemisphere, particularly Argentina, Brazil, and Cuba) saw sharply increasing migrant populations from southern and eastern Europe and Asia. After 1900, this population included increasing numbers of Mexicans, as well.

Nativist movements had targeted immigrants well before this period, and indeed throughout US history. One of the more well-known of these was the Know-Nothing Party, which was formed by anti-Catholic and anti-Irish members of the working class during the 1840s and 1850s (Boissonneault 2017). Yet even the Know-Nothings were never able to create and pass national legislation on nativist grounds. Rather, before the 1880s, immigration to the United States was marked not by legislation, but rather by the lack of it. Beginning in the last two decades of the nineteenth century, however, heightened feelings of nativism among the public and policymakers alike prompted policymakers to move away from liberal immigration policies and towards a raft of new restrictions.

At the root of these nativist impulses were several intertwined phenomena. In the popular imagination, the “new immigrants” of the post-1870 period were unassimilable because of their race, ethnicity, and culture. Commonly held beliefs of the time, many of which originated in the so-called “science” of eugenics, defined specific national and ethnic groups as inherently better or worse than others.<sup>1</sup> Yet economics also played a role: Nativist restrictions were often accepted and promoted by working-class whites, who believed that

1 For a seminal work on nativism in the United States, see Higham (1995). More recent works include Schrag (2010). For a fascinating treatment of eugenics as it was expressed and reiterated in Latin America, see Stepan (1991).

they were losing job opportunities to immigrants. This was certainly true in California, where Chinese and other immigrants from Asia became the first targets of this new wave of nativism.

## **Asian Immigration to the American West**

As with many other national groups, native resentment against Chinese and Asian immigrants increased proportionately in relation to contact and competition between these immigrants and the native-born. Chinese immigration began between 1850 and 1860, when almost 50,000 Chinese came across the Pacific for jobs in the mining industry and on the railroads (Howland 1929, 494). By the 1880s, the Chinese immigrant population had become much more widely dispersed through the coast and mountain states of the West.

Native resentment of the Chinese arose from the perception that they were an “unassimilable, even subversive group, [whose] vicious customs and habits were a social menace” (Jones 1960, 248). Their perceived inability to assimilate was blamed on their appearance — not only their physical characteristics, but also their traditional dress and the hairstyle of male migrants — as well as their tendency to preserve the cultural practices and language of their home country. Their culture was cast not only as primitive and backward, but also as an existential threat to US democratic institutions: a “Yellow Peril,” in the parlance of the times. Economic factors also played a role: The Chinese competed with whites for jobs in gold mining and the railroad industry, and they were often willing to work for lower pay. In addition, an economic downturn during the 1870s caused increased labor competition between Chinese immigrants and the native-born, especially as more native workers migrated from the East to take jobs in California (Kraut 1982, 156; Fuchs and Forbes 2003, 152).

Together, nativist resentment and economic competition fueled reprisals against the Chinese population in the West. Politicians used legislation to target and humiliate the Chinese, as when California legislators passed a “queue ordinance” that required people convicted of criminal offenses to have their hair cut to a one-inch length (Howland 1929, 494). Whites also committed acts of violence: Rioters killed 21 Chinese immigrants in San Francisco in 1871, and set 25 Chinese laundries on fire in 1877, to name just two examples (Kraut 1982, 156-57).

After the 1870s, nativists organized political movements against the Chinese as well. Most notable of these was the Workingmen’s party, lead by an Irish-born sailor in San Francisco named Dennis Kearney. The party demanded that the US government cut off Chinese immigration and limit the rights of the Chinese in the United States. Despite protests by Chinese diplomats, the Chinese-American community, and a few more enlightened politicians, the Workingmen’s Party formed a voting bloc “just large enough to hold the balance of power in California,” and so was an important impetus to legislation against Chinese immigrants in the 1880s (ibid., 160).

During this decade, legislators passed a series of successively more restrictive laws that limited the rights of Chinese in the United States and barred new Chinese immigrants from entry into the country. Most significantly, the Chinese Exclusion Act of 1882 suspended

immigration of Chinese laborers for 10 years, and was renewed periodically until 1943. The Exclusion Act also stipulated that all Chinese had to obtain certificates proving their eligibility to live and work in the United States. In 1887, the Scott Act prohibited the return of any Chinese who left the country, even those who were legal residents or citizens. The 1892 Geary Act denied bail to Chinese in habeas corpus cases and required all Chinese to obtain a certificate of eligibility to remain in the United States. If a Chinese immigrant was arrested without the certificate, the burden of proof fell upon him to prove his eligibility to live and remain in the United States. These and other legislative restrictions (especially the Immigration Acts of 1917 and 1924) ensured that Chinese immigration to the United States was effectively prohibited for nearly three-quarters of a century.

The success of the anti-Chinese movement helped to fuel very similar mobilizations against the Japanese, Koreans, and Filipinos in the West, who had arrived for similar reasons, albeit later and in smaller numbers than the Chinese. Like the Chinese, these immigrants were characterized by nativists as inherently different — “immoral, subversive, and servile” — and therefore impossible to assimilate (Jones 1960, 264). After the Japanese and Korean populations increased after the 1900s, white Californians led labor campaigns and other mobilizations against them in the state. In 1905, nativists formed the Japanese and Korean Exclusion League, and the following year the San Francisco school board ordered all “Oriental” students into segregated schools. The nativist movement against the Japanese eventually resulted in the Gentlemen’s Agreement of 1907, in which the US government persuaded the Japanese government to deny passports to emigrants (Howland 1929, 502-03). Restrictions and discrimination against the Japanese population continued until the Japanese were barred almost completely from immigration in 1924. Filipinos also faced resistance and hostility for all of the same reasons: They were cast by nativists as immoral, criminal, and unassimilable, and in 1934, the Philippine Independence Act installed a quota of only 50 Filipino immigrants per year (Jones 1960, 288). By the end of the 1930s, Asians were almost completely excluded from immigration to the United States, and they would remain so for decades.

## The Rise of the Quota System

The nativist organizing that led to the eventual exclusion of Asian immigrants preceded and overlapped with similar movements against European immigrants in the late nineteenth and early twentieth centuries. While Chinese, Japanese, Korean, and Filipino immigration had occurred primarily on the West Coast, the immigration of southern and eastern Europeans was a great concern to the native population in the East and Midwest. Before 1860, most immigrants had come from the British Isles, Germany, Scandinavia, Switzerland, and Holland. By 1900, close to 70 percent of all immigrants originated in regions and countries including Austria-Hungary, Italy, Russia, Greece, Romania, and Turkey (ibid., 179). This immigration mushroomed after the 1880s: Whereas only 2.5 million Europeans entered the country in each decade between 1860 and 1880, during a single decade in the 1880s, over five million Europeans arrived, and 16 million entered in the subsequent quarter century (Fuchs and Forbes 2003, 152).

Resentment by natives against the new waves of European immigrants stemmed from long-held racial and cultural prejudices among Americans of northern and western European

heritage about non-western Europeans, and particularly against Jews. These prejudices fueled the perception that the southern and eastern Europeans, like Asian immigrants, were simply too different from the native-born to assimilate. As with the Chinese and Asian immigrants, southern and eastern European immigrants' differences in language, religion, economic background, and traditions made them seem undesirable to the native population.

Many of the new immigrants from eastern Europe and Russia were Jews, who were regarded with particular hostility both by the working classes and by elites. Stereotypically portrayed as greedy and materialistic, resented as “competitors for work and housing in the urban slums,” or vilified for their religious beliefs, the rise in Jewish immigration prompted anti-Semitic protests by the Knights of Labor and the other populist groups in the 1890s and afterwards (Garis 1927, 213; Curran 1975, 112-13).

Slavic immigrants, too, were ill-regarded by many of the native-born. Poles, Czechs, Russians, and other eastern Europeans were portrayed as socialists and anarchists, and often blamed for crime and labor conflict (Howland 1929, 445). Frequent complaints were made about the perceived unruliness of eastern Europeans. One contemporary commentator noted that “in any Polish church congregation ... a free fight, or a riot with bludgeons and firearms, may be expected at any moment” (Curran 1975, 114).

Southern Europeans, like the Slavs, were often reviled because of the perception that they were criminally inclined. Nativists accused the Italians and Greeks of “a distinct tendency to abduction and kidnapping,” while the Russians were charged with “larceny and receiving stolen goods” (Kraut 1982, 158). According to one contemporary observer, Italians “drank to excess, they lived in filth, and at the slightest provocation, they went for the stiletto” (Curran 1975, 115). And one author, although writing a fairly tolerant sociological assessment of Greek immigrants, asserted nevertheless that “[Greeks] are probably a greater tax on the police courts of the country, in proportion to their total number, than any other class of our population” (Fairchild 1911, 239). All of these groups faced discrimination and hostility from the native-born population.

The American working classes resented these new waves of European immigrants not only for their perceived criminality and cultural differences, but also because of the labor competition that they represented. Natives, confronting economic downturns after the 1870s, saw the new immigrants as a threat to their personal welfare, and expressed this “in a fear-ridden and sometimes hysterical hatred of foreigners” (Jones 1960, 253).

Upper-class intellectuals, the press, and business elites were also opposed to the new immigration on the basis of racial and economic grounds, and their opinions — often published in the media — helped to fuel working class resentment and xenophobia. In the early twentieth century as the nativist furor reached its peak, books such as *The Passing of the Great Race*, by eugenicist Madison Grant, and editorialists such as Kenneth Roberts of the *Saturday Evening Post*, brought stereotypes about the supposed inferiority of new immigrants to a broad audience (Curran 1975, 136). Throughout the period, political cartoonists such as Thomas Nast produced endless racialized images that cast immigrants as “unsavory-looking figures” whose inherent attributes threatened the United States (Schrag 2010, 61-62). And, as historian Alan Kraut (1995) describes, Americans across the social and political spectrum frequently blamed immigrants for bringing disease into the

United States, creating a kind of medicalized nativism that led to humiliating immigration inspections, and helped drive the impetus for legal restrictions on immigration.

Prior to World War I, legislation did not explicitly restrict the selection or composition of immigrants based on race or nationality, with the exception of Asian immigrants. In general, it attempted to exclude people based on income level, education, and moral, biological, and physical qualities. The Immigration Act of 1875, for example, barred prostitutes and alien convicts, while the Immigration Act of 1882 prohibited the entry of the insane, the mentally disabled, convicts, and those liable to become a public charge. In 1891, immigration legislation excluded people “suffering from loathsome or contagious diseases and aliens convicted of crimes involving moral turpitude” (Fuchs and Forbes 2003, 154).<sup>2</sup>

After the turn of the century, the provisions in the Immigration Act grew increasingly strict. The rationale for this crackdown was a 40-volume report published by the Dillingham Commission, which was formed in 1909 by Congress in order to assess the effects of Asian and southern and eastern European immigration. The commission “began its work convinced that the pseudoscientific racist theories of superior and inferior peoples were correct and that the more recent immigrants from southern and eastern Europe were not capable of becoming successful Americans” (ibid., 55). Despite the fact that the data they collected did not support their preconceived notions about these immigrant groups, members of the commission made policy recommendations based on their nativist assumptions. Published in 1911, their report endorsed the exclusion of undesirable classes, races, and ethnicities, but advocated a literacy test and a tax for all immigrants as an effective tool for achieving this exclusion. With the support of the Dillingham Commission findings and a refreshed xenophobia after the onset of the First World War, the 1917 Immigration Act established a literacy requirement and a head tax on all migrants entering the United States.

Even though the literacy tests were created in order to filter out the majority of the new immigrants, it became apparent in the late 1910s that these measures were not achieving their goals. Between 1918 and 1921, only about 1,500 people per year were kept out of the country based on illiteracy (Howland 1929, 444). In response, legislators began to take definitive steps towards the installation of a quota system that would limit immigration based on the national origins of immigrants.

Taking inspiration from the results of the Dillingham study, the Emergency Quota Act took effect on June 3, 1921. The act restricted all immigration from Europe and European colonies, excluding most countries in the Western Hemisphere. From each of the restricted European countries, immigration was limited to three percent of the number of foreign-born persons from that country resident in the United States at the time of the 1910 census. Even this unprecedented legislation did not satisfy the nativist agenda, as immigration rates did not fall quickly enough. To strengthen the restrictions, the Johnson-Reed Act of 1924 set even more explicit prohibitions against immigrants based on their nationality, establishing an annual limit of 150,000 on immigration from Europe, prohibiting Japanese immigration entirely, and installing even more specified quotas that restricted immigration from any specific country to two percent of the number of foreign-born persons from that country at the time of the 1890 census.

2 Also see description in Howland (1929, 431).

Once the law took effect in 1929, it effectively ended the great wave of “new” European immigration that had begun in the last quarter of the nineteenth century. While immigration from Great Britain, Ireland, Germany, and the Scandinavian countries was relatively unrestricted, southern and eastern European immigration was dramatically reduced, causing the overall numbers of immigrants to decline steeply. From a high of over 800,000 in 1921, European immigration dropped to 700,000 in 1924, to 300,000 per year from 1925 until 1928, and to less than 150,000 by the end of the decade (Jones 1960, 279). Throughout the 1920s, though, another immigrant group was coming to the United States in increasing numbers.

## **Nativism and Mexican Immigration**

The restrictive legislation that was crafted in response to Asian and European immigration in the United States was also notable for a significant omission. Although Mexico had become one of the most important new sources of immigration to the United States after 1890, Mexican immigration went almost unrestricted until the late 1920s. This was not because American nativists were more tolerant of Mexicans than of other immigrants. On the contrary, Mexicans were often portrayed as even less desirable, from a racial standpoint, than Europeans. Despite this, economic factors prevented immigration legislation from affecting Mexicans for almost four decades.

Between 1890 and 1917, the expanding railroad system and the emergence of new industries in the Southwest and Midwest led to an increase in the demand for labor (Rosales 1978; Cardoso 1980, 18-20). As noted above, however, Asian immigration had begun to decline following the Chinese Exclusion Act of 1892. Further restriction of European and Asian immigration, both before and after World War I, created new openings for Mexican labor. As a result, patterns in Mexican employment changed greatly during this period. Whereas Mexicans had worked in agriculture, railroads, and mining prior to the war, afterwards they could be found in automobile factories, steel and meatpacking plants, stockyards, and the service and transportation industries. Settlement patterns at this time also became more urbanized and geographically dispersed. Migrants no longer remained in the agricultural Southwest, where competition had lowered wages, but instead began to settle in urban areas in California, Texas, and the Midwest as well. By the end of 1917, policymakers in the United States had become aware that “almost every sector of the economy . . . depended heavily on the *bracero*” (Cardoso 1980, 51). This pattern only intensified after the new immigration quotas were applied in 1921 and 1924.

The increased presence of Mexican migrants in the United States drew out the same xenophobia and nativism that had been directed towards Asians and Europeans. Nativist groups and labor organizations were vocal in their advocacy for legislative restrictions of Mexican immigration. Opponents to Mexican migration argued that “the Mexican’s Indian blood would pollute the nation’s genetic purity, and his biologically determined degenerate character traits would sap the country’s moral fiber and corrupt its institutions” (Reisler 1976, 38). As with other immigrant groups, nativists argued that the differences between Mexicans and the native population would prevent Mexican immigrants from ever assimilating in mainstream society.

Despite the forcefulness of the nativists' pleas to restrict Mexican immigration, the agricultural and industrial lobbies put significant pressure on lawmakers to waive Mexican nationals from the requirements of the immigration laws of the 1910s and 1920s. For example, although literacy tests required by the Immigration Act of 1917 could have severely limited Mexican immigration, they were not applied to immigrants from the Western Hemisphere. The Immigration Acts of 1921 and 1924, as well, did not apply to this group of immigrants and thus did not limit the entrance of Mexican workers. Mexican migration, therefore, continued in the patterns established during World War I and increased in volume and geographic distribution. By 1929, Mexican migration had spread even further throughout the country (Cardoso 1980, 82-92).

By the end of the 1920s, however, the nativist drumbeat grew impossible to ignore. Between 1926 and 1930, there were numerous discussions in government and the media about whether to apply the immigration quotas of the 1921 and 1924 laws to Mexicans — one proposed measure, the Box Bill of 1926 — would have included Mexicans in the quota system. Pressure from agricultural and economic interests kept such legislation from becoming enacted, but only as long as the economy remained strong.

In the end, while national origins quotas were never rewritten to include immigrants from the Western Hemisphere, immigration from Mexico declined steeply anyway. In 1929, as the stock markets crashed and unemployment began to rise, native-born US citizens targeted Mexican immigrants. Across the country, local and federal officials launched “repatriation drives” — raids and campaigns to deport Mexican immigrants back to Mexico.

In cities and towns across the United States, Mexican workers and their families were pressured (and in many cases, forced) to return to Mexico. Many of them had entered the United States legally, and many — especially their children — were American citizens. The repatriation campaigns expelled hundreds of thousands of Mexicans (some estimate as many as 1.8 million), and continued throughout the 1930s, in what historian Francisco Balderrama has labeled a “decade of betrayal” (Balderrama and Rodriguez 2006).<sup>3</sup>

## **Immigration and Nativism in the United States, 1930 to Present**

The steep decline in Asian, European, and Mexican migration after 1929 — and the immigration legislation that precipitated it — marked a watershed moment in US immigration history. For the next four decades, throughout the Great Depression, the Second World War, and the Cold War, the number of immigrants would decline steadily, and by 1970, the proportion of immigrants as a percentage of the US population reached 4.7 percent, the lowest point since at least 1850.<sup>4</sup>

Once again, Mexican immigration proved an exception to this trend. As mentioned above, immigrants from the Western Hemisphere were excluded from the quotas, and labor was greatly needed in the immediate post-war period. To address this issue, the US and Mexican

<sup>3</sup> For the statistic on 1.8 million, see Wagner (2017).

<sup>4</sup> For US census data on migration, see Campbell and Lennon (1999). See also Migration Policy Institute (n.d.).

governments created the Bracero Program (1944-64), which brought Mexican migrants to the United States as legal temporary guest workers. At its peak, nearly 50,000 farms employed more than 400,000 Mexicans per year (Rosenblum et al. 2012). The program had many administrative problems, however, and undocumented migration from Mexico also increased concurrently. Millions of Mexican migrants without papers were then targeted for frequent deportation drives, such as during Operation Wetback in 1954. Mexican laborers have been the primary target for periodic deportation drives ever since.<sup>5</sup>

The end of the Bracero Program coincided with the Immigration and Nationality Act of 1965, which marked a momentous change not only for Mexican migrants, but of the entire migration landscape in the United States. The new law put an end to the quota system, and replaced it with a preference based on family relationships and professional skills. Throughout the 1980s, 1990s, and 2000s, the number and percentage of immigrants rose continuously and steeply, and the ethnic makeup of the newest wave of immigrants changed significantly, with immigration from Asia and the Americas eclipsing immigration from Europe (Chishti, Hipsman, and Ball 2015). Additionally, the United States had begun welcoming refugees after the Displaced Persons Act of 1948 (although Congress only standardized the placement of refugees after 1980, with the Refugee Act of 1980).

For Mexicans and other migrants from the Western Hemisphere, the 1965 act also contributed to a steep rise in undocumented immigration, since it established a numeric cap on immigration from the Western Hemisphere. Other factors also played a role in the growth of the undocumented population, such as the termination of the Bracero program in 1964 and population growth in Mexico and many other Latin American states, combined with limited employment opportunities and stagnant wages. At the same time, the United States experienced growth in the agricultural and service sector. These factors pushed undocumented migration from Mexico and other countries in the Americas to new heights in the 1980s and 1990s (with Mexicans forming the largest single group of undocumented immigrants). Since the 1990s, the United States also saw an increase in the undocumented immigrant population from other regions of the globe (Passel and Cohn 2016).

US lawmakers passed a series of laws over these two decades in order to attempt to address the issue. The first of these was the Immigration Reform and Control Act of 1986 (IRCA), which created sanctions for employers of undocumented immigrants, while also providing paths to legalization for some immigrants. Subsequent legislation, such as the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, authorized increased resources for border enforcement and expanded the criminal grounds of removal, among other measures (Rosenblum et al. 2012).

Despite these reforms, Mexican undocumented migration increased steadily until the mid-2000s, as did migrant deaths along the border. Beginning in late 1993, an intensified Border Patrol presence at traditionally heavy crossing routes prompted Mexicans and other migrants to cross in more remote and perilous areas (CLINIC 2001, 5-15). While Mexican migration has slowed in the past decade (due to largely changing demographic trends in Mexico), violence and poverty in Central America, as well as economic and political factors

<sup>5</sup> For an anthropological study of the effects of drives on Mexican immigrants and their families, see Boehm (2016).

elsewhere, have continued to fuel undocumented immigration (*ibid*). Thus, undocumented immigration to the United States remains a persistent political, social, and human rights challenge.

By 2015, immigrants made up 13.5 percent of the US population — a proportion not seen since 1920. Today, the United States finds itself at a historical moment that bears some resemblance to the 1920s: It is experiencing a “Second Great Wave” of immigration (Greico 2014). Unfortunately, it is also experiencing another great wave of nativism. Once again, the newest generation of immigrants — many of them from Latin America, Asia, the Middle East, and Africa — are subject to nativist suspicions that they are too different from previous waves of immigrants to assimilate, and that they therefore represent a threat to the native-born population (Schrag 2010, 163-93). Since September 11, 2001, politicians and the media have increasingly framed undocumented immigration and refugee resettlement as a national security threat, as well.<sup>6</sup>

It is up for debate whether today’s nativism is a new phenomenon, or whether it is simply a persistent current that has been present throughout the last century. Certainly, the earlier nativism persisted well after the restrictionist laws of the 1920s were enacted and implemented. One only has to review the racial history of the 1930s, when the United States provided “a fertile field for individual economic and social crackpots and rabble-rousers, left and right . . . who worked xenophobia, racism, nativism, and anti-Semitism with renewed vigor” (*ibid.*, 145). Among the most vocal opponents of immigrants were Gerald L. K. Smith, founder of the America First Party, and Irish Catholic priest Charles Coughlin, whose xenophobic weekly radio show railed against Jewish immigrants in particular. And certainly, nativism played a role in the refusal of the US public to accept Jewish refugees from the Second World War; in public acceptance of Japanese internment camps during the same period; in the continued deportations of Mexican migrants; and in resistance to the resettlement of Vietnamese refugees in the 1970s, to name just a few examples (Kraut 2016).

Yet, there are also differences between the two eras. Today’s nativism, for example, is less likely to be directed at Europeans, Asians, and Catholics, but rather at undocumented immigrants, the majority of whom are Mexican and Central American, and at Muslims. The current rhetoric against undocumented immigrants centers on the charges that they are an economic drain on society (because of the perception that they take the jobs of the native-born and disproportionately use government resources, without paying taxes) and that they are dangerous (because of the perception that they commit crimes at higher rates than the native-born). These charges certainly hearken back to the rhetoric against poor southern and eastern Europeans during the early twentieth century. They are also demonstrably false.<sup>7</sup>

The nativist case against Muslim immigrants also bears some resemblance to nativism a century ago. In general, those opposed to Muslim immigration claim that this group is

6 In the wake of 9/11, the US Customs Service and the Immigration and Naturalization Service were subsumed by the Department of Homeland Security (created in 2003) and reorganized as US Immigration and Customs Enforcement.

7 On jobs, see National Academies of Sciences, Engineering, and Medicine (2016), on taxes, see Gee et al. (2017), and on crime, see Hickman and Suttrop (2008).

unassimilable: that Muslims come from a culture that is too different to that of the native-born; and that they cling to their culture, religious traditions, and language without adapting to American culture. By this rationale, the presence of Muslim immigrants poses a threat to the Christian identity of the United States. This echoes the similar claims about immigrants from China, Japan, Korea, and other Asian countries during the 1870-1940 period, as well as to the anti-Semitism of the same period, and even to nativist fears about Catholics during the nineteenth century.<sup>8</sup> Additionally, Muslim immigrants are perceived by nativists to be inherently dangerous because of their purported links to religious extremists — a fear that echoes historical fears about the potentially dangerous political affiliations of specific immigrant groups during the early twentieth century. As historian Peter Schrag (2010, 196) puts it, “the anarchist rats and the Mafiosi swimming off the ships in New York harbor a century ago have become Arab terrorists wading across the Rio Grande.”

Certainly, anti-Muslim nativism has spiked in the years since September 11, when Muslims have become inextricably linked to the threat of terrorism in the American public sphere. With this focus on difference and danger, nativists group all Muslims together, failing to account for the wide degree of cultural difference among Muslims worldwide, or to distinguish between the tiny minority that participate in terrorist acts and the vast majority that do not, despite the fact that surveys of Muslim American attitudes show extremely low levels of acceptance for religious extremism (Pew Research Center 2007).<sup>9</sup>

Just as they were during the early twentieth century, today’s nativists are vocal and organized. Anti-immigrant organizations such as the Federation for American Immigration Reform (FAIR) and NumbersUSA have been instrumental in disseminating skewed statistics and misinformation about immigrants and lobbying for stricter immigration legislation. Many of today’s most vociferously anti-immigrant groups are also explicitly promoting a racialized vision of a “European” America in which nonwhites are excluded from entry. The founder of FAIR, John Tanton, has written and spoken admiringly of eugenics and eugenic policies.<sup>10</sup> Academics such as Samuel Huntington have lent credence to these calls for a whitened society (much as Madison Grant and the Dillingham Commission did at the turn of the twentieth century) and controversial public figures such as Lou Dobbs and Ann Coulter broadcast these ideas far and wide in the media, just as Father Coughlin did in the 1930s.

Today’s nativists, however, have an outlet that earlier generations did not: a president who not only seems to agree with many of their arguments, but who also stokes the flames of this nativism so explicitly and aggressively. Trump’s nativist statements are too numerous to count, but they tend to target undocumented immigrants and Muslims. Most recently, he announced the foundation of Victims of Immigrant Crime Engagement Office (VOICE), a subgroup within the Department of Homeland Security that will “work with victims of crimes committed by undocumented immigrants” — thereby emphasizing nativist claims that criminalize undocumented immigrants and view them as an inherent threat to the majority population (Kopan 2017). He has also tweeted directly about the purported

8 For a useful overview of nativism as it relates to Christianity in the United States, see Payne (2017).

9 For the perspective of a secular Muslim woman who feels unable to define herself as such, see El Amine (2017).

10 See Campos (2014, 142-44) and People For the American Way (2015).

dangers of Muslim immigrants, and spoken publically about the possibility of establishing a database for Muslims in the United States, thus helping to reinforce nativist perceptions about this group, as well.<sup>11</sup>

## Counteracting Nativism: Some Final Reflections

What can proponents of a robust immigration system do to counteract this rising tide of nativism? One way to do so would be to analyze and discuss the costs associated with nativism. The nativism of the 1870-1940 period came at a social, cultural, financial, and moral cost to society. The case of Jewish refugees who were turned away during the Second World War is particularly compelling when one contemplates the historical and contemporary contributions of America's Jewish immigrants to American culture, scholarship, economy, and society. The same can be said for the innumerable other ethnic and national groups that were denied entry after 1924, or whose integration and prospects were stymied by other discriminatory policies. Repeated deportations of Mexican immigrants over the past century, for example, have not only traumatized deportees and their families, but have also produced no positive effects on wages for the native-born (Clemens, Lewis, and Postel 2017).

Studies of more contemporary immigration restrictions likewise indicate that nativist immigration policies, such as mass deportation, come at a steep cost to American society.<sup>12</sup> The Trump administration's recent executive orders have already begun to create measurable costs for US colleges and universities (in the loss of tuition from immigrant students) and for the tourism sector, as foreign visitors are discouraged from visiting (Nasiripour and Lambert 2017; Muther 2017).

Importantly, however, information about the costs of nativism must be disseminated to a broader audience, which is a difficult challenge in America's ideologically segmented media landscape. Indeed, there is no shortage of scholarship on the benefits of immigration, but the message is not resonating with large segments of American society.<sup>13</sup> More work should be done to publicize the economic, social, and cultural contributions of Muslim immigrants, undocumented workers, and other groups targeted by today's nativist policies. For example, a recent *New York Times* article on the essential role of refugees in regenerating the economy of small towns in upstate New York illustrates how immigration could be reframed as something that has direct and tangible benefits for society (McKinley 2017). In addition, politicians, government officials, civic leaders, scholars, and journalists must do more to educate the public on the costs of nativism and to address the fears that underlie nativist beliefs. A growing effort to understand the concerns of the so-called "white working class" that were instrumental to the election of Donald Trump will hopefully produce more information on how to address and respond to nativism within that group (Molyneux 2016).

11 For two relevant Twitter posts by Trump, see Trump (2017a): "Interesting that certain Middle-Eastern countries agree with the ban. They know if certain people are allowed in it's death & destruction!"; and Trump (2017b): "Because the ban was lifted by a judge, many very bad and dangerous people may be pouring into our country. A terrible decision." For more on his statements about a Muslim registry, see Abramson (2016).

12 See, for example, Warren and Kerwin (2017).

13 On the benefits of immigration, see West (2011).

Nativism might also subside when a broader cross section of the US electorate experiences the costs of the new restrictionist measures and ceases experiencing the benefits of immigration. If immigration restrictions continue, such losses — whether in the form of higher cost goods and services, labor costs, cultural production, and innumerable other tangible and intangible benefits — will be felt more widely in the months and years to come. On the other hand, however, studies have shown that nativism increases during times of economic hardship, and so it is possible that the economic costs of immigration restrictions might actually fuel nativism, rather than mitigate it (Goldstein and Peters 2014).

Demographic developments may possibly help to divert or subdue the current nativist turn, particularly as they impact the electorate. Perhaps when those costs and benefits become more apparent, both immigrants and the native-born will begin to mobilize for political change, as was the case in California during the 1990s when the passage of Proposition 187 inspired the Mexican and Latino immigrants it targeted to become politically active and form coalitions with other immigrant groups, as well as white progressives (Hemmer 2017). Latinos were widely expected to form a definitive voting bloc in 2016, and although the number of Latino voters increased, it was ultimately not enough to elect the Democratic presidential candidate. Still, it seems safe to assume that as the number of Latino voters increases, so too will the possibilities for political mobilization against nativist legislation (Krogstad and Lopez 2016).

Nevertheless, it is also important not to assume that progress is inevitable, and that nativism will decline if only the right arguments are made to the right people. Unfortunately, nativism seems to spring anew with each new generation of Americans. Indeed, the very immigrants who were the targets of nativism in the early twentieth century held their own prejudices and biases about other groups. As Peter Schrag (2010, 140) points out, these immigrants “often invoked these [ethnic and racial] stereotypes proudly, sometimes affectionately, because it showed they were now also 100 percent American.”

Indeed, adopting racist and exclusionary attitudes may be one way of assimilating in a society that is still economically and culturally divided along racial lines. Historians of ethnicity and immigration have demonstrated that the concept of “whiteness” is flexible, and that as some immigrant groups during the late nineteenth and early twentieth centuries came to be considered (and to consider themselves) part of the white majority, they also adopted the attitudes of that majority towards groups still considered to be nonwhite.<sup>14</sup> It stands to reason, then, that today’s immigrants — as well as their children and grandchildren — cannot be expected to automatically develop solidarity with other immigrant groups. Latinos, for example, are divided along political and national lines — and even immigrants from the same country are sometimes divided by political developments in their homeland, a factor I have discussed elsewhere.<sup>15</sup>

For all of the historical and contemporary reasons discussed in this article, the task of overcoming American nativism is a daunting one. Nativism has a long and pervasive history in the United States: In the words of Alan Kraut (2016), it is an “American perennial.” It appears that the United States is once again entering an era in which nativism drives

14 See, for example, Jacobson (1999).

15 See Young (2015).

national policy and legislation. Thus, it may be too much to hope for an end to nativism. It is perhaps more realistic to work towards preventing nativist immigration restrictions.

At the same time, opponents of nativism must continue to promote the principles of immigration reform — reform that would meet the needs of America’s labor market, provide a path to legal entry for immigrants with talent and promise, respond adequately to humanitarian needs and refugee flows, and work to legalize undocumented immigrants, while discouraging and preventing future undocumented immigration. Reforms such as these would do much to combat nativism in the long run. Achieving them, however, will require a complex and multipronged approach, and must involve long-term political mobilization and a more positive public discourse on immigrants and immigration. In this way, the United States might achieve a better future, instead of returning to its nativist past.

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# Working Together: Building Successful Policy and Program Partnerships for Immigrant Integration<sup>1</sup>

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## Executive Summary

Supporting and investing in the integration of immigrants and their children is critically important to US society. Successful integration contributes to the nation's economic vitality, its civic and political health, and its cultural diversity. But although the United States has a good track record on immigrant integration, outcomes could be better. A national, coherent immigrant integration policy infrastructure is needed. This infrastructure can build on long-standing partnerships between civil society and US public institutions. Such partnerships, advanced under Republican- and Democratic-led administrations, were initially established to facilitate European immigrants' integration in large American cities, and later extended to help refugees fleeing religious persecution and war. In the twenty-first century, we must expand this foundation by drawing on the growing activism by cities and states, new civil society initiatives, and public-private partnerships that span the country.

A robust national integration policy infrastructure must be vertically integrated to include different levels of government and horizontally applied across public and private sector actors and different types of immigrant destinations. The resultant policy should leverage public-private partnerships, drawing on the energy, ideas, and work of community-based nonprofit organizations as well as the leadership and support of philanthropy, business, education, faith-based, and other institutions. A new coordinating office to facilitate interagency cooperation is needed in the executive branch; the mandate and programs of the Office of Refugee Resettlement need to be secured and where possible expanded; the outreach and coordinating role of the Office of Citizenship needs to be extended, including through a more robust grant program to community-based

<sup>1</sup> We are indebted to Donald Kerwin and Philip Wolgin for helpful feedback. The authors are equal co-authors.

organizations; and Congress needs to develop legislation and appropriate funding for a comprehensive integration policy addressed to all, and not just humanitarian immigrants.

The federal investments in immigrant and refugee integration we propose are a big ask for any administration; they seem especially unlikely under the Trump administration, whose efforts focus on enforcement and border control, targeting undocumented and legal immigrants alike. Yet immigrant integration is not and should not be a partisan issue. Federal politicians across the political spectrum need to realize, as many local officials and a large segment of the public already do, that successful immigrant integration is a win-win for everybody. When immigrants have more opportunities to learn English, to improve their schooling and professional training, to start businesses, and to access citizenship, we all benefit. A majority of the American public supports immigrant integration, from proposals for learning English to a path to citizenship for undocumented immigrants. Local and state governments are setting up initiatives to promote integration. If the federal government will not act, cities, states, and civil society organizations must continue to work together to build an integration infrastructure from the bottom up.

## I. Introduction

The United States welcomes hundreds of thousands of newcomers every year. Yet it lacks a national, coherent immigrant integration policy. Officials in the US Government Accountability Office note that “no single federal entity has been designated to lead the creation, implementation, and coordination of a national immigrant integration capability” (GAO 2011, 25). Academics have characterized the American approach as “laissez-faire” integration or a “patchwork” of policies (Bloemraad 2006; Bloemraad and de Graauw 2012a-b; de Graauw 2016a; Heisler 1992; Jiménez 2011; Schmidt, Sr. 2007). In the media, whether today or a century ago, integration is represented by Horatio Alger-type stories of poor immigrants achieving the American Dream through individual hard work and the support of family and friends. The twentieth-century Andrew Carnegie, a poor Scottish immigrant turned steel industry tycoon and philanthropist, is the equivalent of today’s Silicon Valley giant Sergey Brin, the Google co-founder born in Russia, or entrepreneurs Do Won and Jin Sook, the Korean-born husband and wife team who founded the fashion chain Forever 21 with \$11,000 and high school educations. In these narratives of immigrant integration, the role of government is largely absent.

Such a laissez-faire approach is short-sighted in its depiction of the past and, critically, as a roadmap for the future. Laissez-faire narratives do not acknowledge that for over a century governmental actors in the United States have played a role in immigrant integration. These efforts have expanded notably over the last decade, especially at the local and state levels, producing diverse partnerships between civil society and federal, state, county, and local governments around immigrant settlement. The failure to build on these foundations means that immigrant integration outcomes will fall short of what they could be, to the detriment

of the nation as a whole. In many respects the United States can be proud of its record of incorporating newcomers, as a recent National Academy of Sciences report makes clear (Waters and Pineau 2016), but comparisons with other countries show that benchmarks fall short at times, especially around naturalization, economic self-sufficiency, and residential integration (Alba and Foner 2015; OECD and EU 2015; Vigdor 2011). A more deliberate federal role in a comprehensive immigrant integration strategy is critical for improving immigrants' societal integration.

We argue for the development of an integrated policy. Such a policy should apply nationally and link to current city, county, and state settlement infrastructures and initiatives, as well as to existing civil society efforts. Where local integration initiatives do not yet exist, the new federal policy would provide goals, best practices, and funding to establish local programs and support infrastructures. Building on successes in refugee resettlement and the growing number of city and state immigrant affairs offices, the resultant policy would leverage public-private partnerships, drawing on the energy, ideas, and work of community-based nonprofits as well as the leadership and support of philanthropy, business, education, faith-based, and other institutions. Such partnerships would allow for local innovation and tailoring programs to the unique needs of a particular community, while a national scope would ensure baseline settlement support across the country as part of a cohesive vision for successful immigrant and refugee integration in the United States.

In what follows, we first discuss immigrant integration in the twentieth century, highlighting historic examples of public-private partnerships to build on today. We next outline immigrant integration efforts in the twenty-first century, highlighting the increased activism of city and state governments, the creation of new civil society initiatives and public-private partnerships, and recent federal interest in immigrant integration. We conclude by making the case for a more robust national integration policy infrastructure, one that is vertically integrated to include different levels of government and horizontally applied across public and private sector actors and different types of immigrant destinations. By working together with federal leadership and support, we can build nationwide partnerships for immigrant integration that lay the groundwork for many success stories, for newcomers and the communities in which they reside.

## **II. Twentieth Century Integration: “Laissez-Faire” with Public-Private Partnerships**

Immigrant integration during the twentieth century is often portrayed as a laissez-faire process relying primarily on grassroots initiative, not public planning or government intervention (e.g., Jiménez 2011; Schmidt, Sr. 2007). Immigrants became part of American society by using their own resources and ingenuity, the help of family and friends, and — on occasion — the assistance of local community organizations. There is much truth in these narratives. Immigrants could count on an expanding industrial economy and a robust public education system to help them and their children secure economic mobility and a comfortable middle-class lifestyle, but government was otherwise not proactive in creating or promoting integration pathways. Just as the “invisible hand” of laissez-faire capitalism was assumed to produce a self-regulated market based on the individual actions of many people, the individual actions of immigrants eager for a better life in the United States were

assumed to function as the invisible hand in immigrants' societal integration (Bloemraad and de Graauw 2012a).

### ***A. Immigrant Organizations, Settlement Houses, and Americanization Efforts: Organized Assistance before World War II***

Laissez-faire narratives ignore, however, longstanding American partnerships between civil society and public institutions. Within immigrant communities, immigrant-run private charities and voluntary organizations have long helped compatriots get a job, secure business loans, encourage citizenship, or provide food, clothing, and funeral benefits during tough times. Starting in the late nineteenth century, US-born social reformers also became involved, setting up “settlement houses.” First established in New York, Chicago, and Boston, by 1911, 413 such institutions were tallied across 32 states, the District of Columbia, and the Hawaiian Islands (Woods and Kennedy 1911, vi). Usually funded by religious groups, charitable associations, and wealthy residents, settlement houses targeted the poor, including many immigrants in large American cities in the Midwest and Northeast. These organizations, within and outside immigrant communities, built a tradition of civil society engagement that continues to this day (de Graauw 2016a).

As settlement houses spread, so did the Americanization movement. It brought governments from the local to federal levels into integration efforts, often in partnership with charitable groups, businesses, social reformers, and local school boards. Their efforts were often paternalistic, nativist, and coercive (Higham 1994 [1955]), but at times could be benign and supportive. Rather than laissez-faire, public institutions engaged with local and immigrant partners. For example, the US Board of Education established a Division of Immigrant Education that funded English language, literacy, and civics instruction, while the US Bureau of Naturalization partnered with school officials to identify adults who might benefit from citizenship classes (King 2000, 87-120; Schneider 2001).

Some early government initiatives came with resources. Over four-fifths of state legislatures in the Northeast and Midwest passed legislation with funding support for adult English and citizenship classes in the interwar period; in 1927-1928, these states allocated, on average, \$1.42 per alien resident for naturalization education (Fox 2012; Fox and Bloemraad 2015, 193). At about \$19.50 per noncitizen in 2016 dollars, today this would be the equivalent of the federal government spending over \$440 million on the almost 22.6 million noncitizens living in the country. In 2016, however, the US Citizenship and Immigration Services (USCIS) awarded less than \$10 million in grants to 46 organizations through the USCIS Citizenship and Integration Grant Program.<sup>2</sup>

### ***B. Post-War Partnerships for Successful Integration: The Case of Refugee Resettlement***

Refugee resettlement offers another public-private collaborative framework for integration, one that built on pre-war organizations. The oldest voluntary agency still engaged in

2 See <https://www.uscis.gov/about-us/citizenship-and-integration-grant-program>. Data on the noncitizen population of the United States is from the 2015 American Community Survey, one-year estimates, available at <https://factfinder.census.gov>.

refugee resettlement today is the Hebrew Immigrant Aid Society, founded in New York City in 1881 to assist Jews fleeing pogroms in Russia and Eastern Europe. Other private resettlement organizations, with religious or secular roots, sprung up in the 1930s and 1940s as Europe descended into fascism, communist purges, and war (Zucker and Zucker 1987). Working overseas and in the United States, these groups became major players in refugee resettlement after World War II, settling hundreds of thousands of people largely using private resources (Holman 1996). Their efforts led the federal Displaced Persons Committee to speak approvingly of the “religious and welfare organizations through whose cooperative activities so many of the displaced persons have come to the United States” and which “have rendered a most commendable service” in partnership with displaced persons commissions or committees in 33 US states (DPC 1950, 22, 25).

After World War II, the relationship between voluntary agencies and government gradually became more permanent, including professionalized services by nonprofits and increased government funding and oversight. After thousands of Hungarian refugees arrived in 1956, the federal government offered voluntary agencies \$40 per person to defray transportation costs (Holman 1996, 6). In 1959, the influx of Cuban emigrés in Miami severely strained local, county, and state capacity to secure housing, jobs, and schools. In response, Congress passed the Migration and Refugee Assistance Act in 1962, the first federal law authorizing and financing domestic refugee assistance, although it restricted support to Cubans in Miami (Holman 1996). However, when the fall of Saigon sent 130,000 Southeast Asian refugees to the United States, Congress drew on similar authority and logic to pass the Indochina Migration and Refugee Assistance Act of 1975. It established a program giving states federal funds to provide medical assistance and financial support to needy refugees and to finance integration programs such as English language and employment training. The 1976 Indochinese Refugee Children Assistance Act reimbursed states for education and special language instruction costs. Unlike the prior program for Cubans, these initiatives were national. Another wave of organizations, often termed Mutual Assistance Associations, were founded to provide linguistically and culturally appropriate services in refugees’ places of settlement. In the late 1970s, Congress reauthorized federal resettlement assistance, while oversight of funding and programs moved around among federal agencies.

In 1980, Congress enacted the Refugee Act to end the ad hoc, patchwork approach to refugee admissions and settlement. In addition to providing a uniform procedure for refugee admissions, the act permanently authorized federal assistance to promote refugees’ self-sufficiency and established the Office of Refugee Resettlement (ORR) in the US Department of Health and Human Services (DHHS). An early assessment concluded that calling this a single program would be a “misnomer,” as it was more accurately a “complex web of federal government, voluntary agency, and state and local government roles that provide the overall framework for resettlement efforts” (Haines 1985, 7). Despite the challenges of a policy and programmatic web developed in fits and starts, it nonetheless has served as a valuable safety net from which refugees could establish themselves, a support structure not available to economic or family-sponsored migrants facing similar integration challenges.

Today, the web of federal, voluntary sector, state and local partnerships around refugee resettlement continues, with a focus on getting refugees to economic self-sufficiency as soon as possible. The US Department of State’s (DOS’s) Bureau of Population, Refugees, and

Migration funds cooperative agreements with a range of public and private organizations to facilitate initial settlement through the US Reception and Placement Program. In 2016, a refugee helped by one of the nine contracted voluntary agencies would be greeted at the airport and brought to a furnished residence stocked with some clothes, culturally appropriate foods, and other necessities. Someone from the agency would provide referral services and practical assistance, from applying for a Social Security card and registering children for school to helping arrange medical appointments, enroll in English language classes, find employment, or use local public transportation. Under the 2017 program, DOS provides agencies with \$2,025 per refugee, amounts often supplemented with agency contributions from other public and private sources since grants are often inadequate to cover costs fully (DOS 2016).

A second set of programs administered by ORR provides transitional settlement assistance to refugees and other designated humanitarian groups.<sup>3</sup> ORR programs provide formula grants to states to provide refugees with cash and medical assistance, and offer grants to a range of government and voluntary sector partners to fund social and employment services. Partners can include public agencies, faith-based or secular nonprofits, and ethnic-specific Mutual Assistance Associations, many of which also contribute matching or in-kind resources. In the 2015 fiscal year, Congress voted \$1,559,884,000 in appropriations for ORR programs, much of it for cash and medical assistance (Bruno 2015, 8). When the refugee assistance program was first established in 1980, federal assistance was available for up to 36 months. Since 1991, refugees are funded for just eight months, often too short a period to secure economic self-sufficiency for refugees with limited education or arriving with physical or mental trauma (Bruno 2011; Nawyn 2011).

### *C. A Threadbare Patchwork for Other Immigrants*

The policy and programmatic web of refugee resettlement faces challenges in integrating humanitarian migrants, especially as ORR's capacity was stretched serving unaccompanied minors from Central America. However, the refugee infrastructure is still more cohesive and extensive than the threadbare, loose patchwork of integration initiatives in place for other immigrants. Most non-refugee immigrants come to the United States under family reunification provisions of the 1965 Immigration and Nationality Act. These newcomers can call on their families for initial settlement support, but individual families can only do so much. More sustained public support is necessary for optimal long-term integration outcomes.

We might expect the main federal agency responsible for immigration to provide leadership on integration. But throughout much of the post-WWII period, the US Immigration and Naturalization Service (INS) did not engage in proactive immigrant integration work. At most, it oversaw the administration and adjudication of naturalization, which included providing public information on how to become a citizen. The INS generally assumed that those granted permanent residence through employment preferences had the skills necessary to integrate, while those sponsored by family could turn to them for help. Indeed,

<sup>3</sup> Immigration and Nationality Act § 412(c), (e). Groups eligible for refugee resettlement include official refugees under the Act, successful asylum applicants, Cuban and Haitian entrants, trafficking victims, Amerasians and immediate family, and Iraqi and Afghan special immigrants (Bruno 2011, 3-4).

unlike the partnerships that characterized refugee resettlement, the INS did not have legal authority to act as a grant-making agency (Bloemraad 2006, 126). When former INS Commissioner Doris Meissner tried to orient the agency to a more proactive stance, the Citizenship USA program came under attack as a partisan effort to naturalize potential Democratic Party supporters in advance of the 1996 presidential election (OIG 2000).

When the US Department of Homeland Security was created by the Bush administration in 2002 to replace the INS, congressional legislation included a provision to establish a new Office of Citizenship within USCIS. This office's mission is "to provide federal leadership, tools, and resources to proactively foster immigrant integration" (Office of Citizenship 2017). Much of its work centers on providing naturalization information, but in a break with INS practice, the office also aims to build community capacity to prepare immigrants for citizenship. This includes funding for collaboration with community-based organizations and other partners to welcome immigrants, promote English-language learning, communicate the rights and responsibilities of citizenship, and encourage naturalization. The demand for these Citizenship and Integration Grants far outstrips available funding, however. In 2009, when the program started, there were 293 applications for \$1.2 million in grants, with only 13 organizations eventually funded (Waters and Pineau 2016, 177). From 2009 to 2016, the program awarded a total of \$63 million, averaging less than \$8 million per year, roughly half a percent of allocations for refugee resettlement.<sup>4</sup>

Beyond the USCIS grant program, a patchwork of other integration initiatives exists. The White House Task Force on New Americans (2015b, 50) identified 58 immigrant integration programs administered by 10 different federal agencies. Of course, once naturalized, immigrant-origin citizens can access the same programs as native-born citizens. But before citizenship, immigrants can also sometimes get help under federal policies that seek to increase the life chances of economically disadvantaged US residents. Federal education laws help English-language learners. Federal civil rights laws protect against discrimination in housing and the workplace and seek to promote greater ethno-racial and gender equality through preferential hiring and contracting policies. Federal labor and employment law protections — including minimum wage and overtime provisions, workplace safety standards, and union organizing rights — generally apply to all workers regardless of citizenship and documentation status. Important safety net policies — including Temporary Aid to Needy Families, the Children's Health Insurance Program, Medicaid, food stamps, and Supplemental Security Income — extend to legal immigrants with a minimum of five years of US residence. Other programs have a citizenship criterion, rendering them unavailable to undocumented immigrants or legal immigrants. These restrictions generate significant integration vulnerabilities for immigrants in their first five years in the United States, years that are critical in accessing good jobs, safe housing, and opportunities to become socially integrated. Thus, while mainstream policies at times support legal immigrants, they do not amount to a coherent national program of immigrant integration, especially as most are tailored with native-born residents in mind (Bloemraad and de Graauw 2012a-b).

More broadly, the federal government offers some baseline constitutional protections that encompass all people living in the United States and that also frame the rights and societal

<sup>4</sup> On grants awarded, see <https://www.uscis.gov/about-us/citizenship-and-integration-grant-program>.

integration of immigrants. The Fourteenth Amendment to the US Constitution guarantees due process and equal protection to “any person,” and it guarantees the birthright citizenship for any child born in the United States, thereby rupturing the intergenerational transmission of noncitizenship or undocumented status. The US Supreme Court’s *Plyler v. Doe* (1982) decision guarantees that all children — including those who are undocumented — have the right to a free and equal K-12 public education. Public schools are important engines for immigrant integration because it is there that children learn English, American history and civics, and it is one of the first entry points where immigrant parents interact with their broader community. In short, despite laissez-faire narratives, existing public policies and programs do influence immigrant integration. But much more can be done, a challenge increasingly taken up over the last decade by local and state governments and civil society organizations.

### **III. Twenty-first Century Integration: Growing Subnational Leadership, New Public-Private Partnerships, and Increased Federal Attention**

The twenty-first century ushered in new dynamics in immigrant integration policy and programs. We see growing activism by cities and states, the launch of new civil society initiatives and public-private partnerships spanning the country, and some federal interest in immigrant integration. These developments provide an important foundation on which to build a more cohesive federal integration policy.

#### ***A. Growing Municipal and State Leadership***

In 2014, Nashville Mayor Karl Dean launched the Office of New Americans to serve the metro area’s immigrant residents, signing an executive order surrounded by Council members, department heads, members of the local chamber of commerce, and nonprofit partners. Although not a historic immigrant destination, Nashville joins a growing number of cities and states that have created new programs and institutions to promote the integration of new residents. In 2016, 41 US cities had a total of 44 formalized offices dedicated to immigrant affairs or immigrant communities (de Graauw 2016b). These offices have different names, including the Office of New Bostonians in Boston, the Mayor’s Office of Immigrant Affairs in New York City and Atlanta, the Office of International Relations and Diaspora Affairs in Newark, and the Office of New Americans in Chicago, Houston, Buffalo, and Nashville. And while most states have long had offices and programs serving refugees, in 2016 there were five states — California, Illinois, Massachusetts, Michigan, and New York — with offices or staff mandated to serve immigrant populations more broadly. The oldest office with an exclusive focus on immigrant issues, created in 1986, is in New York City, which also is the biggest and best resourced office, with over 50 full-time staff. In contrast, the vast majority of other city offices, and all state offices, were set up in the last 10 years, as in Nashville. They are less institutionalized, have fewer paid staff, and operate on more limited budgets.

Beyond formal offices, at least 90 municipalities have developed commissions, committees, councils, task forces, boards, initiatives, and programs dedicated to immigrant issues or

immigrant communities (de Graauw 2016b). Examples include the Immigrant Integration Task Force in Charlotte, the Welcoming Immigrant Task Force in Tucson, the New Americans Task Force in Lincoln, the Commission on Immigrant Affairs in Austin, and the Welcoming City initiatives in Dayton, Columbus, and Pittsburgh. These bodies generally have fewer explicit powers, fewer staff and resources, or a narrower, finite set of tasks than formal offices. They can, however, be an important stepping stone toward further institution-building. Together, city and state immigrant affairs offices and these other municipal bodies demonstrate how the new push for immigrant integration in the United States is coming from lower levels of government, not the federal government. Executive leadership is clearly central: mayors and governors, not legislatures, have created these offices and other bodies.

Integration projects are being advanced in a great variety of cities spanning the country. Most big cities (and traditional gateway states) now have immigrant affairs offices, including longstanding immigrant gateways such as Boston, Chicago, Los Angeles, New York City, and San Francisco. However, offices also exist in newer destinations, including Atlanta, Nashville, Orlando, and Washington, DC, and in former and reemerging immigrant destinations, such as Baltimore, Buffalo, Denver, Detroit, and Philadelphia. Immigrant affairs offices also can be found in cities with smaller populations, such as Allentown, PA (117,942 residents) as well as in cities with foreign-born populations well below the national average of 13 percent, such as Detroit (5% foreign-born residents). Executive leadership is important, but not necessarily in a top-down imposition disconnected from electoral support. Although nine offices (20% or 9/44) operate in cities with council-manager forms of government, most offices (73% or 32/44) are in cities with mayor-council forms of government, where the mayor has an independent electoral base. A bit over half of city immigrant affairs offices (59% or 26/44) are located in states where the majority of voters are Democrat, but they can also be found in states with wide-ranging climates on immigration issues. They are found in Arizona, the state with the most negative climate for immigrants (with an Immigrant Climate Index of -60) and in California and Illinois, the two states with the most positive climates for immigrants (with indexes of 33 and 38, respectively).<sup>5</sup>

Several common factors underlie the recent surge in immigrant affairs offices. Their establishment follows the decades-long growth of the foreign-born population in the United States and immigrants' greater geographic dispersion since the late 1990s. It also responds to the lack of attention to integration by federal officials, who have focused on enforcement and border control. Many cities and states are stepping into the policy void, often because they feel they have no choice. City and state officials are tasked with devising and implementing public policies that promote a productive local economy and a healthy and safe environment for all; they feel that they cannot ignore the needs and interests of growing immigrant communities in their jurisdictions. In announcing the creation of the Nashville Office of New Americans, the mayor underscored that nearly 60 percent of the city's population growth since 2000 came from immigration, new Americans are overrepresented in four of Nashville's 10 largest industries, and a third of children under 18

5 The Immigrant Climate Index sums up each state's environment for immigrants, positive and negative, by quantifying immigration laws enacted by states as well as cities and counties in each state between 2005 and 2009. See Pham and Van (2014) for more detail on the construction of the index.

in the metro area live in bilingual or non-English speaking households.<sup>6</sup> The growth in city immigrant affairs offices is also the result of the wider availability of technical assistance and support from organizations and coalitions dedicated to promoting immigrant integration at the municipal level. One example is Welcoming America, a nonprofit organization created in 2009 and headquartered in the Atlanta area that has worked with over 70 municipalities and 40 nonprofits nationwide to build communities that foster immigrant integration (Welcoming America 2017).

We can also identify commonalities in what these offices do and seek to accomplish. They aim to welcome immigrants and foster positive public discourse. To this end, they convene local stakeholders — law enforcement and other city officials, nonprofit service providers, immigrant advocacy organizations, religious institutions, and business organizations — to facilitate interaction between immigrants and native-born residents. Immigrant affairs offices also make the case that immigrants are of current and future economic importance to cities, metropolitan areas, and states. They publicize immigrants' economic contributions and develop initiatives to retain immigrant talent and support immigrant entrepreneurs. They streamline existing city and state integration services, and they encourage immigrant civic engagement, invest in immigrant leaders, and nurture new community organizations that serve immigrants. Such efforts can start small with citizenship ceremonies, diversity and multicultural celebrations, and recruiting volunteers for city events. Resources permitting, immigrant affairs offices can also spearhead grander initiatives that include social change fellowships to cultivate new civic leadership. More institutionalized offices also develop new policies such as language access and municipal ID card legislation and initiatives to help implement, locally, the federal Deferred Action for Childhood Arrivals and naturalization programs. In sum, cities and states have developed different policies and practices that provide immigrants, including the undocumented, opportunities for inclusion and a sense of belonging even in the absence of federal legalization and integration policies (de Graauw 2016; Suro 2015).

The experiences of city and state immigrant affairs offices highlight several challenges. Key is the lack of resources to get things done. Limited staff and small budgets hamper most offices' ability to develop new initiatives, especially as municipal and state budgets remain under stress. The struggle to survive and justify their existence, especially in places where there is opposition to immigration, can detract from efforts to move the needle on immigrant integration. The federal division of powers also constrains city offices, and even state initiatives, as does the fact that determination of legal status — whether citizenship through naturalization, legalization of undocumented residents, or temporary protection from deportation — must emanate from the federal government. Without federal immigration reform and a cohesive national integration program, the impact of city and state immigrant affairs offices will have limits.

For immigrant affairs offices to succeed, their staff need to tap into the existing knowledge, practice, and culture within immigrant communities in their cities and states. Sustained collaborations between immigrant affairs offices and community organizations carry

6 See “New Americans in Nashville: A Snapshot of the Foreign-Born Population,” a factsheet distributed with the press release for the new office, available at <https://www.nashville.gov/Portals/0/SiteContent/MayorsOffice/docs/news/140922-MONA-FactSheet.pdf>.

many benefits. For immigrant affairs offices, such collaborations enable them to learn about needs in immigrant communities, so they can develop appropriate programs and initiatives to respond. For community organizations, such collaborations open access to municipal and state decision makers and possibly to funding to support their work. Finally, for immigrants, these collaborations offer a helping hand and opportunities to be engaged in local and state civic and political affairs. These collaborative benefits are constrained, however, in newer immigrant destinations with fewer potential partner organizations. Those jurisdictions require investments to nurture new community organizations and build capacity for immigrant integration. Here we see openings for the federal government, philanthropic organizations, and even the business sector to get involved.

### ***B. New Public-Private Partnerships and Increased Federal Interest***

In recent years, new initiatives have also sprouted bringing non-governmental and governmental actors from across the country together to address immigrant integration issues. Welcoming America, mentioned earlier, is one example. Others include the National Partnership for New Americans, a coalition created in 2010 of 37 regional immigrant and refugee rights organizations spanning 31 states that work to influence integration policies and practices at the local, state, and federal levels (NPNA 2017), and Cities for Action, a large national coalition of 123 mayors and leaders from 20 county governments formed in 2014 to build stronger, welcoming, and inclusive cities through immigration action (Cities for Action 2017). The New Americans Campaign (NAC), launched in 2011 and funded by a network of six national foundations, gives resources to nine national and over 100 local nonprofits to provide citizenship assistance to immigrants in 18 large metro areas across the country. By mid-July 2015, NAC-affiliated organizations had completed over 230,000 naturalization applications (NAC 2016). And the Partnership for a New American Economy, launched in 2010, is a coalition of 500 mayors and business leaders nationwide who advocate for immigration reform and public and private programs that offer English-language, civics, and educational classes to immigrants (PNAE 2017). Absent robust federal engagement, city, county, and state leaders have teamed up in vertical and horizontal networks with civil society organizations to further immigrant integration.

These are all bottom-up initiatives where local government actors and grassroots civil society leaders, at times with significant foundation and business backing, have taken the lead in building local, regional, and national momentum for immigrant integration. The new public-private partnerships focus on policy innovation as well as immigrant leadership development and improved, more efficient service delivery to immigrant communities. As interactions between public and private sector actors have become more coordinated and sophisticated, they have facilitated mutual learning and sharing of resources. There are now regular convenings where city, county, and state leaders, funders, and practitioners share best practices, including the annual meetings of the National Immigrant Integration Conference (since 2009) and the Welcoming Economies Global Network (since 2012), focused on the Midwest. All in all, we find a growing energy to sustain, expand, and scale up municipal and state efforts and public-private partnerships for immigrant integration.

The absence of a coherent, robust federal integration policy remains, but the new energy and activism has not escaped federal attention. In 2006, President George W. Bush created,

by Executive Order 13404, the Task Force on New Americans to investigate ways to “strengthen the efforts of the Department of Homeland Security and Federal, State, and local agencies to help legal immigrants embrace the common core of American civic culture, learn our common language, and fully become Americans.” After little engagement with local officials or grassroots organizations, the task force published its 84-page report in December 2008. It recommended building a modern-day Americanization movement, in large part reiterating the integration philosophy and approach of the first Americanization movement a century earlier (DHS-TFNA 2008). The report emphasized the need for federal leadership and a national integration strategy that coordinates existing efforts by local and state governments, community-based and civic organizations, public libraries, adult educators, business organizations, and foundations. During its 2.5-year existence, the task force provided some training and resources to public libraries, adult educators, and immigrant-serving organizations narrowly focused on civics and citizenship education. It did not address economic integration or the integration challenges of undocumented immigrants.

Similar inquiry and advisory efforts characterized the next administration. In 2014, President Barack Obama established, by presidential memorandum, the White House Task Force on New Americans, an interagency effort to create a coordinated and more deliberate federal strategy for immigrant and refugee integration. The task force’s strategic plan, published in April 2015, was developed by representatives from nearly 20 federal agencies and drew on recommendations from 350 organizations and more than 1,000 members of the public. It outlined 16 core goals and 48 recommendations to support the linguistic, economic, and civic integration of immigrants and refugees (WHTFNA 2015b). Unlike the Bush administration report, the plan provided a whole-of-society integration approach that included a broad range of stakeholders. But like the prior task force, it was long on recommendation and short on implementation beyond public services messages, webinars, and regional convenings. It included the “Standing Stronger” citizenship awareness campaign and the “Building Welcoming Communities Campaign,” which consisted of a series of convenings to support local integration efforts around the country. The US Small Business Administration also developed a new website to promote immigrant entrepreneurship (WHTFNA 2015a). These initiatives provide baby steps forward but fall short of the programs and resources required to realize a robust national integration policy and infrastructure.

#### **IV. Towards a Robust and Coherent National Integration Policy**

What can we learn from past and current efforts? The *laissez-faire* approach, supplemented with growing activism by non-governmental actors and subnational governments, has certain advantages. In line with arguments for devolution in other policy areas, the current system allows for local experimentation and innovation. Even though immigration increasingly affects many urban, suburban, and rural communities nationwide, different locales are home to distinct immigrant and refugee communities that face diverse economic conditions, political dynamics, cultural realities, and different infrastructures of civil society organizations. In a country as large and diverse as the United States, a one-size-fits-all approach to immigrant and refugee integration is neither possible nor desirable.

Laissez-faire integration, with its emphasis on immigrant agency and the supportive role of immigrant-led organizations, also minimizes the risk of paternalism and the idea that immigrants' culture needs to be erased for successful integration. In the early twentieth century, native-born Americanizers in government, public schools, business, and private organizations often underestimated immigrants' ability to devise their own effective integration pathways. Instead, policies and practices were often "culturally imperialistic" (Carlson 1987), focused on "indoctrination in 'the American way'" (McClymer 1978). Fueled by sentiments of nationalism and nativism, some initiatives denigrated immigrants' cultures of origin by advancing a one-way assimilation process. Today, such a unilateral approach is no longer acceptable or desirable. As the White House Task Force put it, "[i]ntegration is a dynamic two-way process"; what immigrants bring with them helps keep "our country young, dynamic, and entrepreneurial" (WHTFNA 2015b, 1, 6). Moving forward, we need to make sure that immigrants, refugees, and their organizations have the ability to influence what integration policies look like and how they are implemented. If the Trump administration shuns integration policy, much can be done at local and state levels, in partnership with civil society groups.

Under the current system, immigrant integration has been happening. Contemporary immigrants learn English faster than European immigrants did a century ago, and the majority of their children and nearly all their grandchildren speak only English (Alba 2004). Over time and across generations, they improve their educational attainment, income, occupational status, and homeownership, and they tend to live in more integrated urban and suburban neighborhoods (Iceland and Scopilliti 2008; Kasinitz et al. 2008; Park and Myers 2010; Waters and Pineau 2016). Marriages between immigrants and native-born individuals sharply increased since 2000 (Qian and Lichter 2011). Finally, since the late 1990s, more immigrants have acquired US citizenship at a faster rate than in prior decades, although naturalized citizens are still less likely to register and vote than native-born citizens (Lee 2011). It is the case, though, that immigrant integration remains stratified by immigrants' educational and economic resources, racial inequalities, and legal status, barriers preventing many immigrants from participating and contributing as fully as they could (Portes and Rumbaut 2001; Telles and Ortiz 2008).

Indeed, despite important successes, the United States still fails to meet important integration benchmarks, which comparisons to other western democracies make clear. Immigrant naturalization, voter participation, and homeownership rates in the United States trail those of Canada and several European countries (OECD and EU 2015; Vigdor 2011). Compared to immigrants in many European countries, immigrants in the United States are more likely to live in poverty, experience sharper income inequality with native-born residents, and experience workplace discrimination on the basis of race, ethnicity, or national origin (OECD and EU 2015). Data such as these highlight room for improvement. A national, coherent integration program can play a vital role in ensuring that immigrants' integration is faster, easier, and more successful. Studies highlighting the relationship between public policies and immigrant integration suggest, for example, that helping immigrants learn English, acquire citizenship, and secure better jobs enables them to earn higher incomes and thus contribute more fully to the economy and their children's future (e.g., Biles, Burstein, and Frideres 2008; Enchautegui and Giannerelli 2015). In Canada, government integration policies have facilitated immigrants' naturalization and encouraged their civic and political participation (Bloemraad 2006).

We thus advocate for a robust, comprehensive national integration policy and infrastructure in the United States, one that is vertically integrated to include different levels of government and horizontally applied across public and private sector actors and different types of immigrant destinations. To that end, the federal government first needs to create a national immigrant affairs office, building on the efforts of the Bush and Obama White House Task Force reports. This new office would need dedicated staff and funding to oversee, develop, and coordinate immigrant and refugee integration among federal departments and across levels of government. The office would need to be centrally located, such as in the White House, with direct lines of communication to the president and his advisors, so that it is well-positioned to serve as the interagency liaison to all major federal, state, local, and civil society integration stakeholders. Its work and activities should be supported and monitored by an intergovernmental and cross-sectoral advisory board that includes integration experts from different levels of government, different private sector organizations, and different immigrant communities from across the country.

Besides more centralized coordination of integration efforts from the executive branch, existing programs need revisiting and expanding. For example, the DHHS Office of Refugee Resettlement should be renamed, and it should expand its activities to include longer-term integration goals beyond an eight-month settlement period. The reimagined office should work in close partnership with the national immigrant affairs office and highlight, in the medium term, three to four integration goals, such as adult English-language instruction, naturalization, and small business support, and develop a robust grant program open to civil society organizations and subnational governments to provide direct services. Congress will need to appropriate the necessary resources for these efforts, especially since ORR already is struggling with budget shortfalls given humanitarian demands. If these programs show early successes, the office can expand its programs to address other integration goals and immigrant populations, including economic and family-sponsored immigrants.

The Office of Citizenship in DHS should also expand its activities and set up more direct lines of communication with and support to all 50 state governments and other interested partners at the county and city levels. It should provide more seed funding — perhaps with complementary support from the philanthropic sector — to state, county, and city governments that want to establish their own immigrant affairs offices. Within its mission to engage partners in welcoming immigrants, promoting English, providing civic education, and encouraging citizenship, it should work with education officials at all levels of government to provide free or low-cost instruction to immigrants wanting to acquire US citizenship. It should work with community-based partners to expand the “Welcome to the United States” guide for new immigrants, making it accessible in more languages and a variety of formats, including informational videos and social media apps.

Finally, Congress needs to develop immigration reform legislation that includes funding for a comprehensive integration policy. The goals and structure of future legislation can be modelled on and expanded from already existing legislation on refugee resettlement and integration in the Immigration and Nationality Act, as amended by the 1980 Refugee Act and other subsequent amendments. Such legislation needs to address the integration of all immigrants, including undocumented immigrants, who need to be provided a path to legalization and citizenship. It also needs to invite collaboration with non-governmental

entities to leverage the energy, ideas, and work of community-based nonprofits as well as the leadership and support of philanthropic, business, educational, faith-based, and other institutions.

The federal investments in immigrant and refugee integration we propose are a big ask for any administration, but especially for the Trump administration. The 10-point immigration plan that Donald Trump campaigned on made no mention of integration and his executive orders in the early days of the administration clearly prioritize enforcement, increased border control, and restricted admissions of refugees and immigrants, making any immediate federal immigrant integration efforts improbable. The four-month suspension of the refugee program and the reduction in the number of refugees to be admitted from 110,000 to 50,000 suggest that ORR will be facing difficult times. Congress has not yet provided a clear or unified response, with Democrats determined to undo Trump's early policies and Republicans divided over how to respond.

However, the administration's decision to ignore immigrant integration and possibly roll back the minimal federal integration infrastructure currently in place will be to the detriment of all. Majorities of Americans think that immigration is a "good thing" for the country, that undocumented immigrants should have access to a path to citizenship, and that immigrants should learn to speak English (Gallup Poll 2017). The federal government should take cues from public sentiment to embrace a more proactive role in immigrant integration. When immigrants have more opportunities to learn English, to improve their schooling and professional training, to start businesses, and to access citizenship, we all benefit. More fully integrated immigrants and refugees boost the economy and strengthen community cohesion (e.g., Enchautegui and Giannerelli 2015; Sumption and Flamm 2012). These are integration outcomes that all Americans, regardless of their partisan preferences, will support.

If the federal government will not act, cities, states, and civil society organizations must continue to work together to build an integration infrastructure from the bottom up. Indeed, there is room for states, in particular, to take a more pronounced leadership role on immigrant integration to complement the growing activism by local governments. We must also focus on better knitting state, local, and civil society initiatives together and creating more fora for developing and sharing best practices across sectors. There has been a sharp increase in public and private interest in and action on immigrant integration issues at the local and state levels, especially following the launch of the 2012 Deferred Action for Childhood Arrivals program (de Graauw and Gleeson 2016; Kerwin et al. 2017). This work has been focused, however, on legal and administrative support for a sub-group of the immigrant population, not the broader range of integration outcomes so important to newcomers and the communities that welcome them. The subnational and cross-sectoral capacity to facilitate language training, job placement, immigrant entrepreneurship, positive community relations, citizenship acquisition, and a host of other opportunities must be strengthened and expanded in the coming years, regardless of how the Trump administration and Congress choose to proceed on immigrant integration.

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# Citizenship after Trump

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## Introduction

From February 23, 2017 to March 6, 2017, His Eminence Roger Cardinal Mahony, archbishop emeritus of Los Angeles, California; His Excellency Silvano Tomasi, c.s., delegate secretary for the Holy See's Dicastery on Integral Human Development; and Kevin Appleby, senior director of international migration policy for the Center for Migration Studies of New York (CMS) and the Scalabrini International Migration Network (SIMN), joined in a mission to Lebanon, Jordan, Iraq, and Greece to examine the situation of refugees and the displaced in these states.

The advent of the Trump administration has obviously disrupted immigration policy in the United States. We are in for a wild and (if the first months are any guide) scary ride through the next four years, more so with respect to immigration than perhaps any other policy sphere. Although Trump's unpredictability and lack of core ideological principle supply some slight possibility of immigration reform on a Nixon-in-China model, the early returns are not promising. The coterie around the president seems committed to restrictionist policies, as is his electoral base. Immigrant advocates will almost certainly be in a defensive posture during this administration. The focus will be on beating back anti-immigration initiatives in the courts and the streets, with the response to the initial travel ban and refugee suspension as a model. There will be few, and possibly no, opportunities to adopt more forward-looking US immigration policies.

Citizenship law and practice is shaping up to be another story. Although Donald Trump as a candidate vowed to scale back birthright citizenship, it did not feature prominently among his campaign promises. Since taking office, he has not highlighted any citizenship-related practice, birthright citizenship included. Immigration and citizenship policy have been successfully decoupled in the past, even as restrictionist constituencies have grown more politically powerful. Relative to immigration law and policy, there is a "not broken" quality to US citizenship policy which, true to historical traditions, remains generous. To the extent there are problematic elements to US nationality law, this is not the time to be fixing them.

But the Trump debacle will accelerate broader challenges to citizenship as an institution. These challenges are apparent in both a domestic and a global frame. Domestically, citizenship is less reflective of social solidarities than at any time in modern US history. Extreme political polarization has been well documented. The polarization is also sociological in the sense that Americans as such no longer share a common identity or sustain mutual trust. Citizenship no longer maps out on an American national community. Meanwhile, citizenship at the global level is becoming increasingly instrumentalized; many people now seek or retain citizenship not as a measure of or aspiration to belonging but rather according to the benefits it brings to its holders. The policies of the Trump administration and other populist regimes will accelerate this trend. For now, these trends validate immigrant advocacy efforts to lower barriers to citizenship. In the long run, however, social justice theorists should be looking to vehicles for protecting rights that are not citizenship contingent.

## US Citizenship Policy: Out of the Crosshairs

The Trump presidency is fixated on increasing barriers to immigration. There is the literal barrier of a wall that Trump has promised to build on the border with Mexico. Although the parameters remain unclear, enforcement against unauthorized immigrants is being ramped up. There are indications that the Trump administration will work with congressional allies to scale back legal family-based immigration and non-immigrant employment-related admissions. The extent to which Trump will pursue mass deportations is unclear, and corporate interests may be able to block efforts to limit legal immigration. Immigrant advocates are more likely to enjoy success in the courts than in the political branches. Although the courts have historically deferred to the president and Congress in the immigration context, the Trump regime is sufficiently discontinuous to prior presidencies so as to destabilize judicial precedent. But barring an extreme pivot on Trump's part, there is unlikely to be much room for legislative collaboration on immigration reform.

The same holds true for citizenship policy. But there are two major differences between citizenship policy and immigration policy. First, in the United States, unlike in some other immigrant destination states, citizenship and immigration have been politically decoupled to a large extent. Second, citizenship policy is not in crisis. Although there are deficiencies in current US citizenship law and practice, they are at the margins. In a hostile political environment, it makes little sense for immigrant advocates to trigger battles that they may not win. As a result of these twinned phenomena, the prospects for changes in the US citizenship regime in the near to medium term are low — thankfully.

Several factors have contributed to the decoupling of immigration and nationality policy. Although it has been subject to historical and regional variation,<sup>1</sup> as a general matter, the United States is culturally oriented to the assimilation of immigrants. That assimilation has been enabled by the lack of a hard ethnic or religious national identity. A racially white identity was breached by the outcome of the Civil War, which established citizenship for blacks and constitutionally enshrined birthright citizenship for all persons born in the United States. The terms of naturalization have been contested at various turns, especially before the advent of federal immigration controls in the late nineteenth century, but its availability has not — racial qualifications aside, which were not fully eliminated until 1952, when persons of Japanese descent were made eligible to naturalize. Naturalization procedures triggered intense controversy in the early 1900s in the wake of widespread fraud, with electoral consequences, which led to the federalization of the process that had previously been undertaken by the states. During the same period, literacy, language, and civics requirements were also added. The nationality law was fully codified in 1952. Nationality practice has remained remarkably stable during the intervening 60 years.

Politically, this equilibrium has served the interests of a broad range of constituencies. Immigration policy can be modulated to accommodate some groups while rejecting others. Today, for example, the presence of unauthorized immigrants from Mexico and other Latin American states can be denounced without endangering the admission of, say, Italian and Irish nationals, who can be slotted for legal immigration channels (and to the extent they violate immigration controls do so in numbers that can be politically ignored). Political restrictionism does not bump up against

1 Roberto Suro, "California Dreaming: The New Dynamism in Immigration Federalism and Opportunities for Inclusion on a Variegated Landscape," *Journal on Migration and Human Security* 3, no. 1 (2015): 1-25.

established ethnic constituencies. Nationality laws, by contrast, are much less amenable to variable application. Raising the bar on the naturalization of Mexican nationals would also raise the bar on the naturalization of nationals from countries that are not perceived to be part of the immigration “problem” and who may be politically powerful. Moreover, naturalization by definition involves only legal immigrants. In recent decades, legal immigration has not been a political flashpoint: It has been crowded out by unprecedented levels of unauthorized immigration. Political proponents of crackdowns on unauthorized immigration have thus not pursued any serious parallel efforts to tighten naturalization. Even if the Trump era results in reductions in the level of legal immigration, the acquisition of permanent residence, not citizenship, would supply the choke point.

The one exception to these political dynamics is birthright citizenship as applied to the children of unauthorized immigrants. Since the mid-1990s, restrictionists have proposed restricting territorial birthright citizenship to the children of legal immigrants. These efforts have attracted high-profile attention. Legislation scaling back birthright citizenship has been introduced in every session of Congress for the last 20 years. Despite the swelling of anti-immigrant sentiment, these proposals have made little headway. Not a single bill has made it over the first legislative hurdle (a vote out of congressional committee). Donald Trump expressed support for the restriction of birthright citizenship during the 2016 campaign, but it does not appear to figure in his agenda as president.

The failure of birthright citizenship amendments can also be attributed to the country’s assimilationist norms. Even though the US Supreme Court has never directly ruled on the question, citizenship has been extended to all children born in the United States as a matter of administrative practice. It appears to be well entrenched as a matter of constitutional culture.

US nationality practice is stable and likely to remain so. This stability is at a level that affords access to citizenship. The near-absolute territorial birthright citizenship practice is generous in comparative terms. Although the practice is not unique among states (as some opponents claim), it favorably compares to all European states, none of which applies this expansive form of first-generation *jus soli*.<sup>2</sup> Barriers to naturalization have been and remain low in comparative perspective. Residency is pegged at five years as a permanent resident in most cases. Language and civics requirements are administered in ways that do not demand full assimilation with a test that is not especially exacting. These requirements may deter some otherwise eligible applicants from applying, but they also compare favorably to naturalization processes in most immigrant destination states. The sole outlier feature of US citizenship practice is the naturalization fee, which at \$725 is high in comparative perspective, but waivers are available on a means-tested basis. Perhaps the greatest deficit is the near non-existence of federal programs to encourage naturalization, for instance, federally sponsored language and civics courses.

To the extent there are imperfections in the process, now is probably not the time to solve them. To take one minor example: the naturalization oath is notoriously archaic in its phrasings. It continues to include a renunciation clause even though, under longstanding US practice, the

2 See Patrick Weil, “Access to Citizenship: A Comparison of Twenty-five Nationality Laws,” in *Citizenship Today: Global Perspectives and Practices*, ed. Alexander Aleinikoff and Douglas Klusmeyer, (Washington, DC: Carnegie Endowment for International Peace, 2001). Although the *jus soli* approach is unusual among Organisation for Economic Co-operation and Development (OECD) states, it is typical of Western hemisphere states. See Olivier Vonk, *Nationality Law in the Western Hemisphere: A Study on Grounds for Acquisition and Loss of Citizenship in the Americas and the Caribbean* (Leiden, The Netherlands: Brill Publishers, 2014) 10-11, (30 out of 35 Western Hemisphere states have automatic *jus soli* acquisition at birth).

retention of prior citizenships is accepted.<sup>3</sup> But to provoke a debate on the content of the oath would be to draw unnecessary attention to an essentially non-consequential element of the nationality regime as well as to the toleration of multiple nationalities. A similar argument could be made with respect to the civics requirement, which tests rote memorization only. But any effort to reopen the content of the examination would invite another front on the culture wars at a time when those with a backward-looking, chauvinistic view of national identity control the political branches of government. Attempts to improve citizenship policy could backfire.

That said, there could be opportunities on narrow issues with strong humanitarian underpinnings that could be resolved even in the face of extreme polarization. For example, a campaign has been underway to have the Child Protection Act of 2000 apply retroactively to foreign adoptees brought to the United States before the date of its effectiveness who, because they lack citizenship, have faced deportation to countries in which they have not lived since infancy.<sup>4</sup> Because it involves a small number of individuals and a simple legislative fix, this kind of campaign could succeed even in immigrant-skeptical political conditions.

It will be important to monitor the administration of naturalization laws to protect against ad hoc exercises of negative discretion, parallel to the kind of enforcement discretion that is being negatively exercised against unauthorized immigrants. But the risks in the naturalization context seem lower. In addition to the political distinctiveness of naturalization relative to immigration policy, the bureaucratic culture of the component element of the US Department of Homeland Security responsible for naturalization, US Citizenship and Immigration Services (USCIS), has tended to be more immigrant-friendly than the enforcement arm, US Immigration and Customs Enforcement (ICE), whose sole mission is to apprehend and remove unauthorized immigrants (a mission it appears to be both zealously and capriciously pursuing during the early months of Trump). Vigilance will also be in order at the state level with respect to documentation. Even before the Trump victory, the state of Texas was reported to have denied birth certificates to children of unauthorized immigrants, from which the state relented only in the wake of a lawsuit.

## The End of Citizenship Solidarities at Home

Relative to immigration policy, then, citizenship should figure hardly at all for US immigration advocates in the short to medium term. Relative to the potentially catastrophic developments in US immigration law, nationality law's deficits are minor, and there is good reason to expect them to stay that way, Trump's radicalism notwithstanding. But citizenship as an institution — in the United States and elsewhere — is rotting away at its core. The Trump phenomenon both reflects and is accelerating the trend. The erosion of citizenship solidarities poses one of the great challenges of our time. Conventional responses revolving around civic education and other top-down efforts are unlikely to reverse the decline. Rather, at least some efforts should now be targeted at redirecting citizenship energies to the subnational and global levels as social membership is redefined along these new dimensions.

3 "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen...."

4 See, e.g., Liam Stack and Christine Hauser, "A South Korean Man Adopted by Americans Prepares for Deportation," *New York Times*, November 1, 2016.

Globalization's pincer pressures on the state from above and below are often invoked. In the wake of populist electoral successes, some are now proclaiming the revenge of the state. Citizenship suggests the prematurity of these pronouncements. Citizenship now reflects a lower level of solidarity than at any time in the modern era. This has resulted from a variety of social trends that have shifted the orientation of community. As states attempt to reassert sovereign identity and border controls, citizenship is also being instrumentalized; individuals are increasingly seeking citizenship solely for the value of the passport that comes with it, on a "membership has its privileges" basis. These trends will be difficult to reverse.

Political polarization in the United States is understood to be at record levels. This is reflected in daily polls on almost every controversy, with high numbers of Republicans holding one view mirroring high numbers of Democrats having the opposite view. The presidential election itself revealed these disparities beyond party affiliation. In such cities as New York, Los Angeles, Chicago, and Philadelphia, Hillary Clinton won by margins of 50 percent or more. As "fake news" takes hold on the internet, those with opposing viewpoints no longer even work from the same factual premises.

The polarization transcends politics. An urban Clinton voter has very little in common with a rural or rust-belt Trump voter. They are differently situated in almost all respects. In terms of citizenship solidarities, the shift can be demonstrated through comparative domestic and transnational pairings. It doesn't take rigorous empirical work to suppose that a New Yorker who supported Clinton feels more in common with a Londoner who opposed Brexit than with a Kentuckian who voted for Trump. The New Yorker and Londoner may be more likely to have interacted, and would likely be more comfortable in a social engagement in any case. The cultural referents that mapped out onto national boundaries have dissipated. With sports and Thanksgiving as notable exceptions, there is little in the way of shared knowledge and traditions that are distinctly national, in the US context perhaps less so than in other states. The social glue that once bound citizens to each other across other divisions has grown old and brittle, and it is failing.

In theory, the erosion of citizenship solidarities could be addressed through revitalized civic education, rebuilding, in effect, the common data set that was at one time broadly shared by most Americans. That is highly improbable in the face of certain disagreement on content.<sup>5</sup> Civic education is the unchallenged fodder of liberal citizenship campaigns. But given the political impracticality of national civic education, precisely because of the lack of social solidarity, it seems an unpromising investment of political capital. Ditto for proposals to revive some form of national service. By bringing male citizens from all backgrounds together in an intimate and totalizing institution, conscription was an important foundation stone in the nation-building project. But revived national service is highly improbable. On top of the expense involved and the obsolescence of manpower for military purposes, there is no evidence that citizens are now willing to sacrifice a year or two of their youth to the national community.<sup>6</sup>

The better response would be to build on social solidarities at the local and regional level. These solidarities continue to be organic. Some aspects of community will always be spatial; no matter

5 On the last naturalization test redesign, which did not result in major changes of format or content, see Migration Policy Institute, *High Stakes, More Meaning: An Overview of the Process of Redesigning the US Citizenship Test* (Washington, DC: Migration Policy Institute, 2008).

6 There is an interesting contrast here to the Mormon Church, which continues without the power of law to extract two-year missionary service from its members as they enter adulthood.

how much of our lives moves to virtual realms, there will always be corporeal elements of human existence that will require cooperation in physical spaces. There is also a natural tendency within countries (as zones in which relocation is not legally restricted) to sort, which leads to an aggregation of like preferences. This sorting may become more pronounced in the wake of greater polarization, which will work a feedback loop. Public and private efforts to cement subnational identities are more likely to bear fruit than national ones, although serious challenges remain at even the local level in the face of economic inequality and other fragmenting demographics. It would be more difficult to impose required subnational service — a kind of local draft — insofar as it would operate like a tax that could be easily evaded through relocation.

Subnational citizenship, on the other hand, is a more promising vehicle through which to cement subnational community. A bill was introduced in the New York state legislature last year which would denominate state residents as state citizens regardless of status under national immigration laws. Although decoupled subnational citizenship would be largely symbolic, it would supply a focal point for establishing rights as full members of the community. In this respect, the practice in some states over the last 20 years to extend public benefits regardless of immigration status reflects a distinctive subnational community decoupled from — and possibly stronger than — the national one. This phenomenon could be brought into sharper relief should aggressive Trump moves against so-called sanctuary cities provoke strong local defense of unauthorized immigrants. Indeed, the general sense of local solidarity against the Trump administration (a kind of circling of the wagons) could prove a loose parallel to the kind of national community consolidation well understood to occur during war.

## Citizenship Instrumentalized

At the same time that national citizenship is being degraded from within, it is also being detached from community at the global level. Although the range of rights distinctively attached to citizenship has narrowed considerably, the resurgence of populist politics is enhancing the value of the locational security and mobility rights associated with premium citizenships. The Trump administration's early inclination to follow through on restrictionist campaign pledges will supply an incentive for naturalization as a form of insurance against deportation and possible discrimination against noncitizens in the provision of benefits and in other ways. As with other material incentives for citizenship, this will increase the incidence of instrumental naturalization, that is, the acquisition of citizenship for reasons not reflected (or reflected less) in social membership and identity. Among those already possessing US citizenship, the hostility of the Trump administration to progressive (and possibly democratic) values increases the incentive to acquire other citizenships where available, as a kind of hedge against further social and political degradation of US political and social systems.

This is a variation on economically instrumentalized citizenship acquisition. For example, Argentine and Chilean nationals acquired Spanish and Italian citizenship by descent as a vehicle for expanding economic opportunity in the wake of financial crises in Latin America during the early 2000s.<sup>7</sup> Perhaps the most dramatic example of this phenomenon will come in the wake of the United Kingdom's exit from the European Union. With Brexit, British citizens will lose

7 See Yossi Harpaz, "Ancestry into Opportunity: How Global Inequality Drives Demand for Long-Distance European Union Citizenship," *Journal of Ethnic and Migration Studies* 41 (2015): 2081.

settlement rights in other EU countries. British citizens will now have an incentive to acquire other EU nationalities where eligible. As many as 10 percent of all British citizens are eligible for Irish citizenship through descent. Applications for Irish citizenship have spiked in the wake of the Brexit vote.<sup>8</sup> Finally, global political turmoil is likely to increase the market for investor citizenship programs. Diversifying citizenship portfolios — actual terminology now used by private firms marketing citizenship programs in such countries as Malta, Cyprus, and St. Kitts — is becoming more of a priority among transnational elites to facilitate mobility and hedge against home-country political instability.

These instrumental uses of citizenship will also contribute to the decoupling of citizenship from identity. To the extent that citizenship is acquired for protective purposes and not affective ones, the community defined by citizens will fray. Although not as dramatic as the collapse of mutual trust and solidarity among citizens in a domestic frame, the strategic acquisition of citizenship is becoming more familiar in the face of global political turbulence. As political and economic shocks increase the number of episodes highlighting what is in effect citizenship arbitrage, an understanding of citizenship as having an arbitrary, luck-of-the-draw quality will challenge the traditional understanding of citizenship as a marker of social membership.

This challenge will grow notwithstanding the globalization backlash. On the one hand, the populist resurgence is widely understood as a retreat to nationalist impulses. On the other hand, populism itself has gone transnational (witness the high-profile links among right-wing and restrictionist national political parties). Sharpening political divisions seem drawn not so much around nationality as around class, race, and ideology. The Trump voter in Kentucky is showing an affinity to Brexiters and Vladimir Putin, all of them stacked up against cosmopolitan elites. As political alliances cut across state lines rather than along them, citizenship will become less, not more, salient to political identity. Community is inherent to the human condition. For centuries, the territorial state was a preemptive location of community. That primacy is now under intense stress. Ask an individual to whom she owes her loyalty. It may no longer be to her fellow citizen.

The best response to these developments, once again, does not lie in the revival of national citizenship. In theory, citizenship boundaries could be shored up to better map out onto social membership. In fact, liberal political theorists such as Ayelet Shachar have proposed citizenship law fixes to better align citizenship status to citizenship sentiments. For instance, she argues that citizenship by descent should be limited for those born abroad so as to police against “hollow citizenship.”<sup>9</sup> These fixes are oriented towards establishing a “genuine link” threshold to citizenship status, that is, requiring that citizenship eligibility be constrained by actual social attachments.<sup>10</sup> This effort to bolster citizenship’s solidarities is discordant with autonomy values to the extent it constrains individual self-definition. Who can say that the Argentine of Italian descent does not genuinely identify with her European ancestor, especially when Italy seems agreeable to having her as a member? The approach is bound to fail in any case. Genuine links are easily established

8 The recent Trump administration travel ban on nationals of six primarily Muslim countries provides a similar example on a smaller scale. Nationals of those states who also have nationality in a nonlisted state are not covered by the ban. This would, for example, give an Iranian citizen, who is a permanent resident in Canada, an incentive to acquire Canadian citizenship to facilitate continued access to the United States.

9 Ayelet Shachar, *The Birthright Lottery* (Cambridge, MA: Harvard University Press, 2009).

10 The “genuine link” vocabulary is drawn from international law’s putative requirement that a state have a genuine connection to a national for purposes of representing the individual’s interests before another state. See *The Nottebohm Case* (Liecht. v. Guat.), 1955 ICJ 4 (Apr. 6).

in the wake of globalization. When the European Commission pushed back against Malta's investor citizenship program, Malta agreed to adopt a one-year residency requirement, explicitly denominated as a period in which to establish genuine links. In practice, all that is required is a rental property and other nominal contacts (gym memberships included). Physical presence requirements are minimal. As more countries exploit their sovereign discretion to sell citizenship and others loosen the parameters for citizenship by descent, it will be difficult to shore up the institution against increasing instrumentalization.

Better then to pursue global solidarities than national ones. If conservatives are working to cement global alliances, progressives should be too. This is already happening under other labels in the political realm, for instance, among those who work to protect constitutional democracy and the rule of law. How it is accomplished under the moniker of citizenship is a more difficult proposition. There is not a "world citizenship" that encompasses all of humanity, although that may have its place as well. The purpose here would be to accelerate and institutionalize transnational solidarities. This is already happening from the bottom-up among identity groups as they work to advance a rights agenda for their constituencies, building transnational solidarities in the process. How it might be approached programmatically across groups is a more difficult proposition. International organizations, philanthropists, and norm entrepreneurs may be able to facilitate an understanding of transnational solidarities as a kind of citizenship. For example, international organizations (public and private) could further institutionalize direct representation by non-state groups.

## Conclusion

The endpoint of this analysis is an unapologetic variation on the trope that the state is under assault from above and below. In the long run, the state is unlikely to persist as the primary platform for the redistribution of resources and the protection of rights. The modern state as a form of association is not well adapted to the new dimensions of social organization. It was mostly about the protection and projection of power across space. Power was correlated to population and territory, and external territorial threats promoted a sense of community. Although territorial location remains an important locus of identity, the imagined community of the territorial nation-state is a legacy phenomenon in the face of other solidarities. These solidarities, at the local and global levels, will be more promising vehicles for citizenship-like activity going forward.

In the meantime, citizenship policy in the United States continues to be largely insulated from the political upheaval impacting immigration policy. US citizenship is likely to remain accessible to legal immigrants. Given the insecurity increasingly associated with noncitizen status, those who are eligible for citizenship are likely to access it — and would do well to pursue it — at higher rates than in the past.

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# Enforcement, Integration, and the Future of Immigration Federalism

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## Executive Summary

The federal government has a monopoly over the terms of immigration law, and it superintends the nation's singular immigration enforcement bureaucracy. But our federalism nonetheless provides a vital playing field for sharp debates over the status of immigrants in American life. The forms of state and local involvement in immigration policy are varied, but they fall into two basic categories of mutually dependent and re-enforcing policies: enforcement federalism and integration federalism. Whereas enforcement federalism concerns the extent to which localities should assist or resist federal removal policies, integration federalism encompasses measures designed to assist immigrants, regardless of status, to plant roots and acculturate to life in the United States.

Both forms of immigration federalism take shape through a wide variety of intergovernmental relations, not only between the federal government on the one hand and states and localities on the other, but also between states and the cities within them — an increasingly important dimension of immigration federalism today. These relations have important legal characteristics, and constitutional and statutory law bring them into being and mediate them. But the nature of any given intergovernmental dynamic will be shaped just as much by a combination of ideology and institutional imperatives. These elements can either unite the center and the periphery in common cause or produce the sort of conflict that has made immigration federalism a high-profile issue for decades.

Given the density of the intergovernmental dynamics that shape the country's immigration policy, developing a comprehensive strategy for immigration federalism requires more than a predilection toward or away from centralization of government authority. It requires a clear view on the appropriate metes and bounds of immigration enforcement, as well as a set of beliefs about the proper place in the social order of immigrants with different legal statuses. While this essay remains largely (though not entirely) agnostic on these questions, it offers four basic principles to frame any future federalism agenda.

First, when it comes to enforcement federalism, the federal government ought to acknowledge the reasons that localities might resist federal enforcement efforts, at least as a matter of politics, and if only to ensure that

federal policy is subjected to accountability checks by competing, external pressures. Second, whatever the value of resistance to enforcement, a federalism agenda should include efforts by all levels of government to identify a manageable equilibrium that reconciles the federal government's constitutional and statutory responsibilities for maintaining an enforcement regime with the local politics of immigration and the lived realities of immigrant communities. Third, when it comes to integration federalism, the problem of illegal immigration must be solved, and only the federal government can do so decisively. Federalism can only mediate the political conflict over status and help set the terms for its ultimate resolution. And yet, the structural reasons that have given rise to integration federalism should re-enforce the country's commitment to locally driven integration policy, supported by a national-level commitment to information sharing, coordination, and resource support. Finally, because both enforcement and integration policy require systemic flexibility, it is important not to confuse arguments on the merits of immigration policy with structural claims. In other words, scholars, advocates, or policymakers should exercise humility and circumspection when developing conversation-stopping claims that a certain intergovernmental relation is required by law, especially in a context as charged as immigration policy.

### Introduction

Conventional wisdom has it that immigration law is an exclusive federal domain governed by uniform rules and policies. And yet, American federalism has meant that states and localities have helped shape immigration policy throughout history, often through deliberate resistance to the federal government. During the Obama years, the Arizona model of federalism drew the spotlight, as the state legislature and other like-minded jurisdictions enacted sweeping immigration enforcement measures with great fanfare, in part to rebuke the more tempered federal policy of the day. In a highly unusual response, the Obama administration sued the states, and the Supreme Court eventually vindicated the federal government's exclusive authority to set enforcement priorities.<sup>1</sup> Today, the preeminent intergovernmental script has flipped to what we might call the California model. Pro-immigration states and localities are directly challenging a presidential administration bent on ever-tougher enforcement justified with alarmist rhetoric about immigration's dangers. But even as resistant localities force the federal government to defend its policies in court, the Trump administration finds itself buttressed by yet a third model, according to which states like Texas and North Carolina enact legislation to disable their own pro-immigration cities from resisting federal enforcement. Immigration federalism is in constant flux.

Though these high-profile contretemps keep immigration federalism a part of public discourse, state and local governments long have been de facto immigration policymakers in myriad and more mundane ways. The complexity of intergovernmental relations in our federalist system sets a crucial framework for immigration policymaking. Though the Immigration and Nationality Act (INA) and related statutes span hundreds of pages in the

1 *Arizona v. United States*, 567 U.S. \_\_\_, 132 S.Ct. 2492 (2012).

US Code, the secular expansion of the federal immigration machinery over the last century has not displaced immigration federalism, for one simple reason common to many spheres of regulation. Immigrant settlement and immigration enforcement are fundamentally spatial and territorial, thus implicating the politics and bureaucracies of our federal system. Our national immigration policy is, in fact, debated and set through various intergovernmental relationships — mostly between the federal government and cities and counties, but also between the federal government and states, between states and the cities within them, and by each of these jurisdictions acting autonomously.<sup>2</sup>

At any given time, immigration federalism simultaneously re-enforces and resists federal policy, and the political valence of immigration is often in flux. The ideological diversity in government that federalism produces ensures this state of tension, as does the fact that the institutional interests of federal and local actors do not always align, regardless of partisan affiliation. For example, even as the current Department of Homeland Security (DHS) finds itself in conflict with certain state and local officials who seek to provide immigrants with “sanctuary,”<sup>3</sup> the administration and allies in Congress aspire to recruit still other local officials in an affirmative push to amplify federal enforcement efforts. Republicans in charge of the federal government have not given up on federalism — they simply want it to serve their ends.

To understand the metes and bounds of immigration federalism, it will be useful to break the concept down into two categories: enforcement federalism and integration federalism. The legal, institutional, and political conditions governing each variant of federalism differ. The former entails the local relationship to federal removal policy and its many tools of coercion, and it is dominated by debates over legal authority and intergovernmental relations. The latter implicates affirmative strategies to either promote or prevent immigrant incorporation into the body politic and may have little if anything to do with federal policy, which is itself limited in scope and ambition. Though legal questions arise, integration primarily raises questions of political will and bureaucratic capacity, and states and localities long have taken the lead in devising our nation’s affirmative integration agenda. And so even as we might seek to control or temper local involvement in immigration enforcement, any integration agenda ought to have states and localities at its center.

On some level, this enforcement-integration dichotomy is too stark. Enforcement policy heavily affects immigrants’ prospects for integration. Enforcement policy *is* integration policy. Enforcement federalism encompasses local refusal to assist federal enforcement in order to protect immigrants in the community, as well as federal-state cooperation to deport immigrants, or otherwise create incentives for immigrants to leave. In addition, affirmative integration policies, or the lack thereof, can influence immigrant movement, either attracting immigrants to welcoming jurisdictions, or driving them away by creating inhospitable climates for settlement. Whether a locality creates a receptive climate for

2 For ease of exposition, when invoking states and county and local governments at once, I use the terms “localities” and “local jurisdictions.” But where it makes a material difference to the analysis to refer to states versus cities, I use these more specific terms.

3 As discussed in more detail below, the term “sanctuary” is an evocative yet somewhat misleading label for a set of policies that really ought to go by the more pedestrian term “noncooperation,” because they limit the extent to which local police and other officials assist federal immigration enforcement efforts.

integration can help shape the size and nature of the enforcement domain in any given local setting. But as with any overly reductive dichotomy, this one can help us organize the debate over the state and local role in immigration.<sup>4</sup>

The intergovernmental dynamics and politics that shape immigration federalism are certainly governed by ongoing debates concerning legal authority. The extent to which localities can establish immigration priorities that diverge from federal policy, and the scope of federal authority to reign localities in, set the ground rules for intergovernmentalism. But even if these legal lines were crystal clear, defining an actual agenda for immigration federalism requires answering far more contested questions. Should our default assumption be that immigration ought to be controlled? Or, should our animating objective be that immigrant communities be allowed to flourish? When and how do these objectives conflict?

In this paper, I remain largely agnostic on these policy questions, focusing instead on how federalism provides a framework for answering them. But this framework ultimately points to four very basic goals for a federalism strategy. First, when it comes to enforcement federalism, it will be important to acknowledge the reasons for local resistance to federal enforcement, at least as a matter of politics, and if only to ensure that federal policy is subject to checks by competing, external pressures. Second, the value of resistance to enforcement notwithstanding, a federalism agenda should include efforts to identify a manageable equilibrium that reconciles the federal government's constitutional and statutory responsibilities for maintaining an enforcement regime with the local politics of immigration and the lived realities of immigrant communities. Third, when it comes to integration federalism, the structural reasons that have given rise to it should re-enforce a commitment to locally driven integration policy, supported by a national-level commitment to information sharing, coordination, and resource support. Finally, to preserve the systemic flexibility that immigration policy requires, scholars, advocates, and policymakers should be circumspect about launching hard-edged legal claims concerning the scope of power held by any one level of government, mindful that structural doctrines that advance one's preferred policy objectives in one context might do the opposite in another.

To develop these conclusions, I explore three sets of issues. I begin with and devote the bulk of the discussion to enforcement federalism — the most legally and politically contested domain of immigration federalism with the sharpest intergovernmental conflict. I establish the legal parameters of enforcement federalism and identify the institutional considerations that should inform any strategic thinking about federalism's future. I then briefly explore the role that federalism plays in immigrant integration. Finally, though the federal-local relationship has dominated immigration federalism, that should change. The future of immigration federalism is likely to be shaped significantly by another intergovernmental dynamic — the state-local relationship. I thus conclude by highlighting how tensions between states and their localities reflect and define the national debate over immigration.

4 The dichotomy is useful as a way of separating those policies that are specifically concerned with intergovernmental relations between Washington and the periphery (enforcement federalism) and those that arise largely through autonomous state action (immigrant integration), even as they might present preemption concerns or involve coordination with federal actors through grant programs and the like.

## **I. Enforcement Federalism: A Tale of Legal and Political Flux**

Formally speaking, immigration enforcement constitutes an exclusive federal domain. In contrast to the criminal justice system, states and localities do not operate parallel immigration laws, police, prosecutors, and judges. Congress defines the exclusive grounds for entry and removal, and the executive branch enforces those provisions through an extensive federal bureaucracy.

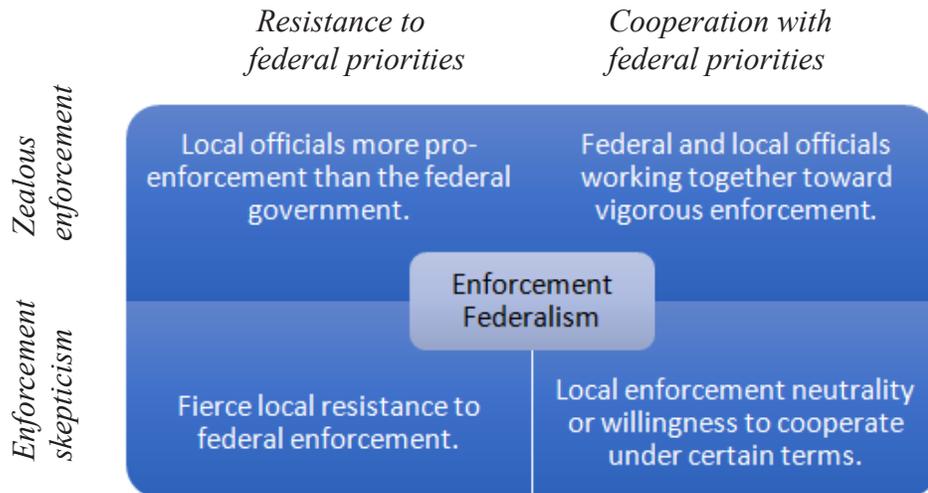
But federalism helps shape immigration enforcement policy for two primary reasons. First, criminal convictions under state law constitute many of the grounds of removal set out in the US Code. Accordingly, state criminal justice systems feed the immigration bureaucracy (Motomura 2011). Second, though the federal enforcement bureaucracy is vast, it has certain crucial limitations. It consists of few “beat cops” who interact on a regular basis with the regulated immigrant community, and its investigative resources tend to be used for large operations rather than ordinary policing. To identify, apprehend, and remove noncitizens, DHS depends on the local, county, and state police and corrections officials who come into contact with noncitizens through arrests and other means. Our immigration enforcement regime is thus best characterized as vertically integrated, even though immigration law itself is defined exclusively at the federal level (Rodriguez 2012).

Enforcement federalism, as I define it, is thus expressly about intergovernmental relations between the periphery and the center. The character and extent of the system’s integration has been in flux in recent years. The system is never fully coherent at any moment in time, because federalism’s many agents inevitably create intergovernmental friction and pockets of tension between Washington and the local. Federalism actually consists of myriad intergovernmental relations rather than a singular federal-local dynamic. Ideological and partisan considerations, as well as institutional factors, shape these many relations.

Ideologically speaking, the mayors and police of large, immigrant-heavy cities such as New York are more likely to end up in conflict with a Republican executive than with a Democratic one. Pro-enforcement states such as Arizona are more likely to challenge or resist the enforcement policy of a federal government in Democratic hands and embrace or re-enforce the policies of a Republican executive. But the logistics of federalism can also transcend or stymie these partisan alignments. The institutional interests of the center and periphery sometimes diverge, regardless of partisan alignment. Even as it sought to advance pro-immigration politics, for example, the Obama administration maintained a robust enforcement and removals agenda, precipitating local resistance from Democratic governors and mayors that complicated (but did not necessarily undermine) DHS enforcement. In addition, despite efforts by the Obama-era DHS to centralize enforcement policy, it could not eschew reliance on state and local cooperation altogether.

Because of this intergovernmental complexity, enforcement will entail a mix of centralization and diffusion, regardless of the ideology or party in charge of the federal government. Indeed, it would be difficult to identify an optimal level of centralization for enforcement policy in any objective sense. Instead, the extent of federal control is always likely to be contested and contingent.

The range of intergovernmental possibilities for enforcement policy can be conceptualized through a simple two-by-two matrix. The x-axis describes the orientation of local jurisdictions to the federal government, with the strategies of “resistance to federal priorities” on the one hand and “cooperation with federal priorities” on the other. The y-axis describes the inclinations of local jurisdictions toward immigration enforcement, with “enforcement skepticism” on the one hand and “zealous enforcement” on the other.



Each of the combinations thus identified reflects both ideological positions on immigration policy and power relationships between the periphery and the center. Different legal parameters and policy possibilities define each type of enforcement federalism, and each should be considered in turn. In so doing, it remains important to keep in mind that resistance and cooperation dynamics will operate under any given presidential administration, even as the locations of resistance and cooperation change. But because of institutional considerations, tensions can arise between the periphery and the center, even when they are ideologically aligned. To varying degrees, the federal government will use the legal tools at its disposal to bring local jurisdictions in line with its own policy preferences.

To see how these combinations might play out, I first examine how a pro-enforcement agenda at the local level might inform the federalism dynamic and then consider how local enforcement skepticism might take shape.

### *A. The Pro-Enforcement Agenda*

A pro-enforcement agenda at the local level can take a number of forms and be advanced by a range of actors, including state lawmakers, governors, mayors, and police chiefs. In the last decade, the pro-enforcement agenda has found its highest profile in state laws and local ordinances that would directly regulate employers, landlords, and even immigrants themselves, in service of eliminating unauthorized immigration and often as a rebuke to perceived federal under-enforcement. But the local pro-enforcement agenda can also be enacted through the day-to-day decisions of state, county, and local police departments working to accommodate federal enforcement requests.

Regardless of their orientation toward the federal government, enforcement enthusiasts

often employ rule of law rhetoric, defining unauthorized immigrants in particular as law breakers or public safety risks. This pursuit of enforcement might reflect recognition by local officials of the basic legitimacy of an immigration enforcement regime, which would make enforcement cooperation a matter of systemic integrity. But as some commentators have argued, the pro-enforcement agenda is also animated in some quarters by more populist and even malign motivations, such as resistance to the cultural change and racial diversity that immigration produces (Gulasekaram and Ramakrishnan 2013, 2130-36; Guttentag 2013).

***Federal local-conflict.*** Once the exemplar of immigration federalism, Arizona's Senate Bill 1070 (SB 1070) — the Support our Law Enforcement and Safe Neighborhoods Act — embodied a staunch local enforcement mentality cum critique of federal enforcement policy.<sup>5</sup> It created state-level penalties for violations of certain immigration laws, sanctioned unauthorized workers directly, and directed local police to inquire into immigration status.<sup>6</sup> Signed by a Republican governor during the Obama administration, the law crystallized a partisan split on immigration policy writ large, with Republicans at the local level calling for maximal enforcement in the face of a Democratic White House that sought legislative legalization and priorities-driven enforcement. SB 1070 represented a kind of culmination of widespread disquiet with the extent of federal enforcement.<sup>7</sup> Similar laws had been percolating around Republican statehouses and local city councils since at least 2006, drafted, sponsored, and advanced by networks of restrictionists and policy entrepreneurs who sought to push their agenda throughout the country. This timing complicates a strictly partisan story of immigration federalism, because it reflects the local, Republican divergence from even Bush-era enforcement policy.<sup>8</sup> But with SB 1070, Arizona refined the “attrition through enforcement” narrative, using the Obama administration as its perfect foil.

In 2012, the Obama administration answered Arizona's challenge in an unprecedented manner by filing a preemption lawsuit against Arizona and other states that had enacted

5 Ariz. S.B. 1070, 49th Leg., 2d Reg. Sess. (2010).

6 California's Proposition 187, enacted by voters in 1994, might also fit into this category, though it differs in important respects from SB 1070-style laws in ways that reflect how immigration federalism has evolved in the federal government's shadow. Proposition 187 sought to deny unauthorized immigrants a range of state and local services, including public schooling, but it did not purport to enlist local officials in direct immigration enforcement or create parallel immigration offenses to mirror federal law. The immigration restrictionism it embodied was also of a piece with the rise of anti-immigrant sentiment among the newly ascendant congressional Republicans of that era.

7 SB 1070 itself begins with a statement of intent declaring the state's “compelling interest in the cooperative enforcement of federal immigration laws,” as well as its intent to make “attrition through enforcement the public policy of all state and local agencies in Arizona.” The provisions of the Act were “intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States” (Ariz. S.B. 1070, 49th Leg., 2d Reg. Sess. (2010)). In public statements, lawmakers expressly called out the federal government's failure to enforce the INA as justification for their own laws. After signing SB 1070, for example, Governor Jan Brewer declared that it “represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix” (Archibold 2010).

8 As I explain in more detail below, the federal government's institutional imperatives, which include running an efficient and effective immigration bureaucracy, can lead to federal-local divergence, even when party lines would suggest otherwise. In the case of the Bush-era DHS, officials likely preferred something less than the sort of maximal, “attrition through enforcement” policy embodied in the predecessor laws to SB 1070 — a divergence re-enforced by the Bush administration's support of (ultimately failed) legislative

similar laws, complementing and overshadowing suits brought by private litigants and the American Civil Liberties Union (ACLU). The lawsuit served both political and bureaucratic purposes. It provided a means for the administration to retake control of the immigration policy debate, using legal tools with the potential to stop in their tracks the restrictionist forces operating through local and state governments. By offering a robust defense of federal supremacy in immigration enforcement, the government also reasserted the authority of DHS and Department of Justice (DOJ) to determine the scope of the national enforcement agenda and to control the extent of the enforcement assistance local officials could provide. To that end, during litigation, the government produced a guidance document defining the sorts of intergovernmental cooperation permitted by the INA (DHS 2012),<sup>9</sup> which expressly contemplates state and local assistance in federal enforcement. The memo listed a range of concrete examples that were notably far narrower and contained than what SB 1070 promised.<sup>10</sup> Even as this document highlighted the federal government's dependency on local police, in particular in pursuing its enforcement mission, it rejected autonomous state lawmaking as a viable strategy.

In *Arizona v. United States*, the Supreme Court issued its first opinion in 30 years on the subject of immigration federalism and substantially curtailed (without eliminating) autonomous local enforcement measures that diverged from the federal agenda. In striking down four of the five core provisions of SB 1070, the Court handed the federal government a resounding and arguably novel victory in two ways. First, in invalidating the provision that would have made it a state misdemeanor for an unauthorized immigrant to apply for work, the Court acknowledged that the state sought to advance one of the core objectives of federal law — the deterrence of unauthorized employment. It concluded, however, that federal law embodied a range of compromises among competing values, and the state's adoption of a different means of achieving the same objective therefore thwarted federal law.<sup>11</sup> Even more significant, the Court articulated a theory of preemption that could be understood as treating federal enforcement priorities, and not just congressional statutes, as federal law: “a principal feature of the removal system is the broad discretion exercised by immigration officials . . . [the Executive] must decide whether it makes sense to pursue removal at all.”<sup>12</sup> In other words, even if state enforcement provisions precisely mirror federal law, the latter would still be invalid because the federal executive necessarily uses its discretion in deciding to what extent to enforce the law.

*Arizona* effectively eliminated localities' ability to adopt an enforcement agenda expressly and clearly more robust than the federal government's agenda. The extent of enforcement federalism thus remains largely a function of federal policy. That said, the Court did leave in place SB 1070's section 2(B), which became known during the public debate as the “show me your papers” provision. It requires local police to inquire into the immigration

9 “In light of laws passed by several states addressing the involvement by state and local law enforcement officers in federal enforcement of immigration laws, DHS concluded that this guidance would be appropriate to set forth DHS's position on the proper role of state and local officers in this context” (DHS 2012).

10 Examples listed by DHS include participation in formal cooperative ventures, such as joint law enforcement task forces or deputization schemes where the federal government retains supervisory control, and lending direct assistance to federal officials by helping to execute warrants or providing equipment and facilities to federal officials (ibid., 13-15).

11 *Arizona*, 567 U.S. \_\_\_, at 403-07.

12 Id. at 2498-99.

status of those with whom they come into contact, and its ongoing validity leaves localities with a measure of independence.

At the time of the decision, many commentators framed the survival of section 2(B) as a hollow victory for the state, in large part because the Court framed its analysis skeptically and left open the possibility of as-applied challenges alleging civil rights violations (Martin 2012). The Court's decision also seemed to have punctured political momentum for local immigration policing, highlighting the truly political character of SB 1070. The distaste for the law held by some pragmatic local police officials loathe to entangle ordinary policing and immigration enforcement may also have deflated its promise as an enforcement tool (Rodriguez 2015, 17). For reasons I discuss in part III, however, this element of the Court's decision may have contemporary consequences by providing legal support for new state laws, recently passed in Texas, North Carolina, Georgia, and Alabama, that would require local compliance with federal immigration requests.

The legal lines the Court drew in *Arizona* certainly advanced constitutional doctrine after a decade of uncertainty. But the most important outcome of *Arizona v. United States* was arguably political. Even at the height of the conflict between Arizona and the federal government, the distance between the federal and state positions on enforcement policy was in large measure rhetorical rather than actual. Even a federal government with an immigration reform agenda, like the Obama administration, must run an enforcement bureaucracy and utilize the resources appropriated to it by Congress. The Obama administration's efforts to shape removals according to certain priorities appears to have borne fruit by shifting focus to high-value targets and away from the interior and to the border (Rosenblum and Meissner 2014, pp. 19-40). But the absolute numbers of removals remained high and the machinery of deportation in operation.

As with much of immigration federalism, pro-enforcement local resistance was as much about creating a rhetorical frame for the immigration debate — that immigration should be controlled and the law enforced to the extent possible — as about the merits of particular enforcement policies. The alternative federal narrative — of humane but consistent enforcement — set a far different agenda for the larger debate. Enforcement was to create confidence in the system in order to build political will for legislation that would include a legalization program and expand opportunities for lawful immigration. *Arizona v. United States* helped ensure that the federal narrative prevailed.

***Federal-local cooperation.*** As the most recent change in presidential administration has made vivid, the federal immigration narrative can change quickly. When the local desire to enforce the immigration laws meets an administration that actively seeks local cooperation as a means of multiplying its enforcement capacities and rhetoric, what does immigration federalism look like?

Even if *Arizona v. United States* has largely displaced autonomous state regulation, the domain of immigration federalism has not so much disappeared as shifted. Zealous localities, aligned with a pro-enforcement federal government, can in theory play a significant role in immigration enforcement. Even the Obama administration emphasized the importance of local cooperation in enforcement, in part because the INA itself expressly accepts it and

creates vehicles for it.<sup>13</sup> Most immigration legislation sponsored by Republicans in Congress in recent years seeks to solidify or augment the local role, and even the comprehensive reform bill passed by the Senate in 2013 with Democratic leadership would have involved border state governors in enforcement decision-making.<sup>14</sup>

The most obvious vehicle for this brand of immigration federalism is the so-called “287(g)” agreement, which Congress added to the INA in 1996.<sup>15</sup> Pursuant to this provision, state and local police can opt to become quasi-immigration agents by entering into agreements with the federal government to receive training and subsequently perform certain immigration functions, with ultimate supervision coming from local Immigration and Customs Enforcement (ICE) officials.<sup>16</sup> Whereas the Obama administration actively sought to curtail the agreements that existed when it came into office (ICE 2014), the Trump-led DHS has touted its interest in expanding the program, including by bringing back the so-called “task force” model jettisoned by its predecessor, which enables local police to perform immigration functions while engaged in policing on the streets and in the community.<sup>17</sup>

The political conditions today might seem ideal for an expansion of the program, and yet certain institutional considerations are likely to mean that this form of immigration federalism will remain marginal. Even during the Bush administration, when agreements began to proliferate in number, the program remained small. At its peak in 2011, only 72 agreements existed, despite the thousands of eligible state, local, and county law enforcement agencies. Simply put, there is very little to be gained for sheriffs and police chiefs in the 287(g) arrangement. Even in pro-enforcement states and localities, the perceived costs of intertwining policing with immigration enforcement — the impact on community trust and relations and the diversion of resources away from the core mission of police departments — will restrain voluntary participation. In addition, the concrete benefits to local jurisdictions are likely to be minimal; though some local agents may welcome the opportunity to participate in higher-prestige federal law enforcement functions, the program is unlikely to yield actual law enforcement or public safety gains. As one scholar has described the program, it amounts to “a solution in search of a problem” (Coonan 2013, 283).

The cooperative terrain over the last decade has shifted instead to the Secure Communities program, which was launched by the Bush administration, continued and then redesigned under another name by the Obama-led DHS, and then fully resurrected by Trump

13 8 U.S.C. §1373(b) (requiring the federal government to accept inquiries from state and local police into the immigration status in the custody of the latter).

14 See Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong., s. 4 (2013). The bill would have created a commission that included border state governors and given it the responsibility to certify that the border had been “secured” before a legalization program could have been fully implemented.

15 8 U.S.C. §1357(g).

16 Even without a formal 287(g) agreement, many localities enmesh themselves with the federal enforcement bureaucracy by, for example, entering into contracts with the federal government to permit the latter to use local jails as detention facilities.

17 A recent memorandum from the secretary of homeland security observes: “[t]he INA 287(g) program has been a highly successful force multiplier . . . To the greatest extent practicable, the Director of ICE and Commissioner of CBP shall expand the 287(g) program to include all qualified law enforcement agencies that request to participate” (Kelly 2017).

administration officials. Its reach far exceeds the 287(g) program, because it relies on technology to harness information in the hands of local police regarding potentially removable noncitizens, rather than on local personnel themselves, and since 2013 it has been operational across the country.

In the main, and across all three administrations, this form of immigration federalism has had two key components, one of which leaves no genuine decision-making authority with localities and the other of which has become a flashpoint of federalism conflict. The intergovernmental dynamic begins with information sharing. State and local police routinely and for criminal justice purposes share their arrest data with the Federal Bureau of Investigation (FBI). As required by federal statute, the FBI then shares that information with its sister agency, DHS. DHS can then determine if a person in state or local custody is removable by comparing the arrest data to DHS's own databases. Obama-era efforts to discontinue Secure Communities in 2014 notwithstanding, this feature has remained in place continuously since 2008.

Some localities have regarded the FBI's sharing of their data with DHS as conscription into federal service raising constitutional concerns, and they have called on DHS to permit jurisdictions to opt out of the program (Kalhan 2013, 1131). But as noted above, federal law directs the president to establish an interoperable system that facilitates data sharing across law enforcement agencies,<sup>18</sup> and the law thus requires the FBI to share its data with DHS given appropriate technological capacities. More to the point, because localities voluntarily share their information with the federal government (i.e., the FBI), the downstream use of the data by the federal government does not amount to commandeering in the constitutional sense, because the federal government has not coerced localities into sharing their data in the first instance. This information-sharing component of enforcement policy ultimately reflects an end-run around federalism to a certain extent, because it occurs automatically and therefore eschews dependence on state and local officials themselves to support federal enforcement policy. But that fact has not quieted the federalism debate, largely because of what happens next.

The federalism-relevant component of Secure Communities arises with the choice the information sharing creates for DHS — what, precisely, should DHS do with the knowledge that a potentially removable noncitizen is in local custody? Both DHS and localities have discretion over the answer. The traditional answer under Secure Communities has been for the federal government to issue a detainer request, asking localities to hold the person in question for up to 48 hours, until ICE officials can take custody and determine whether and how to start the federal deportation process. Despite some confusion among localities that has since been clarified by several courts,<sup>19</sup> detainers are voluntary requests, not legal

18 8 U.S.C. § 1722 (“[T]he President shall develop and implement an interoperable electronic data system to provide current and immediate access to information in databases of Federal law enforcement agencies and the intelligence community that is relevant to determine whether to issue a visa or to determine the admissibility or deportability of an alien.”).

19 See, for example, *Galarza v. Szalczyk*, 745 F.3d 634 (3rd Cir. 2014).

commands.<sup>20</sup> For DHS to demand compliance would cross over into unconstitutional commandeering by using local institutions and personnel to enforce federal law without the consent of the state entities.<sup>21</sup>

As discussed in more detail below, these circumstances created by existing federalism doctrine have made detainer policy an important point of controversy for intergovernmental relations when the periphery and the center differ in their objectives. At least for the zealous jurisdictions considered here, honoring detainer requests seems like an easy and obvious way to advance immigration enforcement.<sup>22</sup> And yet, even for pro-enforcement jurisdictions, external constraints may limit the extent of cooperation. A growing number of lower courts have held that local detainer authority is limited by the Fourth Amendment's prohibition on search and seizure and the requirement that police have probable cause before making an arrest or holding someone in custody beyond their state-law release date.<sup>23</sup> As this doctrine develops, even zealous enforcement jurisdictions may eschew certain detainer requests for fear of incurring constitutional liability.

A zealous enforcement jurisdiction might also adopt any number of complementary enforcement measures that have not been preempted by *Arizona v. United States*. The Immigrant Policy Project of the National Conference of State Legislators (NCSL) documents some examples,<sup>24</sup> including laws that require government contractors and subcontractors to use E-Verify — an electronic database that checks whether a potential employee is authorized to work in the United States — and laws that prohibit the use of consular or embassy documents to determine identity or residence for law enforcement purposes.<sup>25</sup> In a counter-precedent to *Arizona*, too, the Supreme Court in 2011 upheld an Arizona law that threatened to rescind the business licenses of companies that did not comply with federal prohibitions on the hiring of unauthorized workers, finding that the law fell within an express clause of the INA permitting certain types of state support of the

20 8 C.F.R. § 287.7(a).

21 *Printz v. United States*, 521 U.S. 898 (1994) (holding that federal government could not require local law enforcement to assist in the enforcement of federal gun control statute in light of the Tenth Amendment's protection of state sovereignty).

22 Other means of facilitating federal enforcement have developed over the years. Perhaps the most important intergovernmental program outside of Secure Communities has been the Criminal Alien Program, through which immigration officials operate inside corrections facilities in order to coordinate and hasten the deportation proceedings of noncitizens convicted of state law crimes (Schuck 2013, 612).

23 See, e.g., *Morales v. Chadbourne*, 793 F.3d 208, 215 (1st Cir. 2015); *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317, 2014 WL 1414305, at \*10 (D. Or. Apr. 11, 2014).

24 According to NCSL (2015, 1; 2016, 1), state legislatures enacted 185 immigration-related law in 2013, 171 in 2014, and 216 in 2015. NCSL defines immigration-related law broadly, and the measures it documents cut across numerous regulatory arenas, including law enforcement, education, public benefits, and voting. Many of the measures promote immigrant integration or are otherwise designed to protect the interests of immigrants, including the unauthorized.

25 See, for example, North Carolina House Bill 318, amending the state's E-Verify requirement to make it stricter, and prohibiting the use of consular documents (NCSL 2016).

employer sanctions regime.<sup>26</sup> Few if any states appear to have followed Arizona's lead in pursuing this particular enforcement strategy, but it remains lawful.

The utility or success of these complementary measures may be largely independent of whether the local and federal objectives align; local jurisdictions can adopt them regardless of the identity of the presidential administration. In theory, having a zealous enforcement regime in Washington could either propel or obviate the enactment of such laws at the local level. Vigorous enforcement rhetoric from the federal government, coupled with the opportunity to informally cooperate with federal officials, might satisfy the local enforcement impulse. Or, the presence of a like-minded, pro-enforcement regime in Washington could stir local interest, generated either through the work of the interest group or intraparty networks that have been pushing pro-enforcement policy at all levels of government, or as the result of energized public opinion on the immigration question.

### *B. Enforcement Skepticism*

Enforcement skepticism abounds in our federal system. Few, if any, localities reject immigration enforcement of all kinds (in contrast to some immigrants' rights advocates). But local skepticism embodies an overarching concern that immigration enforcement will have a negative impact on local communities — a concern typically buttressed by a commitment to immigrant integration regardless of lawful status. This orientation is common among political officials and bureaucrats in immigrant-heavy cities such as New York, Chicago, Houston, and San Francisco, as well as in Democratic states with large immigrant populations, such as California and Illinois. But small towns such as New Haven, Connecticut, have also been the sites of some of the fiercest resistance to federal enforcement tactics, as well as pro-immigrant politics, and progressive cities within conservative states also have adopted the skeptic's posture.

The central federalism question these skeptical jurisdictions face is whether and to what extent to cooperate with the federal government by honoring detainer requests. By one estimate, over 300 jurisdictions have adopted some form of noncooperation strategy<sup>27</sup> (Henderson 2014). Sometimes called TRUST Acts, or colloquially referred to as sanctuary

26 *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011). The Arizona law at issue in this case survived preemption largely because of a savings clause in the INA. Even though Congress preempted all state laws that sanctioned employers for hiring unauthorized workers in 1986, when it adopted a federal employer sanctions regime, it expressly provided that states could continue to use licensing and other similar laws to regulate. The Arizona law fell squarely within the text of the savings clause, and so claims that the law otherwise undermined the federal scheme or that Congress intended the law to have a narrower reach did not persuade the Court. The Court also held that Arizona's E-Verify mandate did not conflict with federal law, *id.* at 608, confirming that states retained authority to adopt measures of this kind to deter the hiring of unauthorized workers.

27 The anti-detainer policy is the most recent instantiation of the noncooperation impulse. In the 1990s, cities such as New York and Los Angeles adopted policies that prohibited local officials from communicating immigration status information to the federal government. Congress eventually preempted these laws in 1996, and the US Court of Appeals for the Second Circuit rejected a claim brought by then-Mayor Rudolph Giuliani that the 1996 law violated the Tenth Amendment by commandeering local governments as immigration enforcers. See *New York v. United States*, 169 F.3d 29 (2nd Cir. 1999).

laws,<sup>28</sup> these measures delineate under what circumstances states and localities will honor detainer requests. Though few if any jurisdictions categorically rule out cooperation, the adoption of some form of noncooperation law underscores that localities retain the discretion to decide what circumstances warrant enforcement.

These policies have both pragmatic and symbolic dimensions. They reflect concern that conflating policing and immigration enforcement will undermine trust in public officials and police and could even undermine public safety.<sup>29</sup> But they also embody a political position on the immigration debate writ large — that immigrants or some subset of immigrants (the unauthorized without a criminal record, for example) ought not be deported. With respect to the former, it remains empirically contestable whether the noncooperation laws actually promote public safety. And whether they result in fewer deportations also remains to be meaningfully established.

But whether noncooperation laws can actually claim their supposed pragmatic benefits, they do succeed in joining a political fight. Localities that have resisted federal enforcement in this way have decided for themselves whether to be complicit in federal immigration enforcement. The noncooperation movement as a whole offers an alternative vision of immigrants' place in the community to the exclusionist narrative advanced by zealous enforcement jurisdictions. Indeed, the TRUST Acts and other similar laws reflect the influence of a widespread immigrants' rights movement that has sought to use the federal structure to its advantage by creating alternative legal regimes (Rodriguez 2015, 12-15; Vock 2013).

***Federal-local polarization.*** In 2017, a highly polarized version of the intergovernmental dynamic created by local enforcement skepticism dominates federalism debates. On January 25, 2017, President Trump issued an executive order (EO) laying out the administration's interior enforcement policies.<sup>30</sup> Section 9 of the order targets so-called sanctuary jurisdictions, threatening to rescind federal funds for jurisdictions that refuse to comply with 8 U.S.C. §1373, a provision of the INA designed to facilitate local cooperation with federal law. In order to prevent local officials from shielding any immigration status information in their possession from federal enforcement officials, Congress enacted §1373, declaring it unlawful for states and their subdivisions to prohibit their personnel from communicating immigration information to the federal government. In addition to targeting noncompliance with §1373, the executive order also threatens “appropriate enforcement action” against any entity that “has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”<sup>31</sup> In response to the EO, a handful of localities around the country have taken the federal government to court, leading at

28 The sanctuary designation harkens back to a movement of the 1980s of churches providing safe haven to unauthorized immigrants cum refugees fleeing the civil wars of Central America.

29 One comprehensive academic study finds that Secure Communities, which entails the detainers some localities resist for public safety reasons, has not reduced police ability to resolve crimes (Cox and Miles 2017), though the effects detainers might have on trust and the psychic burdens they impose on immigrants may be hard to measure.

30 Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

31 Id.

least one district court to cast constitutional doubt on the order, despite acknowledging the federal government's authority to take the steps it outlined in the course of litigation.<sup>32</sup>

In this sort of polarized context, the federalism question becomes twofold: What can the federal government do to reign in resistant localities? And what are the legal foundations for ongoing local resistance? Any legal analysis will depend on the precise reach of the federal and local actions at issue. But a few general principles provide a framework that can be applied to federal-local tensions of this sort.

Federal power is simultaneously limited and broad. On the first score, the anti-commandeering doctrine interprets the Tenth Amendment and the federalist structure of the Constitution to prohibit the federal government from requiring states and their subdivisions to act as federal agents in the implementation of federal law.<sup>33</sup> Any federal law or interpretation of federal law by the executive that would treat detainer requests as mandatory fits comfortably within the scope of commandeering, as it would reflect the expectation that local police and their facilities and resources serve as agents of immigration enforcement, whether local officials consent or not.<sup>34</sup>

But the federal government can accomplish a great deal through its use of the spending power that it could not otherwise achieve through direct regulation. Congress can create incentives for localities to serve federal objectives by conditioning federal funds on compliance with certain terms. This power is not unlimited, and the Supreme Court has recently reinvigorated what had come to be seen as a perfunctory set of doctrinal limits on federal power.<sup>35</sup> In the interests of federalism, the exercise of the spending power must conform to certain criteria: (1) the condition must be unambiguous and imposed before funds have been distributed; (2) any condition must be germane to the federal program

32 *County of Santa Clara v. Trump*, \_\_ F. Supp. 3d \_\_, 2017 WL 1459081 (N.D. Cal. 2017). The decision is at once narrow and broad. The government's litigating position before the district court was that section 9 of the EO did nothing more than direct the attorney general to rescind grant monies to jurisdictions that failed to comply with the statute, where the grants in question already required, as a term of the grant, compliance with the federal statute. The court acknowledged the federal government's authority to take away funds that already had been made contingent on compliance with §1373, thus giving the government what it purported to want. And yet, the court went to great lengths to reject the government's construction of the order, concluding that it would have rendered the order toothless. Instead, the court read the EO to potentially reach a much larger pool of funds for a wider range of local actions and then proceeded to conclude that its reading raised serious constitutional problems under federalism and spending clause doctrine.

33 *New York v. United States*, 505 U.S. 144 (1992) (striking down as unconstitutional commandeering a federal statute that required states that did not comply with federal scheme to dispose of radioactive waste to take title to the waste); *Printz v. United States*, 521 U.S. 898 (1994) (applying commandeering doctrine to state executive officials).

34 A 2016 report by the inspector general of the DOJ offers a potentially expansive but also likely erroneous interpretation of §1373 — that the statute could encompass policies that prohibit honoring civil detainer requests, even if they do not prohibit information sharing with the federal government, because they affect ICE's interaction with local officials. This interpretation strays far beyond the text of the actual statutory provision. Because reading the law to require compliance with civil detainer requests would raise serious constitutional concerns under the commandeering doctrine, there is little if any justification for reading the law so atextually. See Horowitz (2016).

35 *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (striking down the structure of the Affordable Care Act's expansion of Medicaid because it made the entirety of the states' Medicaid funding contingent on expanding the program according to the terms of the law).

pursuant to which the funds are being appropriated; and (3) the financial inducement cannot be overly coercive.

Each of these criteria leaves considerable room for interpretation, particularly the question of what amounts to coercion. But especially since the Supreme Court's reliance on the spending clause to invalidate the Medicaid expansion component of the Affordable Care Act, courts have demonstrated a willingness to test the federal government's positions. In the case of the Trump EO, the federal government offered an interpretation of the order that conformed to existing doctrine — that it directed the attorney general to rescind a small number of federal grants already clearly conditioned on compliance with §1373 from those grant recipients that willfully violated the statute. But the district court rejected this reading of the EO, finding instead that it could be read to reach all federal funds, and not just law enforcement funds that might have some nexus to immigration enforcement and §1373. Moreover, the order was not clear about what constituted a violation of its conditions.

Beyond the particularities of the January Trump EO, at least three important conclusions about federal power over localities emerge from the case. First, the district court emphasized that the spending power belongs to Congress and not the executive, which by the court's lights meant that only Congress could place conditions on federal grants — a principle that would significantly limit a new administration from unilaterally using federal funds as incentives. This conclusion must be complemented with the observations that Congress can delegate to the executive the authority to set terms for its own grant programs. Requiring compliance with federal law, whatever one thinks of the law, seems straightforwardly legitimate.

Second, these observations about Congress's spending authority open up a whole range of possibilities for a federal government seeking to tamp down local enforcement resistance. It is unlikely a court would find a constitutional problem with a statute that conditioned relevant funds not only on compliance with §1373, but also with detainer requests themselves, unless, of course, either of those conditions is itself unconstitutional (on which more below). In other words, with a willing Congress, the federal government could really test how far localities' commitment to noncooperation runs.<sup>36</sup>

And third, the legality and concrete effects of the executive order may ultimately be of secondary importance to the larger political purpose of the EO and other administration actions like it. The government's own interest in §1373 seems somewhat modest. Some anecdotal evidence exists of local government personnel taking it upon themselves to inform the federal government of the immigration status of people with whom they had come into contact — the acts protected by §1373. But there is no evidence or even really strong reason to believe that government personnel would be motivated or able to report immigration status on a large enough scale to make any meaningful difference in federal

36 As soon as the president announced his executive order, Miami-Dade County rescinded its noncooperation law, citing its desire to maintain its federal funding. Leaving aside the likelihood that the county misunderstood the legal effect of the order and acted hastily, its actions may well reveal that it and perhaps other jurisdictions only tepidly support the noncooperation movement.

enforcement efforts.<sup>37</sup> This actuality also re-enforces that, for enforcement skeptics at the local level, very little is actually at stake as a practical matter when it comes to §1373.

The stakes in the debate over §1373, then, are largely political, expressive, and rhetorical. The Trump EO amounts to the use of the bully pulpit to persuade or shame localities into joining the enforcement bandwagon, or to otherwise build political momentum for a robust and proud enforcement strategy regardless of local opposition. And the local resistance to the order, including the decision to file suit even before the government had taken any action to rescind funds, fits within a larger movement to create a locally based counternarrative to immigrants as public safety risks who ought to be removed to promote the rule of law.

To be sure, to sideline the spending clause as a source of federal authority, out-and-out resistance by enforcement skeptics could take other forms, too. Enforcement skeptics could challenge the very constitutionality of §1373, as Santa Clara County did in its complaint against the Trump EO, declaring that it itself violated the federal statute. But in addition to there being little to gain from ridding the Code of §1373, invalidating §1373 would require expanding the commandeering doctrine to cover at least some information sharing. A plausible claim could be made that §1373 prevents state and local governments, as well as their sub-entities such as police departments, from supervising their employees in order to serve federal immigration purposes — form of commandeering. But drawing the doctrine this broadly could have significant and unpredictable downstream consequences for federal law and policy. In other words, enforcement skeptics should be careful of expanding an already controversial tenant of federalism that limits federal power in a context where the local position happens to match their ideological preferences, because that match may not always exist. Indeed, cause-oriented mobilization of structural constitutional doctrines always present this risk and therefore should be handled with caution and humility.

Without relying on federalism doctrine, enforcement skeptics who seek to end local cooperation with federal enforcement altogether could also pursue Fourth Amendment litigation. As noted, a number of courts have found that localities lacked authority to comply with particular detainers, on the ground that local police had no probable cause to hold the individual in question. This conclusion reflects both the general requirements of the Fourth Amendment, as well as the principle that local jurisdictions do not have independent authority to enforce immigration law. As instances of courts finding Fourth Amendment violations in as-applied cases accumulate, the threat of constitutional liability by itself may lead jurisdictions to eschew ever-larger numbers of detainer requests. Not only could this approach significantly constrain the federal government's reliance on detainers, it also could significantly curtail the federal government of the spending clause as means of instigating compliance with detainers, since conditions on grants may not themselves be violations of the law.

***Cautious intergovernmental compromise.*** Even when enforcement skeptics are in office at both the local and the federal level, intergovernmental tensions will persist. Even though the Obama administration advocated legislation that would have expanded immigration in myriad ways, and used its administrative authorities to grant large-scale enforcement

<sup>37</sup> The central and most fruitful local avenue for federal enforcement comes from the arrest data the federal government acquires through Secure Communities, making detainer policy the far more consequential site of local enforcement and resistance.

relief, the local noncooperation movement flowered among Democratic jurisdictions during the same years. The likes of Chicago and New York, despite being crucial Democratic strongholds, presented bureaucratic headaches for the Obama-era DHS.

This tension among political allies stems to a significant degree from institutional factors. The federal government simply cannot abandon immigration enforcement altogether. By charging it with the enforcement of the INA, Congress has delegated responsibility to enforce the nation's immigration laws and appropriated significant sums of money to effectuate that responsibility. By law and custom, the administration cannot fail to honor either form of delegation, even as it may have considerable authority to make discretionary judgments about the scope and nature of enforcement policy (Cox and Rodriguez 2015, 142-65, 210-14). By contrast, local jurisdictions need not have anything to do with immigration law or enforcement to satisfy their governmental responsibilities. Immigration enforcement at the very least can be a distraction from the management of local public welfare, if not an outright impediment to serving the local interest, for some of the very reasons identified by the noncooperation movement.

The notion that a skeptical local jurisdiction would cooperate with federal enforcement therefore might seem like an impossibility — a null set. But enforcement cooperation extends well beyond local assistance of federal deportation policy and can include joint efforts that even enforcement skeptics could support, such as cooperation to target smuggling rings (Meissner and Kerwin 2009, 48-49, 54). And with respect to deportation policy, there could be pragmatic reasons for local skeptics to reach an enforcement *détente* with the federal government, even though localities can more comfortably and visibly reject immigration enforcement than the federal government (Rodriguez 2015, 15-16, 20). Indeed, few if any of the anti-detainer policies adopted at the local level eschew detainer requests altogether. Instead, localities have defined for themselves the sorts of detainers they will honor, usually recognizing the prudence of responding to detainers for people who have committed serious or violent crimes. This kind of partial cooperation reflects recognition at the local level of a potential public safety dimension to immigration enforcement. But perhaps more important, it demonstrates the importance of maintaining functional, cordial intergovernmental relations, given the value of federal-local cooperation not only with respect to law enforcement writ large, but also across other domains.

Embodying this pragmatic tendency, some jurisdictions have begun developing model detainer ordinances. In particular, to address potential Fourth Amendment liability, jurisdictions might opt to decline detainers that are not accompanied by a warrant or some indication of probable cause that the person in custody is deportable. As many have done, localities could exercise their own judgment concerning the types of underlying crimes that warrant the initiation of removal proceedings, declining detainer requests based only on immigration status violations. To complement this prioritization, localities might also enumerate for themselves the positive equities, such as community or family ties, that would warrant declining a detainer request in individual circumstances. These sorts of judgments — of when removal is appropriate — might seem like precisely the sorts of determinations that ought to be left to the federal government. But because they fundamentally implicate the local government's relationship to its own community, they are judgments that local officials are well placed, perhaps even better-placed, to make, as well.

When enforcement skeptics populate both the local level and the political positions of the federal administration, noncooperation laws that embody pragmatic compromise arguably represent a form of enforcement collaboration — a way of recognizing the inevitability of some form of deportation regime while working however awkwardly toward ensuring its basic fairness. Put another way, otherwise skeptical local jurisdictions might better justify calibrated cooperation when the political officials in charge of the enforcement regime self-consciously define their policies to achieve humane and targeted enforcement. This uneasy but not necessarily oppositional relationship arguably presents the best state of affairs from a systemic perspective, if we accept a baseline legitimacy to immigration enforcement and acknowledge the integration of the enforcement regime, because it helps to keep the federal government accountable.

The Obama administration's now superseded Priorities Enforcement Program (PEP) reflects this sort of equilibrium. In November 2014, then-DHS Secretary Jeh Johnson announced PEP as a rebranding and reformulation of Secure Communities, in response to pressure from enforcement-skeptical jurisdictions. "Governors, mayors, and state and local law enforcement officials around the country," he noted, "have increasingly refused to cooperate with [Secure Communities] . . . The overarching goal of Secure Communities remains in my view a valid and important law enforcement objective, but a fresh start and a new program are necessary" (Johnson 2014). The program would have maintained the data-sharing feature of Secure Communities, which is required by statute, but it would have changed the DHS follow-up strategy. Instead of issuing detainer requests, ICE simply would have notified local officials if a potentially removable person was in their custody, thus re-enforcing local discretion over how to proceed.

Beyond developing a cooperative but wary relationship with a federal enforcement apparatus whose policymakers might share certain skeptical objectives, resistant localities could take other steps to help disentangle local law enforcement from immigration enforcement without engaging in outright defiance. As noted at the outset, state and local criminal justice systems feed the immigration bureaucracy not only through the decisions of police, but also through the charging decisions made by prosecutors. Because criminal convictions under state law become the basis for removal in many cases, state and local prosecutors exert tremendous indirect effect on enforcement policy. Developing charging practices with immigration consequences in mind thus could reduce the number of noncitizens in the potential enforcement pool. The Maryland State's Attorney's Office, for example, recently has instructed prosecutors to consider the immigration consequences for potential defendants, victims, and witnesses of charging minor, nonviolent crimes (Fenton 2017). Of course, when determining prosecutorial priorities within the criminal justice context, the immigration consequences of a conviction can represent but one factor; it hardly seems prudent to create a system where immigration consequences drive criminal justice policy, and backlash by the public and lawmakers against broad policies of this sort is likely to be swift. But as an equity, those consequences can quite reasonably be taken into account. It would be perfectly appropriate for state and local prosecutors' offices, as a matter of policy, to include immigration consequences as a relevant general factor in guiding discretionary judgments (Motomura 2011).

The varieties of enforcement federalism thus look something like the following:



Both enforcement enthusiasts and enforcement skeptics at the local level will be able to advance their agendas regardless of who controls the federal enforcement bureaucracy. In the former case, localities can adopt laws in aid of enforcement that have escaped preemption. The skeptics can take advantage of conservative federalism doctrines that prevent the federal government from coopting local authorities to limit their own participation in enforcement, and they can manage their own criminal justice systems with a view to how they feed into the federal immigration system.

But the scope and tenor of immigration federalism will always remain a function of intergovernmental dynamics. Those dynamics will be shaped by a set of legal relationships and constitutional doctrines that the federal courts have done much to refine in recent years, precisely because immigration federalism has filled judicial dockets. Perhaps more important, the nature of the federal-local relationship will vary in response to shifts in political control at each level of government, even as it embodies persistent institutional tensions. And in mediating this interplay of politics and bureaucracy, the architects of any enforcement federalism strategy will have to grapple with the central question of the place of immigrants in our society.

## II. Integration Federalism: Political Will and Bureaucratic Capacity

Despite the fact that immigration law and the immigration bureaucracy emanate from and are controlled by the federal government, Washington historically has played a very limited role in the formulation and implementation of integration policy. As a 2011 Government Accountability Office report notes, “no single federal entity has been designated to lead the creation, implementation, and coordination of a national immigrant integration capability” (GAO 2011, 25). Instead, immigrant integration largely has been a private sector affair, with state and local institutions playing crucial roles as well in devising affirmative integration

policies. In the integration and acculturation of immigrant children, for example, the local public schools play the single most important and comprehensive role. And a variety of state services and public-private partnerships provide language instruction and civics education, job training, and assistance with public benefits. Many of the federal integration programs that do exist, primarily to aid in the resettlement of refugees, involve contracts with NGOs to provide basic services, or are otherwise run through state agencies.

As with enforcement federalism, integration federalism captures the ideological polarization of the country over the place of immigrants in American communities and their role in the nation's future. This divergence has long-standing historical roots. In the antebellum period, for example, states in the West and South of the country adopted policies to attract immigrants in order literally to build their communities. Eastern seaboard states, by contrast, sought to drive immigrants away because they perceived them as public burdens and sources of crime (Salyer 1995, 4-5). In the years leading up to the Chinese Exclusion Acts and the decades that followed, many states, including California, adopted laws restricting immigrants' ability to earn a livelihood or take advantage of local public resources. Today, many states and localities seek to ground and improve the lives of immigrants, often regardless of their legal status. These local integration measures aim to secure immigrants' long-term political incorporation and economic and financial stability, as well as their cultural affiliation and sense of social solidarity with those who make up the communities around them. Other jurisdictions remain agnostic or indifferent to the incorporation enterprise. Still others actively seek to drive immigrants away — to promote their attrition — primarily with the sort of enforcement federalism above, but also by closing many local institutions and benefits to immigrant participation (Suro 2015, 1-25).

A thorough accounting of federalism's role in shaping the possibilities for immigrant integration is well beyond the scope of this paper. We would need to begin by defining the thorny concepts of integration and acculturation and articulating a set of markers to determine success. From there, a discussion of the particular policies and institutional commitments that facilitate integration could begin. The possibilities for affirmative integration strategies in today's context, as well as the particular role the federal government might play, have been covered expertly and comprehensively elsewhere in this series (de Graauw and Bloemraad 2017, 105-23).

But the historical and contemporary relevance of federalism to the project of immigrant integration, as well as the potential effects of the enforcement federalism discussed in Parts I and III on the prospects of immigrant integration, warrant making three conceptual points about federalism and integration. First, the problem of unauthorized immigration looms large in integration policy, and only Congress can decisively address the matter. The absence of legal status, in the main, deprives noncitizens of the capacity to work lawfully and therefore of adequate labor and employment protections. It also creates an inherent instability in immigrants' lives (for fear of removal) that diminishes the incentives and opportunities for making investments that would enable long-term settlement, such as language acquisition, civic knowledge, and home ownership. And it can heighten the psychological and financial burdens on mixed-status families. To be sure, unauthorized immigrants have become deeply embedded in their communities, and those who arrived as youth are functionally American — the very justifications for legislative legalization

and administrative relief. The creation by the executive branch of discretionary statuses, including the large-scale deferred action granted by the Obama administration, have helped ameliorate the disabilities associated with lack of status. But the 2016 election underscores the fragility and inadequacy of discretionary statuses, at least as mechanisms of stabilizing the lives of unauthorized immigrants and those with whom they associate. The lack of legal status will always be a drag on social status.

A great deal of contemporary immigration federalism, both of the enforcement and integration varieties, consists of a debate about the meaning of unauthorized status and its relevance to community participation (Rodriguez 2008, 581-600). Like past federal administrations, some states and localities have sought to ameliorate the lack of status with the regulatory authorities at their disposal. In tandem with their enforcement skepticism, cities and states such as New York, Chicago, and California and its localities, have attempted to stabilize the status of unauthorized immigrants, including through the extension of benefits and legal protections, such as in-state tuition, drivers' licenses or municipal identification cards, and labor and employment guarantees (Ramakrishnan 2015, 2-6). Enforcement enthusiasts have done the same, not only through indifference to immigrant integration, but also through measures as draconian as prohibiting landlords from renting to unauthorized immigrants<sup>38</sup> (Suro 2015, 9-17).

Of course, as with any issue, the approach to unauthorized immigration does not track partisan lines neatly. Some indifferent or even hostile jurisdictions have adopted in-state tuition laws, for example, or a variety of affirmative integration measures (Rodriguez 2008, 579-80, 585-86). As discussed in more detail below, within hostile states, progressive cities seek to protect and incorporate the unauthorized in some ways. And even in states with historical commitments to integration, the political will behind integration strategies can wane in response to politics. In Illinois, for example, the current Republican governor, upon taking office, proposed to slash spending for affirmative integration programs and rescinded two executive orders issued by his predecessor, one of which prohibited state law enforcement from stopping individuals on the basis of immigration or citizenship status, and the other aimed to enable residents of the state to benefit from Deferred Action for Childhood Arrivals — even as he proclaimed support for immigration reform (Tareen 2015). But this variation is simply further evidence of the churning federalism will produce until the federal government resolves the status question.

A legal framework that draws from similar resources as the one governing enforcement federalism also structures this domain. Anti-integration measures can run afoul of federal policy and therefore be preempted.<sup>39</sup> And the Equal Protection Clause provides a strong

38 The federal courts of appeals have taken differing positions on whether the INA preempts these landlord ordinances. Compare *Villas at Parkside v. Farmers Branch*, 688 F.3d 801 (5th Cir. 2012) (concluding that local landlord ordinances constitute de facto attempts to regulate immigration and are thus preempted), with *Keller v. Fremont*, 719 F.3d 931 (8th Cir. 2013) (concluding that the connection between landlord laws and immigration regulation was too attenuated to justify preemption). The Supreme Court has declined to intervene.

39 See *Villas at Parkside*, 688 F.3d 801; *Keller*, 719 F.3d 931.; *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (issuing preliminary injunction against Arizona law that would have denied drivers' licenses to recipients of Deferred Action for Childhood Arrivals, on the ground that plaintiffs were likely to succeed with their claim that the state law violated the Equal Protection Clause).

bulwark for legal immigrants against state discrimination and a potentially available but still weak and uncertain tool for unauthorized immigrants. But from the point of view of integration policy, this framework simply manages the political contestation around immigrants' social place and restrains states and localities from engaging in egregious forms of discrimination. It cannot cure the ultimate instability of unlawful status. The persistence and irresolution of the federalism debates over the meaning of unauthorized status point to the need for federal intervention, not only if our goal is to anchor and improve the lives of unauthorized immigrants not only to provide stability, but also in the interest of shifting integration federalism — whether of the enforcement or integration variety — to more constructive and less legally contested terrain.

Second, the need for federal leadership on the status question does not mean that the work of integration should pass to the federal government. Instead, integration policy writ large would benefit from a well-conceived, intergovernmental strategy that plays to the institutional competencies of the different levels of government. The federal government's primary role, as the government least connected to the integrative institutions described above, should be to provide a strong integration scaffolding, which would include sharing information, coordinating best practices, and providing robust resource support. Indeed, were Congress to adopt a legalization program to address the status question, its implementation would necessarily depend on state and local institutions working with the private and nonprofit sector, simply because federal capacity does not exist to provide outreach to eligible immigrants, protect them from fraudulent service providers, assemble the requisite documentation to support a claim of legalization, or provide the English-language and civics instruction that likely would be necessary to qualifying for legalization (Pew Charitable Trusts 2014, 2-3).

As with the federalization of any issue, the risks of shifting the weight of integration policy to the federal government would be two-fold. Centralization can have a leveling effect, which in the integration context could mean providing less support and creative problem solving than would come from the most dynamic states and localities with the deepest experience integrating immigrants and their children. And, robust centralization could also threaten to turn integration policy into a homogenizing and ideological project, as opposed to a quotidian, practical one. Over-federalization could create pressure on lawmakers or officials to define a concept of Americanness to guide integration, which if done without nuance or openness, could stifle policy flexibility, such as by prohibiting or discouraging native language use in language education.

Of course, some states will be well suited to the role of integration innovation — California and New York leap immediately to mind. But other parts of the country will have neither the political will nor the bureaucratic capacities required to develop true integration policies, thus leaving integration to the vagaries of social life, or the private sector, which may or may not be robust in any given jurisdiction. And states, including today's integration paragon

of California,<sup>40</sup> might themselves succumb to the over-ideologization of integration. But this possibility of variation — of highs and lows resulting from political diversity and different historical trajectories — is precisely why the federal government’s role should be as a facilitator rather than as the primary player. The federal government can coordinate a national integration strategy that nonetheless permits, prioritizes, and harnesses local and private sector leadership.

Third, the value of a disaggregated integration strategy should not be understood as obviating the importance of a national concept of citizenship supported by federal legal authority. The promise of state and local strategies for integration, particularly because of local progressive resistance to enforcement, has given rise to an optimistic but romantic notion of local citizenship (Ramakrishnan and Colbern 2015, 10-13); (Spiro 2009, 568-71). The concept is valuable as far as it goes, which is not as a substitute for national citizenship or belonging, but as a bridge to it. The practices of citizenship are certainly grounded at the local level, as the preceding discussion of integration policy presumes. The ultimate expression of local citizenship — voting rights in municipal elections — may be attainable in some jurisdictions (Gilbert 2014), but it remains a limited form of participation, and an impossible one for those who lack even legal immigration status. The citizenship status that can only be granted by the federal government, like legal status itself, will be indispensable to the long-term stability that promotes investment in the community and adaptation to the country.

### III. Cities and States

Because the federal government controls the domain of immigration law and policy, discussions of immigration federalism naturally become framed by the dichotomy that guides Parts I and II of this essay: the scope of federal law on the one hand and the limits of state and local power on the other. The central intergovernmental relationship in the formulation of enforcement policy, in particular, is of course the federal connection to the sub-federal. Legal federalism debates thus revolve around understanding the vast scope of the INA and the extent to which the US Code and the Constitution leave localities with any authority to shape enforcement policy other than through carefully controlled cooperation with the federal government.

But as happens in federalism debates generally, a singular focus on relations between the central government and the periphery obscures another vital intergovernmental dynamic in immigration federalism — the relationship between states and their subdivisions, especially their cities. The existence of thousands of local governments, and particularly of large urban centers that transcend their geography, has significant implications for the regulation of the populace’s health, safety, and welfare. Localities often operate according

40 At the state level, California has undergone a shift that ought to be studied and understood, as a potential model for transformation. In the mid-1990s, it was the land of Proposition 187 and the effort to exclude unauthorized immigrants from whatever state and local institutions were possible. Voters also enacted an ideologically driven, counterproductive measure to prohibit the use of native language in English-language instruction in the public schools. But today, the state has taken the lead in doing everything within its power to provide security to unauthorized immigrants, both by resisting federal enforcement and providing affirmative tools of integration, and it even appears to be rethinking the native language ban (Suro 2015).

to their own politics while overseeing the institutions most vital to immigrant integration, such as schools and police forces. And the ideological diversity within states embodied in local governments further complicates and enriches the national debates over contentious issues that federalism helps structure (Gerken 2014; Bulman-Pozen 2014).

Across the country, staunchly Republican states and their erstwhile blue cities sharply diverge on some of the day's most pressing socioeconomic concerns, including gun control and gun rights, civil rights for the LGBTQ community, and immigration enforcement. And, of course, the dynamic works the other way, too, with Democratic statehouses looking for means of ensuring that local agents tow their line. These increasingly pitched battles also reflect a more profound divergence in American life — between rural and exurban communities on the one hand, whose interests are magnified and often protected at the state level, and cities on the other, whose cosmopolitan ethos is driven by wealth, immigration, and economic productivity. Indeed, the rural-urban split cuts across the country and the red and blue lines our national-level politics rely on to divide up the country. Increasingly sophisticated accounts of American federalism thus break down the blue and red boxes of the states to study decentralization in all of its manifestations (Gerken 2010; Hills 2005). The once ancillary field of local government law has become central to federalism theory, if not constitutional law itself.

In our constitutional system, states have the formal power, and cities are essentially creatures of state law. Powerful and important cities can sometimes drive state policy by virtue of their sheer size and economic might. But the divergence in world views between many states and their cities is still leading the former to use their formal authority to enact laws to preempt the latter. For progressive movements that find their firmest footing in liberal cities within conservative states — think Houston, Austin, and San Antonio in Texas, and Raleigh-Durham and Charlotte in North Carolina — state preemption of local law represents a clear and present danger. And this dynamic matters a great deal generally, too, because states themselves are internally complex. State preemption of local law can succeed in flattening the ideological and policy diversity federalism produces.

Immigration federalism has long been marked by this state-city tension (Rodriguez 2008, 637-40). Republican states have been responding for at least a decade to the noncooperation movement by preempting local sanctuary laws. Texas Senate Bill 4 (SB 4), enacted in May of this year,<sup>41</sup> builds on this practice, as do similar laws recently adopted in North Carolina, Georgia, and Alabama. Texas SB 4 introduces formal legal devices meant to coerce local police and governments into participating in federal immigration enforcement. SB 4 takes the predictable step of expressly preempting local laws or policies that prohibit officials from engaging or assisting in the enforcement of state and federal immigration laws, and it requires that law enforcement agencies honor ICE detainer requests. But the law goes a novel step further and targets potentially noncompliant officials directly with legal jeopardy. The law defines failure to honor detainer requests as a misdemeanor, enumerating fines as high as \$25,000 per offense (after a first offense). The law also creates a civil proceeding to remove *elected* officials who violate the law's provisions.<sup>42</sup>

41 Tex. S.B.4, 85th Leg., (2017).

42 The law does carve out a number of local institutions from its reach, including hospitals, peace officers working at religious institutions, school districts, public health departments, community centers, or mental health authorities. See SB 4, section 752.052, subsections (a)-(f).

As with the higher-level, federal-state debate, these sorts of laws can be analyzed legally or as a matter of politics and policy. Legally speaking, it is a familiar tenet of local government law that cities “can exercise power only within the legal frameworks that others have created for them” (Frug and Barron 2006, 1). The US Constitution does not protect cities from state interference in the way it protects states (and its subdivisions) from federal commandeering or displacement. The commandeering doctrine, which can provide a bulwark for enforcement skeptics at the local level against the federal government, applies when the federal government has dragooned states or localities into the implementation or enforcement of federal law. The doctrine embodies the balance the Constitution strikes between the central government and the states. But the principle does not apply when the federal government is absent from the equation. To be sure, cities may have state law claims against preemption statutes or other state measures that interfere with local policy making or governing structure,<sup>43</sup> and some local government scholars argue that cities ought to have a place within the US constitutional firmament. But the basic principle that localities amount to creatures of state law gives states wide-ranging coercive authority over its subdivisions.

In fact, there are strategic reasons to remain wary of devising structural claims to prevent states from disabling their subdivisions, for the same reason that preemption works as a double-edged sword in federal-state relations. Fights over constitutional structure frequently if poorly mask deeper disagreements about policy. One could certainly take a principled, across-the-board, localist position, on the theory that local policies are easiest to change or best reflect our ideological diversity in its many manifestations. But it can be risky to develop structural claims in highly charged settings such as immigration policy, where those advancing the novel legal claims really have an underlying agenda. Cities (especially large ones) in the main tend to support the progressive agenda, especially when it comes to immigration, because of their cosmopolitan and immigrant identities. But states can also be enforcement skeptics. The California model discussed above reflects precisely that, and the state legislature has relied on preemption as a tool to promote its vision of state integration policy.<sup>44</sup>

But even though states have considerable power over their cities, they cannot regulate their subdivisions in ways that would violate federal law or the US Constitution, or require their subdivisions to do what would otherwise be legally prohibited. Based on this principle, in confronting SB 4, a good lawyer would thus ask whether federal law or the Constitution prohibits anything about the Texas law.

Because the INA defines and effectively captures the field of immigration enforcement, there is always the possibility that a state enforcement law will run into conflict with it. But

43 See, e.g., *State Building and Construction Trades Council of Cal. V. City of Vista*, 54 Cal.4th 547, 555-557 (S. Ct. Cal. 2012) (striking down application of state prevailing wage law to contracts entered into by local jurisdiction and discussing home rule doctrine that permits cities “to govern themselves free of state legislative intrusion, as to those matters deemed municipal affairs” but does not insulate them from state laws that address matters of “statewide concern”).

44 The state legislature enacted a law preempting localities from adopting housing ordinances that penalized landlords for renting to unauthorized immigrants, responding to the emergence in the late 2000s of these sorts of ordinances at the local level in various parts of the country. See 2007 Cal. Assem. Bill 976, 2007-2008 Reg. Sess. (2007).

because federal law contemplates localities offering their cooperation with federal law, a state law that requires local entities to respond to detainer requests, which are themselves requests for cooperation, seems to re-enforce the INA. Perhaps a hypothetical state requirement that localities enter into 287(g) agreements would create tension with an INA that contemplates leaving that choice to the local sheriffs and police departments, on the theory that law enforcement officials are the appropriate local entities to decide whether to actively enforce immigration law. But because local authority stems from state authority, it would be hard to muster a claim that the state cannot stand in for its own subdivision in making that choice, in the absence of a state law basis to ground that claim.

Constitutional rights provisions might also limit certain types of state preemption laws, including SB 4. In the case of the anti-anti-cooperation laws, the most viable claim would be the Fourth Amendment one, which local enforcement skeptics could use against either the federal or the state government. To the extent honoring a federal detainer request would violate the Fourth Amendment, the state cannot require its police departments to violate the Constitution. The limit of this approach is that it makes challenging state laws facially, or in their entirety, difficult. Fourth Amendment claims tend to be fact-specific. But perhaps the very complexity of sorting out which detainers can be honored and which risk Fourth Amendment liability provides a strong legal policy argument against the adoption of a sweeping pro-detainer law, to insure localities from legal liability and act as a prophylactic against predictable Fourth Amendment violations.

Slightly further afield, equal protection claims against anti-sanctuary laws might be devised, to the extent local noncooperation laws can be framed as attempts to insulate noncitizens or particular racial groups from animus and discrimination. Preemption laws that withdraw such protections might be manifestations of animus against noncitizens.<sup>45</sup> Unlike the Fourth Amendment theory, this legal critique of the likes of SB 4 has not been tested to date; the primary purpose of most anti-detainer laws is to promote good policing, not to prevent discrimination, and states like Texas could well justify their own preemption laws by pointing to the importance of enforcing federal immigration law. But regardless of its likelihood of success, this approach to legal strategy at least has the benefit of expressing substantive reasons for opposing the state law.

The limits of these legal claims against state laws like SB 4 underscore the surpassing importance of a feature of immigration federalism also relevant in the federal-local debate — the need to build a politics around these issues. Litigation can certainly be a part of that strategy. Even unsuccessful legal arguments can play a vital role in deepening these political claims, and lawsuits can help write a narrative about immigration, policing, and the local community to counter the state's. By drawing attention through litigation to the sheer breadth of the state's attempt to control its localities, litigation can draw political support and other resources to a fight worth having as part of the broader immigration enforcement debate. But cities are unlikely to be able to protect themselves, or advance the interests of their noncitizen residents, with legal arguments alone.

<sup>45</sup> *Romer v. Evans*, 517 U.S. 620 (1996) (striking down amendment to Colorado Constitution that prohibited localities from adopting nondiscrimination ordinances to protect gays and lesbians, on the ground that the amendment reflected bias or animus on the basis of sexual orientation, in violation of the Equal Protection Clause).

Another legal political-strategy would have the federal government come in on the side of localities in some way. Some scholars have raised the prospect that Congress or the federal government might take steps to protect cities from state preemption through congressional preemption (Davidson 2007), or at least give states incentives to permit their cities room for maneuver, including by providing funding for integration programs (Rodriguez 2008, 637) — long a source of concern for states with large immigrant populations. But whether a federal-local partnership is either viable or a good idea depends less on theories of optimal intergovernmental arrangements than on one's views about the politics of immigrant integration.

The state-local divide ultimately helps highlight how fundamentally contingent political structure questions can be. The intergovernmental relationship we might prefer will depend both on our substantive immigration preference and on the policies each level of government might pursue at any given moment in time. But regardless of substantive preferences, the very fact that intergovernmentalism encompasses a multiplicity of arrangements means that a federalism strategy must be attentive to the full range of intergovernmental relations. Laws such as SB 4 re-enforce a vigorous enforcement agenda and help quash locally supported movements toward humane enforcement, or even non-enforcement. As with integration policy, an exclusive focus on what emanates from the center therefore obscures many of the sites in which our immigration policies and the corresponding politics take shape.

### Conclusion

Despite its control over the terms of immigration law and the vast administrative apparatus created to enforce it, the federal government cannot escape the push and pull dynamics generated by federalism. In an arena as ideologically contested as immigration policy, it should come as no surprise that our federal system will produce divergent policies and regular challenges to whatever might be the federal government's reigning conception of immigration policy. The intergovernmental disputes and dependencies that can arise in a federal system are most apparent and complex when it comes to enforcement policy and the federal government's relationship to states, cities, and their law enforcement bureaucracies. But they are also increasingly salient in the relationships between states and their cities, which are often at odds about the place of immigrants in our societies. To a less pointed extent, federalism also structures the processes of immigrant integration, separate and apart from debates over how vigorously to pursue deportation, though the latter intimately affects the former, too. The intractability of the immigration policy questions that animate these federalism dynamics is perhaps the best argument for sustaining an intergovernmental framework for immigration, whether enforcement or integration is at stake. And yet, perhaps the most contested matter within immigration federalism — the proper social status of those without legal status — can only be truly resolved through decisive federal action. Whether our immigration federalism and the legal and policy diversity it entails can eventually prompt a humane and lasting resolution to that question remains to be seen.

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# Is Border Enforcement Effective? What We Know and What It Means

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## Executive Summary

For too long, the policy debate over border enforcement has been split between those who believe the border can be sealed against illegal entry by force alone, and those who believe that any effort to do so is futile and without expanded legal work opportunities. And for too long, both sides have been able to muster evidence to make their cases — the enforcers pointing to targeted successes at sealing the border, and the critics pointing to continued illegal entry despite the billions spent on enforcement. Until recently it has been hard to referee the disputes with any confidence because the data was simply inadequate — both sides could muster their preferred measures to make their case. But improvements in both data and analysis are increasingly making it possible to offer answers to the critical question of the effectiveness of border enforcement in stopping and deterring illegal entry.

The new evidence suggests that unauthorized migration across the southern border has plummeted, with successful illegal entries falling from roughly 1.8 million in 2000 to just 200,000 by 2015. Border enforcement has been a significant reason for the decline — in particular, the growing use of “consequences” such as jail time for illegal border crossers has had a powerful effect in deterring repeated border crossing efforts. The success of deterrence through enforcement has meant that attempted crossings have fallen dramatically even as the likelihood of a border crosser being apprehended by the Border Patrol has only risen slightly, to just over a 50-50 chance.

These research advances should help to inform a more rational public debate over the incremental benefits of additional border enforcement expenditures. With Congress gearing up to consider budget proposals from the Trump administration that seek an additional \$2.6 billion for border security, including construction of new physical barriers, the debate is long overdue. In particular, Congress should be taking a careful look at the incremental gains that might come from additional spending on border enforcement. The evidence suggests that deterrence through enforcement, despite its successes to date in reducing illegal entry across the border, is producing diminishing returns. There are three primary reasons. First, arrivals at the border are increasingly made up of asylum seekers from Central America rather than traditional economic migrants from Mexico;

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this is a population that is both harder to deter because of the dangers they face at home, and in many cases not appropriate to deter because the United States has legal obligations to consider serious requests for asylum. Second, the majority of additions to the US unauthorized population is now arriving on legal visas and then overstaying; enforcement at the southern border does nothing to respond to this challenge. And finally, among Mexican migrants, a growing percentage of the repeat border crossers are parents with children left behind in the United States, a population that is far harder to deter than young economic migrants.

The administration could better inform this debate by releasing to scholars and the public the research it has sponsored in order to give Americans a fuller picture on border enforcement.

## **Deterrence through Enforcement**

For most of its history, the United States had only limited controls over its land borders; the efforts over the past two decades or so to close the borders to unauthorized entry are a sharp departure. Unauthorized migration from Mexico began to rise sharply in the mid-1960s following the elimination of the Bracero Program that had offered temporary work permits to Mexican citizens, mostly for agricultural jobs. By the 1990s, with a huge bulge of young Mexicans entering the labor market and Mexico's economic growth too weak to absorb them, the number of illegal border crossers soared. The modern effort at border control can be dated quite precisely. It began on September 19, 1993, when the chief of the Border Patrol in El Paso, Silvestre Reyes, decided he was fed up with using his agents to try to chase down unauthorized migrants after they had already crossed the border into Texas. Instead, he took 400 of his 650 agents and put them on 24-hour duty along the most heavily trafficked 20 miles of the sector, between the cities of El Paso, Texas and Juarez, Mexico. This "Operation Blockade," which was later renamed "Operation Hold the Line," was immediately successful in reducing illegal entries in that corridor (Alden 2008). The effort was enormously popular, and Reyes went on to win a seat in Congress in the 1996 elections. His initiative was emulated the next year when Operation Gatekeeper was launched in southern California, in the corridor between Tijuana, Mexico and San Diego, California, that had been a similarly large magnet for illegal crossers. Both operations were seen as successful. In its first year, Operation Gatekeeper resulted in a 65 percent fall in illegal crossings along the five miles of the border from the Pacific Ocean inland; across the San Diego region, illegal crossings fell to a 24-year low. Similar declines were seen in El Paso, Texas (Pearson 2000).<sup>1</sup>

The model developed along the border in Texas and California was a strategy of "deterrence through enforcement." If the decision by a migrant to attempt to enter the United States illegally can be conceived as a rational calculation of costs and benefits, then the US strategy for deterring illegal migration since the mid-1990s has been based almost entirely on raising the expected costs of illegal migration through increased enforcement and penalties, rather than increasing the benefits by providing additional legal channels

1 Joseph Nevins (2002) provided the definitive account of Operation Gatekeeper.

for migration or temporary work. President Trump's proposal for a "big beautiful wall" covering the entire border is only the most extreme version of an enforcement strategy that has relied primarily on border security to reduce illegal migration to the United States.

For more than a decade after its launch in 1996, the evidence on the effectiveness of deterrence through enforcement was mixed at best. Measured by the number of apprehensions or arrests at the border, it was quickly apparent that building fences and massing Border Patrol agents was a powerful deterrent to illegal crossing in the places where it was deployed. In the El Paso sector, the decline in apprehensions was almost immediate following Operation Hold the Line, falling from 250,000 in 1992 to fewer than 80,000 by 1994. In the San Diego sector, apprehensions fell more gradually but still dramatically, from more than 550,000 in 1992 to just 110,000 in 2001 (CBP 2016a). But it was also equally apparent that sealing the high-traffic corridors alone would not significantly reduce illegal crossings. Instead, border crossers move to the more remote regions in Arizona, and the numbers continued to climb, as did the number of migrant deaths in what became increasingly dangerous crossings. Apprehensions along the entire border remained extremely high throughout the 1990s, and reached a record number — more than 1.6 million — in 2000.

Many leading scholars have argued that border enforcement was destined to fail because the decision to migrate illegally was driven overwhelmingly by economic opportunity, and enforcement would never provide a sufficiently powerful deterrent (Massey, Durand, and Malone 2003).<sup>2</sup> And with US wage rates on average remaining three to four times as high as those in Mexico, the potential wage gains for unauthorized migrants were, and remain, large. For much of the 1990s and early 2000s, this thesis seemed to be confirmed by the high level of illegal entry attempts despite a significant increase in Border Patrol agents, physical barriers such as fencing, and surveillance. Border Patrol leadership continued to argue throughout this period that enforcement was still a work in progress, and that with sufficient manpower and resources the early successes in California and Texas could be replicated across the border. Congress, not surprisingly, sided with the Border Patrol. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IRAIRA) authorized the hiring of an additional 1,000 Border Patrol agents annually to a cap of 10,000, as well as large new investments in surveillance capabilities. A second surge came in the mid-2000s, when Congress authorized another doubling of the size of the Border Patrol, and passed the 2006 Secure Fence Act authorizing no less than 700 miles of reinforced fencing along the border. The Department of Homeland Security (DHS) also invested heavily in surveillance technology to create a "virtual fence" along the border. Today, the Border Patrol numbers are just under 20,000 — with most of those along the border with Mexico — and more than 650 miles of fencing has been constructed along the border, most of it in California and Arizona. The Secure Fence Act also laid out a border mission for the Department of Homeland Security (DHS) that remains the law today — that the United

2 More recently, Massey, Durand, and Pren (2016) have argued that the evidence shows that the primary effect of border enforcement was to increase the number of settled unauthorized migrants, because they feared returning to Mexico and being unable to re-enter the United States.

States should achieve “operational control” of the border, defined as “the prevention of all unlawful entries into the United States.”<sup>3</sup>

While DHS remains far short of achieving that unrealistic goal, the last decade has provided evidence that the Border Patrol was more accurate in its predictions that enforcement would begin to reduce illegal entries significantly. Apprehensions of illegal border crossers began to fall sharply in 2006, and have continued to decline, falling even more sharply in the early months of 2017 following the inauguration of President Trump (Partlow 2017). The cause of the decline was initially difficult to determine, because the steep drop off in apprehensions began in 2007, which coincided with the collapse of the home construction market (a large employer of unauthorized workers) and then with the spike in unemployment that followed the 2008 financial crisis. But with the strong recovery of the US economy since 2009, coupled with a continued low level of apprehensions, the increased effectiveness of border enforcement has become more apparent. The United States has now had the strongest sustained period of job creation in the post-World War II era, unemployment has fallen well below five percent, and much of the job growth has been in lower-wage service and retail occupations that have historically attracted unauthorized immigrants. Yet illegal border crossings remain much lower than they have been in decades.

The decline in unauthorized border crossings is not entirely an enforcement story. Some of the fall is explained by demographics — the number of young Mexicans entering the labor market, the most likely cohort to attempt to migrate illegally, has been slowing, making it easier for them to find work at home even as growth in Mexico’s economy has remained weak. Legal temporary work admissions have also been rising, especially under the H-2A program for agricultural workers, which was often ignored by farmers and growers when an undocumented labor force was readily available. The total number of H-2A visas issued to Mexicans has roughly tripled from the level of the early 2000s, from fewer than 30,000 annually to near 90,000, suggesting that more farmers and growers are using the legally available alternatives. But the decline in illegal entry has been far too large to be explained by these factors alone.

The evidence of an enforcement impact is strengthened by research showing that many fewer Mexicans are attempting to return after being deported or voluntarily returned to Mexico, suggesting that for various reasons, they are being deterred from attempting another crossing (Roberts, forthcoming). Recent research on illegal border crossings has improved our understanding of the role of deterrence. Despite the enormous buildup in Border Patrol personnel, fencing, and surveillance capabilities over the past two decades, the likelihood of an illegal border crosser being apprehended has risen only slightly. The Border Patrol faces an adaptive adversary, the smugglers, who try to keep the likelihood of arrest from rising through their own investments in personnel (spotters, foot guides), technology (night vision goggles, drones), and tactics (new crossing routes). But this raises smugglers’ costs and thus the fees that they charge their clients, which rose from less than \$1,000 in 2000 to \$3,000 or more in recent years. The Border Patrol also began to

3 Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2705. That exact language was replicated in President Trump’s January 25, 2017 executive order on border security, in which operational control was defined as stopping all illegal entries. See Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

impose consequences on those caught attempting illegal entry in the late 2000s, ranging from formal removal to prosecution and jail time. Rising smuggling costs and intensifying consequences have increased deterrence, both for those contemplating going to the border in the first place, and those caught attempting illegal entry after going to the border. Deterrence through enforcement appears to have been a significant factor in reducing the number of unauthorized border crossings.

## Measuring Success

Our understanding of the role of border enforcement in reducing illegal entry has been greatly enhanced by recent improvements in the measurement of illegal border crossings. Since 1925 following the creation of the Border Patrol, the primary measure for the security of the border against unauthorized entry has been the annual number of apprehensions. Apprehensions are simply a measure of the number of arrests made in the border region of those attempting illegal entry; for the past two decades, the Border Patrol has kept good records of multiple (or “recidivist”) apprehensions, which show that up until recently many border crossers had tried to cross multiple times in a single year. The annual number of apprehensions rose more or less steadily from the end of the Bracero Program in 1964, reaching peaks of just over 1.6 million in 1986 (right before the passage of the Immigration Control and Reform Act, which legalized many unauthorized migrants in the United States) and then a record of 1.65 million in 2000. From 1974 to 2010, the annual number of apprehensions at the US-Mexico border never fell below 500,000. Despite its long lineage, however, the apprehensions measure has always been an inadequate one for understanding the utility of border enforcement in preventing illegal entries. Apprehensions are a poor measure of success. A falling number of apprehensions could equally indicate successful border enforcement (rising deterrence and fewer attempts) or failed border enforcement (a lower apprehension rate and more successful illegal entries). And the apprehensions number is of little value in determining which enforcement measures have been more or less successful at discouraging illegal entry.

Recent studies have begun, however, to disaggregate the various components of border enforcement, and make it possible to arrive at more robust conclusions on effectiveness. As Roberts, Alden, and Whitley (2013) argued, the goal of border enforcement is to reduce the number of successful illegal entries; therefore, the core strategic measure of enforcement success is the total number of illegal entries. But determining successful “entries” is much harder than simply counting arrests. It requires making credible estimates of the number of persons who succeeded in crossing the border and entering the United States without being apprehended, or in many cases even directly observed, by the Border Patrol. In order to determine that measure, the US government needs robust estimates on both the likelihood that an unauthorized border crosser will be stopped and detained (the “probability of apprehension”) and the likelihood that border crossers will be deterred from attempting entry or reentry after being apprehended and returned to Mexico. While the Border Patrol keeps accurate records of “recidivist” apprehensions — those arrested multiple times — determining whether an individual has evaded the Border Patrol entirely and entered successfully, or was deterred from making additional entry attempts, poses much larger methodological challenges. In 2015, DHS contracted with a research organization, the

Institute for Defense Analyses (IDA), to produce the first serious estimates of successful illegal entries between the ports on the US-Mexico border, as well as at the port of entry and in the maritime environment (IDA 2016). The estimates were presented to the department leadership in early 2016, but were never released to the public or to the Congress. A copy of the study leaked later that year, however, producing several news stories, and was posted on the internet (Spagat 2016).

The findings were striking. First, the research found that the total number of successful illegal entries across the southern border has fallen much more dramatically than the apprehensions data suggest — from close to 1.8 million in FY 2000 to fewer than 200,000 by FY 2015. Second, the primary cause of that sharp drop was not that a significantly higher percentage of border crossers was being apprehended by the Border Patrol, but rather that they were being deterred from trying in the first place, or from trying again after being arrested and returned the first time. The “deterrence rate” has risen from just 10 percent in the early 2000s — meaning that 90 percent of those returned across the border would try again — to roughly 60 percent by 2015. Third, this success was achieved despite the Border Patrol falling far short of the 100 percent apprehension rate that has been sought by the Congress since the passage of the Secure Fence Act. The likelihood of arrest on any particular border crossing has increased, but not by a lot — in 2000, the odds of getting caught were roughly 40 percent, and by 2015 it had risen to a little over 55 percent. And yet the total number of crossings has plummeted.

Deterrence appears to have increased considerably after 2011, when the United States began imposing “consequences” on nearly all apprehended migrants. Historically, most border crossers were “voluntarily returned” to Mexico, and the evidence shows that most simply kept trying until they were successful in entering the United States. But beginning gradually in the mid-2000s, and more comprehensively in 2011 with the launch of the “Consequence Delivery System,” more and more border crossers have faced some sort of more severe penalty — from jail time to removal to the interior of Mexico to formal deportation.<sup>4</sup> Criminal prosecutions, especially felony prosecutions, appear to have had a powerful deterrent impact in discouraging apprehended border crossers from making future efforts. A Migration Policy Institute (MPI) survey of repatriated Mexican nationals showed a sharp increase in the number saying they would remain in Mexico rather than attempting to return to the United States. As recently as 2010, some 95 percent of all returnees said they would seek reentry, but by 2015 only 49 percent said they would try again (Schultheis and Ruiz Soto 2017). Rising smuggling costs — a consequence of tougher enforcement that has required smugglers to use more difficult and dangerous entry corridors — also appear to be acting as a strong deterrent. The MPI study reported that average smuggling costs for an individual had risen from \$1,500 in 2010 to \$4,100 by 2015 (*ibid.*, 1).

This research has marked a huge advance over the traditional apprehensions measure, and over the Border Patrol’s own “known flow” estimates, which rely on physical observations of border crossers. The IDA work, in particular, provided the first compelling evidence that enforcement — and not just demographic and economic factors — has played a big role in the reduction of illegal entries, and the research has isolated the importance of the consequences programs in deterring reentry. For the first time since the border build-up

4 For an analysis of the Consequence Delivery System, see Capps, Hipsman, and Meissner (2017).

began more than two decades ago, there is some solid evidence on what works and what does not in border enforcement.

## Conclusions and Policy Implications

The border enforcement buildup, coupled with harsher consequences for unauthorized border crossers, has played some significant role in reducing illegal entries across the southern border with Mexico. This might seem to lead logically to the conclusion that still more enforcement and even harsher consequences would be still more effective. This is indeed very much the approach the Trump administration is taking. There is a danger, however, in drawing such simplistic conclusions from the research.

There are at least three reasons to think more deeply about the policy implications of these findings. The first is the changing nature of the border-crossing population. The decline in traditional Mexican border crossers coming to the United States for better jobs has been accompanied by a rise in Central Americans — mostly from El Salvador, Guatemala, and Honduras — arriving at the border to request asylum protection. Over the past several years, apprehensions of non-Mexicans at the border, mostly from Central America, have met or exceeded apprehensions of Mexicans. The number of asylum requests from those arriving at the border has also soared in recent years, from just 22,000 in 2011 to 140,000 by 2015. Arrests of unaccompanied minors and family units have fluctuated, hitting nearly 140,000 in FY 2014, falling to 80,000 in FY 2015, and rising again to nearly 140,000 in FY 2016, but they have been consistently far higher than they were a decade ago (CBP 2016b). This population is a very different population from the traditional Mexican border crossers; while some may be coming solely for economic opportunity, many are fleeing violence or the threat of violence. The question of whether such individuals can be, or should be, deterred is a very different question.

Given the dangers that asylum seekers face back home, this is a harder population to deter, one that is willing to run higher risks than would traditional economic migrants. The United States has used a variety of means to deter asylum seekers from Central America, including working with Mexico to bolster enforcement at its southern border to prevent transit, the use of expedited removal to reject asylum seekers at the border, and detention during the application proceedings for those who are permitted to make their case in court. The Trump administration appears determined to double-down on these deterrence efforts. The recent White House executive orders, as interpreted by DHS, call for a range of deterrence-oriented measures, including: tightening “credible fear” determinations so that more asylum seekers are turned back at the border; increasing detention of asylum applicants; and sanctioning parents who pay smugglers to bring their children to the United States (Kelly 2017). While it is too early to draw any firm conclusions, it is possible that these threats have contributed to the decline in asylum applications at the border in the first half of 2017. Apart from the question of effectiveness, however, the policy issues raised by deterring asylum seekers are quite different from those involved in deterring economic migrants. Even those sympathetic to economic migrants seeking better jobs and opportunities in the United States would acknowledge that the law forbids them from entering and working illegally. But migrants have clear rights not to be returned where their life or freedom

would be threatened on account of race, religion, nationality, or membership of a particular social group or political opinion, and to seek asylum, which requires showing of a “well-founded” fear of persecution on one of these grounds.. Those standards, based on United Nations conventions and protocols, are incorporated into US law. Using enforcement tools to deter potential asylum seekers thus calls into question US compliance not only with its international obligations, but with its own laws. Congress should be vigorously debating how far it is willing to go down the path of deterring even legitimate asylum seekers.<sup>5</sup>

Secondly, along the same lines, deterrence works best where the stakes for the individual migrants are the lowest. Those most likely to be deterred are those with the weakest ties to the United States. In the MPI survey of repatriated Mexicans, for example, nearly two-thirds of those who had been deported and left minor children behind in the United States said they would try again to cross the border, far higher than the numbers for those without children (Schultheis and Ruiz Soto 2017). Again, while it may be possible to deter some of those deported parents, they are clearly willing to run much higher risks to enter again than would a border crosser whose primary motivation is economic opportunity. And the moral judgments involved in splitting up families in the name of enforcement are quite different from using deterrent measures to discourage young job seekers from coming to the United States. The current consequences regime is set up to impose harsher and harsher penalties on repeated border crossers if they are apprehended, in effect reserving the harshest punishments for those unauthorized migrants whose family ties to the United States are strongest. Again, Congress should be debating whether this was the intention behind tighter border enforcement.

Finally, further increasing border enforcement would seem to be a case of fighting the last war. As recent research by Robert Warren and Donald Kerwin (2017) has shown, the Mexican border has ceased to be the route of choice for those seeking to enter the United States and remain illegally. Increasingly, the easiest path into the country has been to arrive on a legal visa and then simply remain after the period of admission has expired. Visa overstays have long been a big percentage of the undocumented population — about 42 percent currently according to the Warren and Kerwin research. But they are a rising share of the newly arrived undocumented. In 2014, the latest data available, two-thirds of those added to the undocumented population in the United States were visa overstays. Despite more than two decades of pressure from the Congress, however, administrations have made only modest advances in discouraging visa overstays. Even simple and obvious measures — like email notifications to visa holders present in the United States warning them of the consequences of overstaying — have not been taken (Alden and Schwartz 2012). And enforcement actions targeted specifically at visa overstayers are rare. The potential enforcement gains from deterring overstays would appear to be far larger — and likely far less costly — than a further buildup along the border.

The latest research, in other words, would suggest that the United States is reaching the point of diminishing returns on border enforcement. Further border enforcement may do a bit more to discourage illegal entry, but it will overlook the biggest path for illegal migration (visa overstays), and require harsh targeting of the most vulnerable populations

<sup>5</sup> For a fuller discussion of the limitations of deterrence with respect to refugees and asylum seekers, see Gammeltoft-Hansen and Tan (2017).

(asylum seekers) and the most motivated ones (parents with children in the United States). Congress should be vigorously debating whether this is what it intended when it launched the border buildup more than two decades ago.

Finally, the public debate over border enforcement would be greatly enhanced by the release of research and data that DHS continues to hold in-house. While the research advances of the past couple of years are important, they have not been broadly shared either with the public or with the expert community. The potential is there for still further advances if researchers can get full access to DHS data, and can build on the excellent work done by the IDA team. Congress has long been demanding the development and release of such measures. Most recently, the National Defense Authorization Act of 2017,<sup>6</sup> passed in January 2017, calls for the administration to “develop metrics . . . to measure the effectiveness of security” between ports of entry, at ports of entry, and in the maritime domain. It specifies that the measures should include the apprehension rate and the estimated number of illegal entries. The time for a fact-driven debate on the cost-effectiveness of border enforcement — and the most sensible policy responses — is long overdue.

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<sup>6</sup> National Defense Authorization Act for Fiscal Year 2017, S. 2943, 114th Cong.

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# Immigration Adjudication: The Missing “Rule of Law”

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## Executive Summary

The United States spends more than \$19 billion each year on border and immigration enforcement.<sup>1</sup> The Obama administration removed more people in eight years than the last four administrations combined.<sup>2</sup> Yet, to the Trump administration, enforcement is not yet robust enough. Among other measures, the administration favors more expedited and summary removals. More than 80 percent<sup>3</sup> of all removal orders are already issued outside the court process: When the Department of Homeland Security (DHS) uses summary removal processes, both access to counsel and an immigration judge can be nearly impossible. Advocates and policy analysts are equally concerned that a backlog of over 545,000 immigration court cases creates delay that harm people seeking asylum and other humanitarian protection. Recent use of priority or “rocket” dockets in immigration court and lack of appointed counsel also interfere with the fair adjudication of claims. Thus the administrative removal system is criticized both for being inefficient and moving too slowly, on the one hand, and for moving too quickly without adequate procedural safeguards, on the other. Both critiques have merit. The challenge is to design, implement, and most critically, maintain an appropriately balanced adjudication system.

While it is clear that US removal procedures need reform, process alone will not be able to address some of the systematic flaws within the system. Ultimately, the DHS will need to refine and prioritize the cases that are placed into the system and the government needs new tools, widely used in other adjudication systems, that can reduce backlogs, incentivize cooperation, and facilitate resolution. Congress should similarly reexamine the barriers to status and avenues for regularization or preservation of status. The paucity of equitable forms or relief and the lack of statutes of limitation place stress on the immigration court system. The lack

1 In fiscal year (FY) 2016, the budget for CBP and ICE was \$19.3 billion. See analysis by the American Immigration Council (2017a) about the costs of immigration enforcement. The budget for the immigration court has grown only 30 percent in comparison with a 70 percent increase in the budget of the DHS enforcement.

2 Taken from Obama removal data and comparison to past administrations (Arthur 2017).

3 The DHS does not routinely publish full statistical data that allows a comparison of the forms of removal. In a recent report by the Congressional Research Service, the analyst concluded that 44 percent were expedited removals as described below, and an additional 39 percent were reinstatement of removals — 83 percent of all orders of removal were outside the full immigration court system (Congressional Research Service 2015).

of appointed counsel has a dramatic impact on case outcomes. Without counsel, the rule of law is barely a constraint on government authority. Conversely, a system of appointed counsel could lead to efficiencies and to a culture of negotiation and settlement within the immigration court system.

DHS has increasingly used every tool in its arsenal to expeditiously remove people from the United States and most of these tools bypass judicial hearings. In these “ministerial” or expedited forms of removal, there is no courtroom, there is no administrative judge, and there are rarely any opportunities for legal counsel to participate. Moreover, there is rarely an opportunity for federal judicial review. In these settings, the rule of law is entirely within the hands of Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) officers who serve as both prosecutor and judge. There is little record keeping and almost no avenue for administrative or judicial review. This paper will argue that the rule of law is missing in the US removal adjudication system, and will propose ways in which it can be restored.

### **Assembly Line Adjudication — the Need for Priorities and Process Protections**

For many years, the DHS has increased removal enforcement and Congress has similarly increased the funding for detention as a part of the removal process. In 1990, Congress revised the statutes to create an integrated immigration removal system that would both adjudicate the claims of those seeking initial admission or apprehended at entry and those who are found in the interior and subject to a ground of deportation. Over time, the adjudications before the immigration courts, a division within the Department of Justice, grew to over 200,000 new cases a year (EOIR 2017).<sup>4</sup> Frustrated with delays and intent on stiffer enforcement at the border with Mexico, the federal agencies expanded their reliance on forms of ministerial or expedited removal.<sup>5</sup> Today at least 80 percent of all removal orders are prepared and executed largely without the involvement of an immigration judge. In these cases, only a claim of persecution or torture can prevent a rapid deportation executed solely by DHS personnel. In many of these cases, the unrepresented individual is unable to persuade an immigration judge that a fuller hearing is required.

The growing reliance on expedited procedures has raised concerns about the adequacy and accuracy of the agency determinations. In a detailed report published in the summer of 2016, the US Commission on International Religious Freedom (USCIRF) reported that Customs

4 The Executive Office for Immigration Review (EOIR) publishes a statistical yearbook annually providing data on cases types, dispositions and completions. The data here is from FY 2016.

5 Congress first created the expedited removal statute in 1996 but has expanded its use to people found within 14 days and within 100 miles of the international land borders and to those apprehended who admit arriving by sea within the past two year. Under INA § 235; 8 U.S.C. § 1225, the DHS is only to use the procedure if a person is inadmissible for specific grounds, lack of documents, or making a misrepresentation or using fraud to secure a visa. However, the lack of records and administration review precludes knowing if the border officials constrain themselves to these contexts. The new administration is exploring expanding the use of expedited removal to the entire interior provided the individual arrived within the last two years.

and Border Protection (CBP) officers were not well trained or adequately supervised in their use of the expedited process. In addition, the need for protection determinations caused a shift in resources from the immigration court and the US Citizenship and Immigration Services (USCIS) Asylum Office that led to tremendous backlogs in the regular adjudications (Cassidy and Lynch 2016). Although some legal challenges to the fairness and accuracy of expedited removal have been attempted, most have failed because Congress curtails access to independent judicial review. In April of 2017, the Supreme Court denied review of a decision that refused to entertain jurisdiction to review the sufficiency of the expedited removal process for mothers and young children seeking asylum. In that decision, the Third Circuit Court of Appeals found that Congress may constitutionally preclude judicial review, including suspending the writ of habeas corpus.<sup>6</sup> In short, the rule of law is missing in immigration removal adjudication.

Even for those who are in regular removal proceedings, the quality and fairness of the procedures and the independence of the immigration court is a significant concern. Immigration judges (IJs) are civil service employees that serve at the pleasure of the attorney general. The immigration court is not an independent agency. It has coordinated its work with the enforcement units within DHS and has adapted its court-docketing procedures and relocated judges based on the enforcement priorities of the new administration. The National Association of Immigration Judges (NAIJ), the American Bar Association (ABA), and others have long called for greater financial and managerial independence as well as greater protections for the independence of the adjudicators making these important decisions (ABA Commission on Immigration 2010). As Dana Marks, the President of the NAIJ, has phrased it, “We are conducting death penalty cases in a traffic court setting” (Dooling 2016).<sup>7</sup>

Moreover, while immigration courts determine whether the government has established that a person is removable, it may also be the only place where an individual can seek protection from deportation. These are two distinct roles. While the forms of protections are limited, Congress has given immigration judges the power to make decisions in cases seeking asylum or protection against torture. For a small class of people, the IJ may be the only adjudicator with jurisdiction to determine if a noncitizen will be able to remain based on length of residence, extreme hardship to family, and/or surviving forms of domestic violence. In reality, Congress has narrowed these forms of relief so dramatically that less than 35 to 39 percent of the people in removal proceedings file any formal application for relief (EOIR 2017, figure 13).<sup>8</sup>

At first blush, the fact that so few people file applications for relief may imply that there is little need for the court, but in fact, DHS makes a great number of prosecutorial discretion determinations during the court process. It often decides to place individuals in removal proceedings. Yet, DHS also often agrees to close, or for the court, to terminate cases: In fiscal year (FY) 2015, 34 percent of the cases without a grant of relief or a final order of

6 See *Castro v. United States Dep't of Homeland Sec.*, 835 F3d 422 (3d Cir. 2016), cert. denied, \_\_ U.S. \_\_, (April 17, 2017).

7 See also Marks (2012).

8 In FY 2015, the rate was 35 percent and grew to 39 percent in FY 2016 (ibid.).

removal were closed or terminated. This number grew to 38 percent in 2016 (EOIR 2017).<sup>9</sup> At times, the case is terminated because it was improvidently begun, but in the vast majority of cases the government determines the case should not move forward to a removal order. The government may close the case because the removal hearing might have motivated the individual to apply for an immigration benefit or relief. There is little need for the immigration court involvement if the individual is going to qualify for an immigration benefit from USCIS.<sup>10</sup> While administrative closure or termination is appropriate in these cases, some cases should never have been initiated or should have been closed as soon as a possibility of status was identified.

Some of the delays in the regular removal system occur because persons in proceedings are given continuances to try to secure counsel. But the immigration court lacks robust motion, conferencing, and settlement traditions. While the procedural rules contemplate motions and written pleadings, the tradition in the system is to do everything in front of the judge. Thus, attorney time and court time is filed with routine submission of documents, oral motions, and more requests for continuances that could be better managed. Moreover, many of the applications for relief cannot be adjudicated by the immigration court. The system created by Congress and DHS is replete with hard-to-fathom and rigid jurisdictional limits that cause cases to be broken into pieces and divided among a variety of benefits agencies. Immigration courts cannot expedite the security check, petition adjudication, or document review process because these functions are handled by a separate agency. And some of the rules require hours of court time to make factual findings that could be resolved by stipulation between the parties if the DHS would afford greater autonomy to its attorneys. The removal system lacks needed flexibility to allow for appropriate adjudication.

But regardless of the court process, one of the biggest factors in Immigration Court congestion is the assembly line or automatic initiation of removal proceedings by DHS. Most federal agencies cannot prosecute every violation nor pursue every enforcement action. Immigration “prosecutions” are a form of civil administrative adjudications. The entire system is predicated on the characterization that the sanctions for immigration enforcement are primarily civil sanctions assessed by administrative judges. The structure of the Immigration and Nationality Act (INA) gives the DHS border inspector insufficient flexibility and authority to avoid the removal process. But even within the interior of the country, it appears that the DHS is using the initiation of removal proceedings as a rough way to sort out who deserves some form of discretion. In general, because the charging documents are prepared and filed without formal consideration and evaluation by the prosecuting attorneys, it is not until the litigation has commenced that a DHS attorney examines the case. A well-defended individual will use the court process to explore

<sup>9</sup> These numbers are based on comparing tabs B and C in EOIR (2017). Likely the numbers are higher than past years because many of the cases involved unaccompanied children who were eligible for relief or could not be safely repatriated. See discussion of outcomes in juvenile cases below.

<sup>10</sup> A clear example of this is the large number of unaccompanied children’s cases. The benefits and applications that protect children are all made before a component of the USCIS. For most of the cases, the immigration court serves little purpose other than to move the case to another continuance. Of course, it is because the children are in removal that so many attorneys have stepped forward to volunteer to assist them, or that the children’s relatives have found the funds to hire the counsel who are essential to the application process. None of the work is simple and certainly the applications cannot be made by children unassisted by counsel.

the equities in the client's life with the ICE attorney and to try to negotiate a closure or termination, or to narrow issues to allow the immigration judge to adjudicate the underlying eligibility for a form of statutory relief. Unfortunately, because there is no right to appointed counsel for indigent individuals, and because there is no formal mechanism or culture of prioritizing cases once within the system, the results are uneven. The rule of law exists, in large part, between the lines.

And finding justice between the lines is especially a problem for those behind bars. Each year DHS detains nearly 400,000 people a year. For those who must complete a removal hearing in detention, fewer than 20 percent secure any legal representation (Eagly and Schafer 2015).<sup>11</sup> The strategies that aid a closure may not exist in the context of a detained case. Congress mandates detention in a large number of cases as a means of efficiently completing the removal process. The calculus of who qualifies for relief and what type of hearings may be required is distorted by the stark reality of detention. Most detention centers are in remote locations and there are few defense attorneys nearby. The court itself has increasingly relied on video teleconferencing to conduct the hearings in these facilities. Video technology frequently separates the ICE attorney from the person in removal proceedings, and the opportunities for negotiation or requests for discretion may be even harder to initiate in these settings. The court does not publish annual statistics on its use of teleconferencing but a recent academic study reported that by 2012 one-third of all detained hearings used video technology (Eagly 2015, 953).<sup>12</sup>

### **There is No Other Forum for Adjudication — the Immigration Court is the Cauldron**

The large number of terminations and closures by the DHS suggests that our government should be making a careful selection of cases *before* the allegations are filed in the court. The lack of other forums for adjudications — for procedures to regularize status and for a method of investigating the context and equities in a case — makes the immigration court the default forum. The closure of cases may be the government's only tool to consider the equities, given the rigidity of immigration law and its paucity of substantive options and pathways to status.

People are frequently surprised to learn that there is no general power within the immigration system for a judge to consider all of the factors and make a recommendation against removal. Immigration court is not a court of equity. The immigration judge has only the powers of grace afforded by Congress, and our statutes have increasingly limited relief and narrowed the relevant criteria for eligibility. For many years, Congress has restricted access to permanent resident status or waivers of deportation. There is often no application to file because the law precludes IJ discretion.

And in the outside-the-court ministerial removals, there is almost no opportunity to apply for a waiver or any form of discretionary relief. Individuals facing reinstatement of a prior removal order or expedited removal have a limited chance to seek protection from persecution or torture, but little else is available. Because there are so few ways to stop

11 Eagly and Schafer (2015) found that 14 percent of people in detention were represented by counsel.

12 According to Eagly (2015), "97.7% of removal proceedings in 2012 received pure in-person adjudication."

removal, persons in proceedings try to find a way to fit into the narrow protection grounds like asylum. Nevertheless, when individuals seek immigration review, the initial DHS finding of lack of fear is reversed in a significant percentage of cases (EOIR 2017).<sup>13</sup>

In recent years, one of the largest subset of cases are those of unaccompanied minor children arriving from the Northern Triangle states of Central America where a crumbling civil society and systemic violence against youth have pushed children to seek safety in the United States. These youth frequently choose the United States as a destination because many have US resident relatives who may or may not have status. DHS maintains that all children identified at or near the border must be placed in removal proceedings and for three years its enforcement priorities included these recent arrivals, whose cases were placed onto priority dockets. Similarly, at the request of the DHS, the immigration courts also prioritized the cases of adults with small children who also arrived from the region seeking asylum. In 2017, the court announced that it would no longer prioritize the cases of non-detained children. Nevertheless thousands of children’s cases remain pending in immigration court. Children with counsel secure status or receive administrative closure at relatively high rates. Using the court cauldron to sort and process juvenile cases is unnecessary. Moreover, this setting is poorly suited to consider children’s claims. The attempt to rely solely on docket management tools in these cases rather than to examine the entire system — from initiation of removal to benefits adjudication — epitomizes the system’s lack of flexibility. A careful look at the process used in children’s cases would identify larger systemic problems. For example, when a child wants to seek a special immigrant juvenile petition, the immigration court is powerless to adjudicate every aspect of the petition. Instead, it must continue the case while the child, if represented, goes first to state juvenile or family court and then to the benefits division of USCIS and finally back to the court to seek closure of the case. None of these steps are simple. All require advocacy and lengthy adjudication procedures. These procedures congest already overcrowded dockets.

The current removal systems were largely designed in 1990 and relief and judicial review were substantially restricted in 1996. In the past 20 years, the immigration enforcement budgets and the numbers of people affected by the system have grown exponentially. All legal systems are dynamic. Over time, they bend, twist, clog, and even break. People desiring a more restrictive immigration policy, as well as those seeking more paths to regularization of status, agree that the US removal adjudication system has reached a breaking point. Factors such as the high dependence on physical detention, the immense volume of cases, the growing numbers of children in the system, the lack of transparency, and the near impossibility of substantive review in more than 80 percent of the cases call into the question the effectiveness, fairness, and accuracy of the US removal adjudication system.

13 From the 2016 EOIR Statistical Yearbook, credible fear review reflects a reversal of the agency determination in a significant number of cases. In FY 2015, the IJ reversed the credible fear denial 1,344 times out of 6,629 (20 percent) and in FY 2016, the percentage rose to 27 percent in 2086 out of 7,469 cases. The reversal is lower in the reinstatement cases or defense to administrative removal under INA § 238. In FY 2015, there were 449 reversals out of 2,587 (20 percent). In FY 2016, there were 567 reversals out of 2,522 (22 percent). These rates of reversal argue strongly for more process, greater transparency, and oversight rather than leaving these decisions solely to DHS determinations.

## The Essentials for Adjudication

There is no perfect adjudication system. These systems should protect values like accuracy and fairness, and operate efficiently. However, ultimately, the demands placed on a system and the people acting within it can frustrate the goals of its designers or negate individual protections (ABA Commission on Immigration 2010; Benson and Wheeler 2012). Unfortunately, the US system is so far from perfect and so driven by the goals of efficiency and deterrence that it fails to incorporate the essential qualities of fairness. Moreover, the adjudication system does not operate in a vacuum. If US immigration policies allowed people to regularize their status, had a mechanism for correcting errors of judgment, or contained fines or punishments for breaking immigration rules that were proportionate to the interests at stake, it is very likely that it would not be under the current strain. People are subject to removal because the system blocks their path to status or makes them vulnerable to expulsion even after lengthy residence. Too many people are also in removal because the United States has no effective mechanism for processing refugee flows at our border (Musalo and Lee 2017).

Substantive rights and procedural structures are not separate. If we have a rigid system that excludes and punishes all who infringe on even minor rules, people will, by necessity, use the adjudication process as a substitute for substantive protection. Delay is a partial win. And just as frequently, if the individual lacks a remedy, he or she is more likely to do everything possible to avoid detection and to remain outside the law.

Furthermore, all of the basic assumptions about “the rule of law” or “due process” or basic constitutional rights, do not fully operate in the sphere of immigration law. In the immigration context, Congress has the power to define both the rules as to who will be admitted and the level of procedural protections necessary to evaluate claims. In a handful of cases, the Supreme Court has found that some noncitizens by virtue of their formal status or their connections to the United States and, most commonly, by virtue of their physical presence within US territory are entitled to due process of law.<sup>14</sup> But “due process” alone without a corresponding robust limit on government power to deport may be insufficient. The process may always seem unfair and stacked in favor of the government if Congress does not provide any formal mechanism for individual clemency or adequate paths to regularization of status.

Phrased another way, the current immigration system and the case law creates very real borders — not the territorial borders — but legal fictions that put immigrants outside the mainstream body of fundamental protections. Immigrants are remarkably vulnerable to a government official who oversteps, to a judge who acts in an arbitrary fashion, to the asymmetry of the power between the government attorney and the unrepresented detained individual. The US immigration system runs roughshod over hundreds of thousands of people each year and it creates uncertainty and fear for noncitizens and their families.

<sup>14</sup> See, e.g., *Landon v. Plasencia*, 459 U.S. 21 (1982), in which returning lawful permanent resident, although at the border, was entitled to a measure of procedural fairness and remanding for application of *Mathews v. Eldridge* procedural due process balancing; and *Demore v. Hyung Joon Kim*, 538 US 510 (2003), which acknowledges due process rights of people inside the United States, but finding detention may be permitted. Note that the Supreme Court is revisiting the ability to detain without bond review in *Rodriguez v. Robbins*, 804 F.3d 160 (9th Cir. 2015), cert. granted, 136 S.Ct. 2489, renamed *Jennings v. Rodriguez*, decision pending as of March 2017.

## The Hallmarks of a Just System

The legal philosopher John Rawls (1971) in his book, *A Theory of Justice*, created a thought experiment. He asked us to consider what type of governmental system and respect for human rights we would design if we didn’t know what status or role we would play in the new system. If operating behind a “veil of ignorance” would we create a system with a balance of rights and protections to limit governmental power? To be fair, Rawls expressly designed his experiment assuming that the participants were all citizens creating a nation-state. But others, such as the philosopher Joseph Carens (2013), have carefully explained that the process of design without regard to our individual privilege or status is also a tool that allows us to ethically examine the choices we make about borders and immigration controls. As some have put it, the lottery of birthplace does not fully justify the rule of law drawing distinctions amongst individuals. A system that values protections for individual liberty and protections for substantive rights to remain with family should be more extensive for those with long tenure in a country regardless of the manner of entry. International law already mandates both procedural and substantive protections for individuals who face a threat of violence in their country of origin. Constitutional values have routinely slowed administrative process and added robust notice and hearing procedures tempering mere efficiency or speed in adjudication. Scholars have long noted that a system with redundancy and appeals offers a better adjudication process, builds trust in outcomes, and can help to ensure accuracy. Records of proceedings, transparency and review protect against undue bias in adjudication and can identify patterns of selective, perhaps discriminatory, prosecution.

The US removal system does not adequately reflect these essential values. More than 80 percent of all removals take place without a hearing before a judge. Without records of proceedings, opportunities for appeal or adjudication before an independent decision maker, the US system is vulnerable to error, bias, and corruption. Given the importance of the issues involved, such as asylum claims or the right to retain permanent residence, the US system does not afford sufficient time and resources for careful development of evidence and evaluation of complex legal analysis. If the United States values efficiency, it is difficult to understand why so many cases are referred for removal proceedings and then closed as a matter of prosecutorial discretion. At first blush, it may appear that the lengthy backlog and months to completion of removal cases may argue for less process, but the lack of counsel in proceedings and the culture within the court’s system may be among the largest contributors to delay.

## Truncated Process and Lack of Substantive Protection Lead to Systemic Problems

For many of those subject to it, the US removal adjudication system does not adequately balance efficiency, accuracy, and fairness. Placed behind the theoretical veil of ignorance and unaware if he or she would be a noncitizen in removal, few people would design the truncated procedures used in so many of the cases. Most people would be dissatisfied with the removal and detention system if they knew it would impact them or their close family members. Most would argue for greater process, a right to counsel, options for discretion, or clemency and protection from arbitrary or dangerous *refoulement*.

Traditionally, legal scholars have said that to build a fair adjudication system, the government must ensure that the administrative process balances efficiency with the goals of accuracy and fairness. Usually these commentators also assume that the system will be transparent and provide records of the proceedings. Evidentiary rules, the right to counsel, and the right to appeal are all hallmarks of protections built into adjudication to ensure accuracy and fairness. In expedited removal cases, people receive a removal order moments after arrival that forever impedes their ability to regularize their status. Persons who use the visa waiver program to enter and overstay a visa are not entitled to a hearing despite years of residence. People who are apprehended in the interior or who have held lawful status but are now charged with being removable do have a right to an administrative hearing, but Congress has foreclosed the opportunity — in most cases — for individual equitable assessments. For some, DHS has the ability to use a conviction to eliminate substantive relief before the court and to narrow the scope and nature of any appeals or judicial review. For others, there is no remedy, and despite years of living in the United States, even those brought as children, Congress has left them without a remedy before a court. The only shaky and unreliable remedy is to try to seek prosecutorial discretion in the hope that the government will not initiate removal proceedings or execute a removal.

It is a worthy endeavor to try to identify the characteristics of a removal system that would protect the essential values of adjudication.<sup>15</sup> However, no mere process scheme can adequately protect individual rights if it truncates or curtails the scope and presentation of claims. While on paper, our expedited removal system might seem to protect some values of accuracy and additional process for those who fear harm, in reality, the balance is skewed solely toward government efficiency. The United States has lost sight of the core values that protect an adjudication model (and those subject to it) from arbitrary determinations and that promote the rule of law. While in the main Congress has crafted the US immigration system, the manner in which the executive branch wields its enforcement tools is equally, if not more, powerful in constructing a system that honors the rule of law. In many areas of administrative law, the federal courts act as a tempering and moderating force, but in the immigration field, Congress has severely limited the power of the judiciary to impose limits on the enforcement choices or to fail to exercise discretion. Most of the power in the system is allocated to the government's power to remove and little is afforded to the adjudicators to make case-by-case assessments. The number of dead ends, automatic grounds for deportation, and barriers to status far outnumber the discretionary exceptions. Only where Congress has chosen to protect a small number of victims of crime or domestic violence, or where international treaty is enshrined in our domestic law, does the system prioritize an individualized assessment of harm over the authority of the government to deport. This imbalance, the very generous allocation of power solely to enforcement, creates the harsh reality of our immigration system.

## Recommendations

Suggested here are some standards and characteristics of a removal system that would go further to promote fair outcomes and still preserve the government's enforcement

<sup>15</sup> Other scholars have written important pieces that evaluate these values. See, e.g., Legomsky (2010), which suggests an independent Article I court, and Family (2011). Family (2011) and other works by the author explore many aspects of the adjudication and process issues in the immigration courts.

obligations and need for efficient resolution of claims. Some of the ideas are culled from the excellent and voluminous recommendations and studies that have been prepared by the ABA, USCIRF, the Administrative Conference of the United States (ACUS), and others (ABA Commission on Immigration 2010; Cassidy and Lynch 2016; Benson and Wheeler 2012). Other recommendations are based on my over 30 years of experience in this field and the opportunities to observe and reflect upon the operation of the removal systems. The lived territory of immigration adjudication is a very different place than a pure blueprint found in statutes and regulations would suggest.<sup>16</sup>

***1. The DHS Should Establish Clear Enforcement Priorities and Cases Should Be Investigated and Evaluated Before Commencing a Removal Case***

As mentioned above, many of the cases in the immigration courts or within the ministerial removal systems are initiated by enforcement officers without review and prioritization by the trained attorneys representing the government. Typically the mandatory cases are those arriving at the border. Almost all other cases should require an individual assessment by an attorney. ICE attorneys should not only review the charges presented by the enforcement officers but they should spend additional time on fact investigation. DHS should be given the resources to conduct fact investigation and to review the entire file of an individual. If the person appears to have extensive history and familial ties to the United States, the DHS should consider how the commencement of removal might disrupt a community business or harm the US family members. In some cases, if DHS offers freedom from incarceration and a period of a stay of removal, that option might be sufficient to create a settlement and a negotiated departure.

In a recent case pending before the US Supreme Court, the federal criminal prosecutor did not intend the deportation of a man, Jae Lee, who had lived in the United States for 34 years.<sup>17</sup> Integrating removal decisions with sentencing requests by federal prosecutors is already a possibility in some cases but is not widely used.<sup>18</sup> ICE does not have to put this man into removal after he has served his criminal sentence. ICE attorneys tend to begin removal cases and decide during the hearing whether or not removal is appropriate. In cases where ICE believes the individual has been convicted of an aggravated felony the agency has usually taken the position the case must move forward. While a man like Jae, who held lawful permanent resident status, is entitled to a removal hearing and to defend against the grounds of removal, ultimately Congress has eliminated almost every form of relief. Congress cannot criminally prosecute a noncitizen without the same due process protections afforded a citizen, but because US law treats deportation as a civil sanction, someone like Jae can lose everything he values. Courts have repeatedly pointed out the

<sup>16</sup> See Benson (2007) for a fuller elaboration of this concept.

<sup>17</sup> *Lee v. United States*, 825 F.3d. 311 (6th Cir. 2016), cert. granted, 137 S. Ct. 614 (2016). The Sixth Circuit Court of Appeals had ruled that Jae Lee could not set aside his plea agreement because it was not reasonable to assume that a person would risk trial with a longer period of incarceration where there was strong evidence of guilt rather than take a plea that shortened his sentence.

<sup>18</sup> INA § 238 authorizes a federal sentencing judge in a case involving an aggravated felony to also issue an order of removal. There is little published data about the frequency of the US attorney general’s implementation of this process.

harshness of deportation but have said it is up to Congress to afford more opportunities to remain in the United States. Until that day, and as immigration courts have no general equitable authority, it is incumbent on the ICE attorney to consider the whole person and to make careful determinations about whether deportation should be sought.

This appeared to be the approach used in the final years of the Obama administration. After years of robust deportations, Secretary Johnson issued a memorandum directing ICE prioritize individuals with serious criminal convictions that posed a risk to national security or public safety and to prosecute recent border entrants (Johnson 2014). The new administration has rescinded these directives and replaced it with a general policy of broad enforcement. DHS Secretary John Kelly preserves a focus on national security and public safety, but expands the priorities to all who have violated immigration rules (Kelly 2017). The impact of the changed priorities remains to be seen. In the Obama administration, the vast majority of people in removal were charged with immigration regulatory violations. Fewer than five percent of the people in removal last year were charged with being removable based on a criminal conviction unrelated to a violation of immigration status. Many people who come to the attention of DHS due to criminal arrests are ultimately treated only as status or entry violators. While many have committed misdemeanors in illegally entering the country, the lack of a significant number of cases involving criminal conduct other than immigration violations indicates that ICE is not adequately evaluating the importance of a case and the real risks to public safety.

To use a model of selective referral to removal proceedings, DHS would need a culture change. It could model itself on other important federal agencies that protect US health and welfare. The Department of Labor is unable to bring every wage and hour violation. The Environmental Protection Agency cannot pursue civil sanctions for every polluter. The Department of the Treasury cannot sanction every taxpayer and seize assets in every case. These agencies investigate, prioritize, and negotiate. If DHS were armed with more tools than simply not bringing an enforcement action or closing a file without action, it would incentivize cooperation by the affected individuals. Further, the opportunity to investigate and interview would allow the ICE trial attorney to rely on the skills and adjudication techniques of the people within other branches of DHS to make security and risk assessments, such as whether the individual contributes to society's well-being or might be prone to an offense that threatens public safety. At the present time, until an application for relief is initiated by the individual, there is little for the DHS officer or ICE attorney to do but focus on removal, detention determinations, and execution of the removal orders. In asylum cases, the ICE attorney plays an important role in testing the veracity of the evidence and the testimony of the applicant. But not every case needs to be resolved solely through contested litigation. There are many other mechanisms such as written submissions of evidence, in-person depositions, or conferences with the parties that might more quickly and effectively narrow issues and allow a case to be resolved.

With an estimated 11 million undocumented people in the country and many living under existing final orders of removal, we need to give the DHS attorneys bargaining tools such as temporary work authorization, temporary status, conditional residency, and even a grant of permanent resident status for cases that might meet the legal immigration criteria, if not for technical reasons such as an entry without inspection, which make them unable to complete the adjustment of status or immigrant visa process.

Given that a significant number of cases pending in the removal system resulted in and are likely to continue to result in case closure without a removal order, DHS should not waste the resources of DOJ courts or its appellate bodies. Instead, ICE should become part of the US registration and regularization force for cases deemed a low enforcement priority. ICE should be able to exercise discretion prior to the removal adjudication.

### ***2. Fair Adjudication for New Arrivals Requires Adequate Resources and Greater Accountability***

Prior to 1996, if a person arrived at a US port of entry such as an airport and the CBP (formerly Immigration and Naturalization Service [INS]) inspector thought he or she had the wrong documents or false documents, he or she could put you into inadmissibility proceedings before an immigration judge. The individual might be detained, but most were given a temporary parole into the United States and then required to return for a further interview or for the hearing on their eligibility to enter. In 1996, Congress gave CBP officers the choice to use expedited removal when a person lacked documents. For many years, the agency did not choose to use this tool to refuse admission along the Mexican border. People would simply be refused entry. But DHS began to adopt a removal with consequences strategy. They expanded the use of expedited removal, which bars an individual for five years and subjects them to heightened criminal penalties if they chose to illegally reenter the country. The agency can and should return to its past practice of affording persons in this situation “regular removal proceedings.”

It is hard to say whether Congress has always intended these outcomes. Immigration law is complex and few have mastered all of the procedures or substantive rules. Over time, as Congress added more enforcement tools to expedite and to improve the efficiency of the removal system, it perhaps did not fully foresee the way in which the delegated authority would operate. When expedited removal was first created in 1996, it was rarely used and applied only to people arriving at airports who had destroyed their documents on flights. Over time, CBP began to use expedited removal as a tool against people who had been apprehended multiple times trying to cross the border illegally. But in 2000 and again in 2002, the Bush administration used the statutory authority to expand expedited removal to within the interior for those who within the previous two years had entered illegally by sea, and to those apprehended within 100 miles of the international land border who could not prove presence of more than 14 days or entry with proper inspection. Now the Trump administration is considering whether to expand expedited removal into the interior of the United States for all who cannot prove presence of more than two years and who cannot prove proper inspection. Expedited removal now accounts for more than 44 percent of removal orders (American Immigration Council 2017b).<sup>19</sup> This process affords no judge, no hearing, no chance to defend, and no chance to delay. The only exception is for those who can establish a possible claim for protection due to a “credible fear” of persecution.

It is difficult to evaluate the accuracy and fairness of expedited removal proceedings. First, it is even difficult to measure the use of the tool. The DHS formerly released the data about

<sup>19</sup> According to American Immigration Council (2017b): “In FY 2013, approximately 193,000 persons were deported from the United States through expedited removal. That represents 44 percent of all 438,000 removals from the United States in 2013.”

the form and quantity of various removals. But the agency no longer reports expedited removals, reinstatement of removals, and administrative removals separately from other forms of removal. Second, these forms of removal require little more than a DHS form and a supervisor's signature. People subjected to the process may not understand that they have been subjected to a formal order of removal as opposed to being pushed back into Mexico or told simply to return to the country of origin. People subjected to reinstatement of removal may not fully understand that they can request a hearing to raise a fear of persecution, but that they have no ability to present details or circumstances of their lives or to demonstrate the harm removal might create for them or their families. Because this process includes no judges or transcripts in a central adjudicatory body, there is no public account of the removal orders and almost no review of the accuracy or fairness of the procedures used to establish the necessary predicate facts that subject the person to these truncated procedures.

When considered solely as an efficient tool for rapid decision-making at the US port of entry, expedited removal may seem like a good balance of efficiency over accuracy. Some people might be refused improperly but the alternative might be people who would use hearings and delay in the system to overwhelm the adjudications and to force the government to allow their physical presence within the United States. That rationale was part of the design when the system was limited to people who present themselves at a port of entry. However, the DHS expanded expedited removal and used it against people apprehended beyond the ports of entry. Further, the use of expedited removal does not operate in isolation from other provisions of the law. Handing an apprehended person a piece of paper labelled "removal" may be an insufficient warning of the severe consequences for subsequent reentry. Reentry after an order of expedited removal can trigger criminal prosecution as a felony or the almost insurmountable lifetime bar to future legal admission. In theory, the statute contains a powerful tool to deter people from violating the rules and entering illegally after an order of removal, but in reality, the people who are subjected to these rules have received little information about the law, and virtually no warnings about the consequences of violating the law, or advice about alternatives. Once someone enters illegally and remains for more than a year, she is trapped inside the United States. If she ever came forward to leave to try to correct her status, she would subject herself to the permanent bar.

The cumulative effect of these procedures has been to create a vulnerable and trapped class of residents. There are likely millions of people who could be removed quickly and who have few ways to correct or regularize their status. ICE does not formally report the number of outstanding final orders but estimates are that an estimated 900,000 people have a final order but the government has not chosen to or been able to remove them (Vaughan 2016). Some people appear at supervised release interviews living under a final but unexecuted order of removal. Under existing procedures, ICE need not provide an opportunity for a new hearing even if the person has resided in the United States for most of his or her life. Discretion given can be discretion withdrawn. The law's finality means that an individual may not be able to argue that a change in the interpretation of the immigration consequences of a conviction should now prevent her removal. Congress's desire to create absolute categories of removable people and the elimination of many of the discretionary forms of relief have combined to create a rigid system where the person's lack of ties to any other nation, the citizenship of her children, and her long-term residence in the United States are irrelevant to the removal adjudication process.

## Immigration Adjudication: The Missing “Rule of Law”

Perhaps Congress has not given the border officers sufficient alternatives. If a person seeking protection appears at the US-Mexico border and has no visa to seek admission, the system forces CBP to place her into some form of removal. There are many reasons Congress and the agencies have chosen the path of detention and expedited removal. The primary argument is that the use of these tools will deter unlawful entrants. The evidence is mixed. The United States has never experienced the massive movements of people comparable to the millions seeking protection as they flee Iraq, Afghanistan, and Syria, or the millions displaced or threatened within Africa or Asia.

And, the current expedited removal status is actually not well suited when the United States receives large numbers of people with strong claims for protection. CBP takes the position that if someone arrives at a port of entry or a border crossing, and has no documents that authorize admission to the United States, it has no authority to allow them to seek asylum or similar protection. Instead, CBP maintains that people in this system or those apprehended within 100 miles of the border, must be placed in expedited removal and detained. In a recent memorandum, the Trump administration seemed to be considering whether to refuse even those who have a credible fear and to arrange for the use of video conferencing hearings from Mexico (Kelly 2017).<sup>20</sup>

The statutes and regulations have created a system where, once a statement of fear is made and recorded in a short “Q and A,” CBP holds the individual for a credible fear assessment made by an asylum officer from the USCIS that processes refugee and asylum claims. In some instances that means a face-to-face interview with an asylum officer and in others, it may mean a video teleconference. There is no right to counsel in the process but in some situations, CBP will allow an attorney to sit with the applicant and take notes. If the asylum officer finds the person has met the initial threshold, he or she will continue to be detained while a removal hearing to seek protection is scheduled. But if the assessment is a denial of the credible fear, then the applicant may seek a review of that determination by an immigration judge. There is no appeal from this decision, and only if the immigration judge finds a credible fear, will the individual proceed to a full hearing.

At the time of its design, this system seemed like an appropriate way to weed out weak claims with little likelihood of success on the merits. Congress created the expedited removal system to provide the federal government with tools to adapt to large numbers of arrivals, but for nearly 15 years DHS has expanded its use of expedited removal as a basic tool of enforcement. Expedited removal is used both for the asylum seeker and the entrant refused admission at a border or between official ports of entry. During many of those years, the DHS would allow people to be released pending the asylum adjudication; some were released with ankle monitors, some posted bond, and some on their own recognizance. But as the numbers of people seeking protection escalated in the summer of 2014 due to the growing violence and collapse of civil society protections within the Northern Triangle of Central America, the system could not keep up with the volume of people seeking protection.

At first, the US government responded both with an acknowledgement that the movement was a humanitarian crisis and by attempting to deter more asylum seekers. Initially, CBP

<sup>20</sup> See generally, INA § 235(b)(2); 8 U.S.C. § 1225(b).

released adults traveling with small children, but continued removal proceedings against them as inadmissible aliens. But as the numbers grew, the DHS began to build more detention facilities (Gilman 2016).

**Table 1. US Border Patrol Southwest Family Unit and Unaccompanied Alien Children Apprehensions FY 2013 to FY 2016**

	FY 13	FY 14	FY 15	FY 16
Unaccompanied children	38,759	68,541	39,970	59,692
Family units	14,855	68,445	39,838	77,674
Individuals	360,783	342,385	251,525	271,504
<b>Totals</b>	<b>414,397</b>	<b>479,371</b>	<b>331,333</b>	<b>408,870</b>

Source: CBP (2016a).

**Table 2. US Border Patrol Southwest Unaccompanied Child Arrivals FY 2010 to FY 2017**

Southwest border apprehensions								
Country	2010	2011	2012	2013	2014	2015	2016	2017
El Salvador	1,910	1,394	3,314	5,990	16,404	9,389	17,512	1,776
Guatemala	1,517	1,565	3,835	8,068	17,057	13,589	18,913	2,308
Honduras	1,017	974	2,997	6,747	18,244	5,409	10,468	1,367
Mexico	13,724	11,768	13,974	17,240	15,634	11,012	11,926	1,205
<b>Total</b>	<b>18,168</b>	<b>15,701</b>	<b>24,120</b>	<b>38,045</b>	<b>67,339</b>	<b>39,399</b>	<b>58,819</b>	<b>6,656</b>

Source: CBP (2016b).<sup>21</sup>

The Obama administration sought to deter children and women with small children from making the dangerous trip and insisted that all adults traveling with children would be detained pending the expedited removal process. This led to a legal challenge to the adequacy and fairness of the expedited removal process.

The United States is not alone in struggling to adapt asylum adjudication procedures to large numbers of people.<sup>22</sup> However, the combination of expedited removal, mandatory detention, obstacles to legal representation, and evidentiary restrictions abridges human rights. The fact that Congress also precluded extensive judicial inquiry into the process

21 Totals added by author and last accessed in December 2016. The page contents have changed with the new administration.

22 While asylum applicants at the border have dramatically increased since 2014, the totals are much smaller than the movements of millions of people fleeing Iraq, Syria, Afghanistan, South Sudan, Eritrea, the Central African Republic, or many other refugee source nations. The UNHCR (2016) estimates that more than 65 million people are forcibly displaced person. The United States needs to recommit to the protections enshrined in humanitarian treatise such as the Refugee Convention and not allow numbers alone to cause us to abandon these commitments.

and that at least one Circuit Court of Appeals agrees with those limits, creates a zone of adjudication without any of the key protections or process of an adjudication system. Efficiency seems to be the paramount, singular goal.

In a comprehensive evaluation published in the summer of 2016, USCIRF reported that the expedited removal system remains flawed and expressed concerns about both the operation of the system and the increasing use of detention and video technology to conduct interviews by asylum officers (Cassidy and Lynch 2016).<sup>23</sup> Authorized by Congress, in part, to observe and evaluate the expedited removal process, USCIRF has proposed ways to increase transparency and ensure greater procedural protections. However, many of its recommendations have not been adopted. There is no other external regular assessment or review mechanism for this process. In short, expedited removal operates outside the rule of law.

While courts have been reluctant to find that newcomers are entitled to a constitutional minimum of procedural protections, some new entrants are different in quality and nature than others. Some have family here. Some have no safe place to return to or are particularly vulnerable, such as young children. The obscurity of the expedited removal process hides its substantial problems. All removal procedures should generate an administrative record. Yet, at present, expedited removal paperwork is very limited and completely controlled by the CBP inspectors. Others have suggested that all interviews be recorded. Even if the United States valued speedy adjudication over additional process, it should allow a process for administrative review, submission of additional evidence, and review of the determination. If an individual was not seeking admission based on a claim for protection, this later review might be initiated while the applicant is abroad. At the current time, there is only an opaque process insulated from assessment and review.

Furthermore, if the United States chooses to use an expedited process, it should adequately staff adjudication teams to interview, investigate, and determine who might need temporary admission and who might deserve permanent protection. Congress should also give CBP and the Asylum Corps more options to respond to the protection needs of people at the border. For example, the United States could expand its use of temporary admission via parole. The United States could also expedite its adjudication process to help bona fide refugees present and complete their claims for protection.

If speed becomes important for security concerns or due to emergency situations, our system should have the flexibility to deploy more resources quickly and to use tools like priority dockets to move urgent cases first. At the current time, the underfunded courts are mostly disrupted when they try to move judges to needed areas and to move categories of cases to the front of the line. The repeated impact is to delay the adjudication of many other cases and to waste time and court resources in deciding which cases to prioritize. If the DHS attorneys are more engaged in the case-by-case decisions and if they are given greater options for outcomes, the system will both be more flexible and be better able to address emergent needs.

23 The USCIRF is the only entity that has been given access to carefully study the operations of the expedited removal system. The report by Cassidy and Lynch (2016) calls upon Congress and the DHS to regularly investigate operations and to improve internal oversight.

It is possible that generous adjudications and temporary admissions at our borders might encourage too many people to seek admission. But the current system screens out with a blunt removal and a bar for five years. The person who succeeds in entering illegally then becomes both a criminal and is barred potentially for life. In short, the pendulum has swung too far in one direction.

### ***3. The System Must See the Whole Person Not Merely Examine the Mode of Entry***

For many, the legal process authorized is completely controlled by the original means of entry and has little or nothing to do with current ties to the United States. If a child is brought to the United States with her parents under the visa waiver program, he or she is bound by the waiver of her parents. Even half a lifetime later, that child can be removed without any hearing. People previously ordered removed, after a few minutes of paperwork at an airport, could be subjected to reinstatement of removal even after 20 years of residence and the US citizenship of her children. Long-term residents, with or without permission, almost never acquire any equitable authority to limit the power of the US government to remove them, especially if they are convicted of any criminal conduct.

A traditional hallmark of due process is to assess the property or liberty interest at risk and to ask if the government has a right to interfere with the individual's interest. While the Supreme Court has recognized since 1903 that even aliens are entitled to due process in deportation proceedings when the person is residing in the territory, it has unfortunately refused to use substantive due process to cut off the right of the federal government to deport. No matter the length of residence, no matter the hardship upon removal, courts have repeatedly concluded that the due process clause is insufficient to provide a shield from removal. Instead we have relied on procedural surrogates to provide long-term residents with procedural protections such as hearings or burden shifting.

Congress has been unwilling to allow noncitizens to apply for waivers of deportation or regularization of status when they are convicted of certain crimes or in punishment for illegal entry after removal. While there are a few exceptions for victims of crime or domestic violence or for those who can demonstrate a probability of severe harm or torture, in the main, far too many long term-residents lack a remedy in immigration court.

The system needs to provide more options. The empirical data indicates that the vast majority of people residing without status in the United States live in mixed households.<sup>24</sup> Some family members are citizens, while some are permanent residents. Moreover, the United States has two statutory provisions that establish significant barriers to status through the legal immigration system. Since 1996, the United States has punished people who overstayed a grant of status by more than one year with a 10-year bar if they depart. If the system removed this single provision, hundreds if not thousands of people could seek status through family and employer petitions as they did prior to 1996. It should also provide tools for DHS officials to grant permanent residence to people residing within the United States who cannot obtain status due to technical violations or an original failure

<sup>24</sup> According to Warren and Kerwin (2017), there are 5.3 million US households with undocumented residents, and they are home to 5.7 million US-born children.

to enter with a valid visa. DHS has a limited “parole in place” program, which allows the spouses and parents of US military on active duty to regularize status. If these individuals had to depart the United States and travel abroad to apply for a visa, their departure would trigger a permanent or 10-year bar to reentry. Some view discretion as “rewriting the immigration laws.” If so, Congress could always authorize parole more broadly or create more exceptions and interior waivers of the draconian departure bars.

#### ***4. A Statute of Limitations is Essential***

One of the oldest constraints on civil law is the legislature’s ability to limit litigation by forcing the parties to litigate before the claims go stale. Statutes of limitation are, in part, intended to preserve the accuracy of evidence and the ability of adjudicators to serve a truth-seeking function — time dims memories. The statutes also serve the interest of finality and certainty. If an old debt has never been pursued, for example, the debtor is free to deploy the assets elsewhere. If a title was transferred with a stain or lien, as the years go by, the new owner can be certain he or she possesses a clear title and the value of the asset is preserved or enhanced.

In the US immigration system, this concept has been almost completely lost. In the early years of immigration law, the power to deport was limited to those who committed fraud at entry or committed an offense within the first few years after entry. There are still vestiges of the concept in some portions of the INA. A single offense may render a noncitizen deportable if committed within five years of entry but not afterward unless a second offense follows. But as the list of deportable offenses grew, few came with any temporal limit.

The US immigration system should afford a sense of finality and security to persons who have built strong equitable ties and lived in the United States for many years. If long-term residents commit a crime, the criminal justice system has the tools to punish them. However, to deport a person after years of residence makes a mockery of the claim that removal is not punishment but a civil sanction.

#### ***5. A Path to Regularization***

The vast majority of people in removal proceedings entered without a visa or overstayed a period of temporary admission. For some, the commencement of a removal proceeding might unlock a door to status through cancellation due to “exceptional and extremely unusual” hardship to a US citizen or permanent resident relative. Yet, cancellation for someone who has not held lawful permanent resident status is limited to 4,000 cases a year and for people who have resided in the United States for a minimum of 10 years.<sup>25</sup> These numbers are usually used within the first 30 days of each year.

<sup>25</sup> INA § 240A(b); 8 U.S.C. § 1229b provides for cancellation of removal for a person who can meet the strict criteria but the relief is only available in removal proceedings and is capped at 4,000 per year. There are other forms of cancellation for the lawful permanent resident who has seven years of physical presence and for victims of domestic violence. See generally INA § 240A(a) and (c); 8 U.S.C. § 1229b(a) and (c). But these opportunities for relief also are restricted by bars to eligibility for some forms of criminal behavior, even if the person is able to demonstrate rehabilitation.

Rather than placing people into the adversarial cauldron of a removal proceeding, DHS should have options for interviews and assessment. The agency could give individuals a deadline to apply for status and then pursue the usual background checks and evaluation of character and relationships as it already does in many cases. If the individual has committed serious crimes that have not been prosecuted or is a risk to national security, DHS can make a determination of whether the person should be removed. But the presumption should be that long-term residents would be vetted and integrated, not deported. Congress could make this option a reality. The political conversation is a complex one but a path to status offers a huge incentive and vehicle for tax compliance, transparency, reporting, military service, family stability, and economic growth. The power to grant status may be the single best incentive for participating in the court process. Conversely, the more difficult it is to qualify for status, the less effective it will be in promoting court adjudications.

### *6. A Right to Counsel*

Processing times for non-detained cases can take years, given the massively backlogged court dockets. In cities like Los Angeles or New York, it is not uncommon for adjudication to require more than three years. However, more people are represented and ultimately successful in securing a remedy or relief from removal in these cities. The complexity of the adjudication process and the underlying law makes counsel a necessity. In a survey of IJs by ACUS, more than 80 percent reported that competent counsel improved the court's operations (Benson and Wheeler 2012).<sup>26</sup>

The New York Immigrant Family Unity Project has been providing universal representation to all indigent New Yorkers in regional detention for nearly four years. Before the project began, fewer than 3 percent of the individuals secured any relief from removal. At present, approximately 30 percent of the individuals in removal proceedings either defeat the government's charges or win discretionary relief.<sup>27</sup> There are too many variables to predict similar results in every locality, especially where the substantive law can vary by federal circuit rulings. In New York City, a high percentage of the cases involve people who have applied for asylum affirmatively and are seeking review of their application, or were placed into removal due to a determination during a benefits application that their case presented a problem. The length of residence of the people, the existence of some waivers based on family relationships, the skills of the attorneys presenting asylum claims — these variables likely explain the differential in outcomes.

But the evidence that counsel makes a difference is dramatic. Transactional Records Access Clearinghouse (TRAC) data center at Syracuse University has a standing Freedom of Information Act (FOIA) request for the data and outcomes in juvenile cases. It appears that when a juvenile has an attorney in immigration court, he or she is 17 more times likely to secure a termination of the proceeding. These terminations are largely issued because the juvenile was granted a benefit such as special immigrant juvenile status or another visa or was able to secure asylum affirmatively at the USCIS office. Phrased another way, in

<sup>26</sup> See also Shannon (2014) and Thomas and Benson (2016), which discusses the importance of counsel.

<sup>27</sup> Testimony of Jennifer Friedman of Bronx Defenders to the New York City Council, on behalf of the New York Immigrant Family Unity Project, dated March 22, 2017, on file with author. This project is funded by the City of New York and does not receive federal funding.

the cases completed in FY 2015, a child was ordered removed in 34 percent of the cases without counsel and only 5 percent of the cases with representation.

Unfortunately Congress has not authorized paid counsel for children and recent litigation seeking government-appointed counsel was dismissed. A panel of the Ninth Circuit Court of Appeals ruled that Congress required cases to begin with the immigration courts, to exhaust the administrative appeals process, and only then to avail themselves of the courts of appeal.<sup>28</sup> The litigation seeking a class action declaring children were entitled to the appointment of counsel had begun in the federal district court. So Congress, perhaps in an effort to preserve judicial efficiency, has instead, created a situation where thousands of children will have to hire counsel or hope for pro bono assistance or simply preserve the issue of a need for counsel in the individual immigration hearings. The result is particularly perverse because most remedies available for these juveniles are found in fora outside the court in applications for relief made before other bodies such as the asylum office or family courts. But children in removal proceedings have no knowledge of those external procedures and the immigration judges are powerless to grant relief directly.

**Table 3. FY 2015: Outcomes in Juvenile Cases in All Immigration Courts\***

<b>FY 2015</b>	<b>Removal order</b>	<b>Prosecutorial discretion</b>	<b>Other closure</b>	<b>Relief</b>	<b>Termination</b>
Total of all juvenile cases: 31,075 (pending as of Mar. 2017: 13,973)	6,695	269	4,364	90	5,148
17,102 completed	39% of the completed cases	15.7%	25.5%	.5%	30%
Unrepresented	5,905	21	367	2	284
9,819	34% of the completed cases	.01%	2.1%	.01%	1.6%
Represented	791	248	3,997	88	4,864
21,256	4.6%	1.45%	23.3%	.5%	28%
	More than 8 times greater risk of removal order for unrepresented.		10 times greater likelihood of success than unrepresented	44 times	17 times

\*Fifty-five percent of the juvenile cases initiated in FY 2015 were completed during the year. Not all removal orders are executed. Juveniles may receive an administrative closure or after an order of removal or deferred departure. Political asylum is the most common form of relief granted in these cases. Termination usually occurs with ICE consent based on relief pending at USCIS. *Source:* TRAC (2017), using the data from 2015.

28 *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016). A petition for *en banc* review is pending as of March 2017.

Legal counsel increases rates of relief from removal. In addition, there is strong evidence that providing counsel would save time and money for the federal government (Montgomery 2014).<sup>29</sup> Counsel would not be able to secure relief for every person but they can advise the individual about his options and in many cases this may result in fewer nights in detention and shortened proceedings. As mentioned, if the ICE trial counsel adopted a culture of negotiation, it is likely that the delays inherent in the system now would be reduced. At present, more than one-half of all the continuances granted by IJs are issued to allow the individual time to try to secure counsel (Benson and Wheeler 2012).

### ***7. Reconsider the Growing Criminalization of Immigration Violations***

Despite the fact that the majority of removal orders are issued in an expedited or purely ministerial fashion, the long-term consequences for the individuals who are subject to these orders can be quite extreme. People who reenter the United States after an order of removal are subject to criminal prosecution for a felony. Immigration violations are primarily civil law violations. Yet, in the past 10 years, the federal government has chosen to use criminal sanctions against those who illegally reenter. In fact, it is the single largest category of criminal prosecution in the entire federal system and the fastest growing category of any crime. In FY 2016, the US federal courts entertained prosecutions for illegal entry (a misdemeanor) and criminal reentry (a potential felony) in nearly 69,000 cases (US District Courts 2016).<sup>30</sup> The next closest category of federal prosecutions was for drug crimes, with fewer than 20,000 cases.

A truncated, summary removal order issued by a CBP inspector one day can result in a later felony conviction if the individual tries to reenter the United States the next day. Further, these criminal prosecutions can carry significant sentences. The federal public defenders have developed an entire body of law collaterally attacking the legitimacy of the initial expedited removal to help diminish or eliminate the criminal sanction that can follow from that order. The defenders have sought to show that the expedited removal process violates basic tenets of procedural due process as the system can be prone to errors of fact and of application of law. A panel of the Ninth Circuit recently ruled that although the system of expedited removal may be swift, it does not violate the due process rights of recent unlawful entrants because Congress may largely define the scope of process and the Constitution, while guaranteeing due process of law to all “people” may not attach to recent entrants.<sup>31</sup>

### ***8. End Detention as Part of the Pre-trial Removal Process***

The growth of civil detention in immigration cases is exponential and expensive. The funds used to detain and control nearly 500,000 people annually could be better spent

29 Montgomery (2014) concludes that counsel reduces delays and detention and would be cost effective and might produce savings.

30 One analysis of the data states that as of the end of FY 2016, 52 percent of all criminal cases in the federal district court are related to immigration (TRAC 2016).

31 See *United States v Peralta-Sanchez*, 847 F3d 1124 (9th Cir. 2017), on collaterally attacking an order of removal in a subsequent criminal prosecution. Petition for *en banc* review pending.

in providing resources to the adjudicators. There is no true justification for wholesale detention of noncitizens. Congress has traditionally justified detention as necessary to ensure attendance at removal hearings or to protect public safety. For those people who are in detention related to a conviction in the criminal justice system, the DHS could prioritize completing the removal process.<sup>32</sup> If DHS relied more heavily on proven and promising alternative to detention programs, some of the worst aspects of the removal system would be eliminated.

## Conclusion — A Dark Territory

Immigration law operates in the darkness beyond the reach of due process protections, accuracy, fairness, and transparency. Record numbers of immigrants live in the United States, but far too often they reside in a legal territory which the light does not reach. This essay has highlighted some of the characteristics of the US removal system. It outlines this system’s lack of substantive protections and its overreliance on hidden and expedited processes. It argues that this system needs to be redesigned to reflect the rule of law. The system needs to be exposed to the light of day.

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# The Promise of a Subject-Centered Approach to Understanding Immigration Noncompliance

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## Executive Summary

Unauthorized immigrants and immigration enforcement are once again at the center of heated public debates and reform agendas. This paper examines the importance of applying a subject-centered approach to understanding immigration noncompliance and to developing effective, ethical, and equitable immigration policies. In general, a subject-centered approach focuses on the beliefs, values, and perceptions of individuals whose behavior the law seeks to regulate. This approach has been widely used in non-immigration law contexts to produce a richer and more nuanced understanding of legal noncompliance. By contrast, the subject-centered approach has been an overlooked and underappreciated tool in the study of immigration noncompliance. This paper argues that a subject-centered understanding of why people obey or disobey the law has the potential to generate new insights that can advance public knowledge and inform public policy on immigration in a number of important ways. Specifically, the paper considers how the use of this approach might help us: (1) recognize the basic humanity and moral agency of unauthorized immigrants, (2) appreciate not only direct and immediate costs of immigration enforcement policies, but also their indirect and long-term costs, and (3) develop new and innovative strategies to achieving desired policy goals.

## Introduction

Across many areas of law, researchers have long accepted the basic notion that to understand why people obey or disobey the law, we ought to understand the perspectives and experiences of individuals whose behavior the law seeks to regulate. This subject-centered approach to the study of legal noncompliance has produced a rich body of research across many different areas of law — as wide-ranging as illegal littering (Grasmick, Bursik, and Kinsey 1991), illegal fishing (Gezelius 2002), juvenile delinquency (Fagan and Tyler 2005), neighborhood violence (Kirk and Papachristos 2011), and white-collar crime (Soltes 2016). In this paper, I suggest that a subject-centered approach is an often overlooked and underappreciated tool in the study of immigration noncompliance, and

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that this approach to understanding why people obey or disobey the law has the potential to generate new insights that can advance public knowledge and inform public policy on immigration in a number of important ways. To be clear, I am not suggesting that a subject-centered approach ought to replace other approaches to the study of legal noncompliance in immigration law (or in any other area of law). Rather, my argument is that in light of the unique knowledge and insight that a subject-centered approach can provide, this approach should be adopted more widely to complement non-subject-centered approaches.

The remainder of this paper will develop this argument in three parts. The first part discusses some of the basic features of a subject-centered approach, and key challenges to employing this approach. The second part examines the application of a subject-centered approach in studies of legal noncompliance in tax and criminal law, respectively, in order to illustrate the versatile use of this approach across the civil-criminal law divide. My goal is to provide a broad context for thinking about the utility of a subject-centered approach, and to show that this approach has been used in varying ways across many different areas of law to enhance public knowledge and produce policy-relevant findings. Finally, I conclude by outlining some of the significant benefits to using this approach to understand immigration noncompliance. My discussion of these expected benefits centers around the following three key points that I further elaborate in this paper.

First, I show that a subject-centered approach can play an important role in helping us to recognize the basic humanity and moral agency of unauthorized immigrants. This recognition, in turn, is a critical foundation for developing immigration policies that are informed by international human rights norms, rather than by the immigrants-as-criminals trope, which lacks empirical basis but is often used to fuel public anxiety and fear.<sup>2</sup> Second, I discuss the ways in which a subject-centered approach can help us to better appreciate not only direct and immediate costs of immigration enforcement policies, but also their indirect and long-term costs. Although these indirect and long-term costs may be more difficult to measure, their potential implications for governance and system legitimacy are significant. Third, I consider how a subject-centered understanding of immigration noncompliance can foster new and innovative strategies to achieving desired policy goals. For example, my prior study indicates that unauthorized labor migration arises not from the immigrants' lawlessness or disrespect for the rule of law, but from their belief that unauthorized migration constitutes the only morally-acceptable response to economic exigencies that threaten their ability to perform "legal" and "honorable" work in support of their families. This finding would suggest that a focused developmental strategy that promotes job opportunities in key sending communities is more likely to reduce noncompliance than expending the same resources to produce threats of criminal punishment or to build a physical barrier along the US-Mexico border.

## I. Subject-Centered Approach

A subject-centered approach requires researchers to place their research subjects' perceptions and experiences at the center of their investigative focus and analysis. A number of scholars

<sup>2</sup> For a summary of studies that show that popular assumptions of immigrant criminality lack empirical basis, see Ryo (2015).

have expressly recognized the importance of applying subject-centered approaches to understand diverse and wide-ranging social phenomena. For example, Yasemin Besen-Cassino (2008, 352), in her study of youth labor in the United States, explains that “[w]hile youth employment has been studied extensively from the perspectives of parents, educators, and policy-makers, the central actors — young people themselves — have been relatively neglected and young people’s motives behind work remain virtually unexplored.” Besen-Cassino (2008, 360) argues that exploring the youths’ perspectives advances our understanding of not only those individuals’ decision-making process about work, but the way in which they make sense of their work and the “alternative functions [that] work fulfills” for them.

Likewise, Min Zhou and colleagues (Zhou et al. 2008; see also Lee and Zhou 2014; Zhou 2015) expressly acknowledge the importance of using a subject-centered approach in their study of immigrant assimilation. According to Zhou et al. (2008, 42), “the process of social mobility is complex and multifaceted and . . . mechanisms leading to divergent outcomes depend largely upon how structural and cultural exigencies affect subjects and how subjects respond or react to those exigencies.” Thus, Zhou et al. (2008, 42) argue that a subject-centered approach that attends to immigrants’ perceptions, and definitions of mobility and success, will enable us to better “understand both the obvious and subtle reasons [why] members of the second generation make certain choices and pursue particular pathways” to social mobility.

While there is temptation to strictly equate subject-centered approaches with qualitative methods like ethnography or open-ended interviews, I suggest that subject-centered approaches are pluralistic and often times agnostic, with respect to methodology. To be sure, quantitative methods such as closed-ended surveys are less adept at capturing *in depth* the inner world of research subjects than qualitative methods like open-ended interviews. However, surveys typically enable researchers to more easily capture the perspectives of a significantly larger sample of individuals. Given these tradeoffs between quantitative and qualitative methods, researchers have often deployed both types of methods, either simultaneously or sequentially, to obtain a more holistic picture of the complex dynamics underlying the social or legal phenomenon at issue. Whatever the researcher’s chosen methodology, subject-centered approaches can present daunting challenges. For example, these approaches often require time- and resource-intensive field research. Researchers may encounter substantial hurdles to gaining access to subject populations of interest if those populations are hidden from public view. Researchers may also face formidable obstacles to establishing the mutual understanding and trust necessary for meaningful data collection, especially if the members of the subject population occupy marginalized or vulnerable positions in society.

In the next section, I turn to research on criminal law and tax law to illustrate how scholars have deployed subject-centered approaches to produce richer and more nuanced understandings of legal noncompliance in those disparate areas of law. My goal is not to offer a comprehensive review of the vast and growing bodies of research in these two areas of law. Nor do I mean to suggest that immigration noncompliance is in any way analogous or similar (legally or morally) to criminal or tax noncompliance. Rather, my goal is simply to illustrate in relatively broad strokes the ways in which subject-centered approaches have become an important device across both criminal and civil law domains.

## II. Applications in Criminal Law and Tax Law

A long line of research has focused on the question of why people obey or disobey the law (see, e.g., Meier and Johnson 1977; Grasmick and Bryjak 1980; MacCoun 1993; Jackson et al. 2012; Tyler and Jackson 2014). The dominant models of legal noncompliance — from the instrumental model to the procedural justice model — are perceptual models at their core. These models focus on, for example, how people perceive the certainty of apprehension and severity of sanctions (Nagin 1998; Paternoster 2010), or how people perceive the legitimacy of law or legal authority regulating their conduct (Tyler [1990] 2006; Mazerolle et al. 2013).<sup>3</sup> Researchers have responded to the subjective nature of inquiries required to test these models by collecting and analyzing a voluminous array of empirical data on the legal attitudes and legal experiences of individuals subject to the law. Below, I highlight a few of these studies in criminal law and tax law contexts, respectively, to illustrate these studies' diverse range, scope, and methodology.<sup>4</sup>

In criminal law research, scholars have long recognized that “to ignore or minimize the value of [offenders'] views and opinions” of criminal law and policies “because of distrust of their honesty and motives is to risk failing to obtain invaluable information from those in a position to offer unique and unanticipated insights” (Larson and Berg 1989). For example, it was only through surveying nearly 300 criminal inmates across a number of prisons and jails that David Anderson (2002) was able to demonstrate the extent to which criminal offenders made uninformed decisions about whether to engage in criminal behavior. Anderson asked on the survey, “When you committed this crime, how likely did you think it was that you would be caught?” and “When you committed this crime, did you know what the likely punishment would be if you were caught?” Anderson's analysis of the responses to these survey items showed that 76 percent of active criminals and 89 percent of the most violent criminals in the study, respectively, had not thought about either the risk of apprehension or the likely punishments at the time of their offending.

Eugene Soltes (2016) reached a similar conclusion in his study of former executives who had been convicted of white-collar crimes such as insider trading, violations of financial reporting requirements, and pyramid schemes. Drawing on in-depth interviews with almost 50 former executives, Soltes (2016, 5) “sought to place [himself] in their positions and to understand the world as they saw it.” By adopting this subject-centered approach, Soltes was able to dispel the myth of the mastermind, which presumes that white-collar crime is a product of careful cost-benefit analysis. Contrary to this myth, Soltes showed that white-collar crime was more a result of failures in intuition and gut instincts, as well as the executives' inability to appreciate the human suffering and harm caused by their corporate malfeasance. Soltes (2016, 6) explained, “[W]hile manipulative corporate conduct has the same financial effect as stealing money from an investor's wallet, there is a crucial difference

3 Models of legal compliance have also become more complex over the past several decades as researchers have sought to develop more realistic theories that explicitly take into account aspects of human behavior that challenge standard assumptions of neoclassical economics (see Jolls, Sunstein, and Thaler 1998 [discussing bounded rationality, bounded willpower, and bounded self-interest]).

4 I focus on US studies for the purposes of my exposition, though there are many studies in this body of research that focus on non-US contexts (see, e.g., Hucklesby 2009 [examining factors underlying compliance with electronically-monitored curfew orders among criminal offenders in England]; Wenzel 2004 [examining the impact of social norms on tax compliance among Australian citizens]).

between these types of crime from the perspective of the perpetrator.” According to Soltes (2016), “Stealing money from another’s pocket involves a high degree of intimacy . . . But manipulative corporate conduct lacks all these sensations associated with theft. Executives never need to get close — physically or psychologically — to their victims.”

Subject-centered approaches have also broadened our understanding of the complex dynamics underlying tax noncompliance.<sup>5</sup> A great deal of this research has focused on the importance of “tax morale” — what Marjorie Kornhauser (2007, 139) refers to as “the collective name for all the non-rational factors and motivations — such as social norms, personal values and various cognitive processes — that strongly affect an individual’s voluntary compliance with laws.” Subject-centered approaches have been critical to uncovering the nature and operation of tax morale subtypes. For example, Stalans, Kinsey, and Smith (1991) investigated how people form beliefs about sanctions and norms about tax compliance by conducting a survey of 1,200 residents in Minnesota. This study found that communication with coworkers lowered the perceived likelihood of apprehension and the severity of sanctions for tax evasion, whereas communication with family members increased the perceived fairness of tax laws and positive personal norms about tax compliance.

Onu and Oats (2016) also studied the importance of social communication and social norms on tax compliance, but they relied on an in-depth discourse analysis. Their analysis focused on 120 interactions between professional web designers on online forums, in which the professionals sought one another’s advice on their tax obligations. Onu and Oats’ study revealed active social influence processes in tax communication — processes that had been ignored in past studies based on the assumption that taxpayers were “passive transmitters” of information to each other. Onu and Oats found that the study sample’s professionals, most of whom were self-employed and thus obligated to voluntarily report their income tax, actively influenced and persuaded each other to comply with tax laws, using a range of known persuasion techniques in their discussions. These persuasion techniques ranged from stating the benefits of compliance, to threats and warnings of the consequences of tax evasion. Onu and Oats (2016, 38) concluded that while the former set of techniques generally yielded responses that were supportive of tax compliance, the latter set of techniques generated more defiant responses, especially when those techniques referred to the coercive power of tax authorities.

Taken together, both bodies of research — research on criminal offending and research on tax evasion — suggest that subject-centered approaches have played a key role in advancing our knowledge of the relative importance of complex social dynamics, such as community norms, perceptions of the legitimacy of the law, and moral judgments, that underlie legal noncompliance. These advances have challenged, complicated, and extended traditional deterrence models that have focused almost exclusively on instrumental factors such as expected economic costs and benefits of noncompliance.

<sup>5</sup> For recent reviews of tax compliance studies, see Khlif and Achek (2015), Pickhardt and Prinz (2014), and Devos (2013).

### III. Understanding Immigration Noncompliance

What might a subject-centered understanding of immigration noncompliance look like, and what might be the relevance and implications of such an understanding for policymaking? A growing but still a small number of studies have examined immigrants' experiences with and the impacts of immigration law from the immigrants' perspective (see, e.g., Ryo 2006; Gleeson 2010; Abrego 2011; Gonzales 2011; Menjivar and Abrego 2012; Rodríguez and Hagan 2014; Menjivar and Lakhani 2016).<sup>6</sup> In a related but a distinct line of inquiry, I adopted a subject-centered approach to explore immigration noncompliance among current and prospective unauthorized immigrants in the United States (Ryo 2013; Ryo 2015; Ryo 2017). Consistent with the discussion above that a subject-centered approach is not synonymous with specific research methods, I have relied on both qualitative and quantitative methods, as appropriate, to examine the perspectives, beliefs, and motivations of individuals who are subject to US immigration laws and policies.

For example, in *Deciding to Cross*, I collected and analyzed a large-scale survey in Mexico with individuals who were considered to be at risk of engaging in unauthorized migration into the United States (Ryo 2013). My findings showed that in addition to certain economic cost-benefit calculations, prospective immigrants' normative values, such as their moral sensibilities and their perceptions about the legitimacy of immigration laws and authorities, were significantly related to their intentions to cross the border illegally.<sup>7</sup> In a companion piece, *Less Enforcement, More Compliance*, I explored the nature of these normative values based on group interviews with immigrants at the US-Mexico border and in the interior of the United States (Ryo 2015). My analysis in *Less Enforcement, More Compliance* yielded several insights about the immigrants' normative values and their role in individual decisions to engage in unauthorized migration. Below, I briefly underscore two key findings that emerged from that study.

First, I found that the immigrants viewed themselves as law-abiding individuals who valued legal order and respected national sovereignty notwithstanding their violations of US immigration law. Underlying this self-perception were certain *value* orientations and *moral* imperatives. For example, in discussing their decisions to cross the border illegally, the immigrants commonly emphasized structural forces that were beyond their individual control, such as the collapse of their national or local economies, and crop failures. Faced with these structural forces brought on through no fault of their own, the immigrants viewed their migration decision as the only morally appropriate way to fulfill their deeply-felt personal responsibility to provide for their families, and their commitment to "legal" and "honorable" work. Moreover, the immigrants viewed immigration noncompliance as morally distinct from other kinds of noncompliance such as criminal law violations. From their perspective, the former type of noncompliance allowed them to perform work that helped to build the US economy, whereas the latter type of noncompliance engendered clear harm at the individual and societal level.

<sup>6</sup> There are also studies that engage in subject-centered analyses of the spillover effects of immigration policies on community members who are not the direct targets of the policies but are nonetheless impacted by those policies; these community members include, for example, border region residents and US-born Latinos (see, e.g., Heyman 2013; Quiroga, Medina, and Glick 2014).

<sup>7</sup> More recently, I used a survey to examine the legal attitudes of immigrant detainees, and found that the detainees' procedural justice perceptions were significantly related to their reported willingness to obey immigration authorities (Ryo 2017).

Second, my analysis showed that the immigrants viewed the current US immigration system (in terms of both its admission and its enforcement policies and practices) as neither in alignment with their expressed moral values nor legitimate. Prominent in the immigrants' narratives were discussions of the various ways in which the current US immigration system violated fundamental notions of equality and fairness by operating in biased, hypocritical, and arbitrary ways. For example, the immigrants often described the US immigration system as a "business" or a "lottery," in which only the lucky few "won" visas to enter the United States legally. These beliefs about the lack of system transparency, predictability, and rule-based qualities, together with the immigrants' expressed moral values undergirding their decisions to migrate, formed a powerful normative basis for enabling noncompliance. Moreover, these findings provide a nuanced account of why unauthorized immigrants might engage in a particularized rather than a generalized form of noncompliance — that is, why they might violate US immigration law but not other laws. In sum, the foregoing discussion suggests that subject-centered approaches can generate a fuller and more complex perspective on immigration noncompliance.

Why might we want such a deeper understanding of immigration noncompliance? There are at least three reasons. First, legal discourse and political debates about unauthorized migration and immigration enforcement policies in the United States are largely divorced from discussions of human rights. This is in large part due to the deeply-held and widely-accepted notion that nation-states have an absolute and unfettered right to determine who may enter and stay in their territories (Cole 2006; López 2006). But what are the limits, if any, to this self-determination principle, and what does a just and ethical immigration policy require for those seeking to enter, for those already in the United States, and for those whom the government seeks to expel? More specifically, what does a liberal democracy's professed commitment to and respect for every individual's human rights demand in terms of its immigration policy?<sup>8</sup> Grappling with these questions requires first recognizing the basic humanity and moral agency of immigrants. Fundamental to such a recognition is the understanding of immigrants not as passive objects of state control, but as individuals who are capable of normative judgments about the law and legal authorities, and whose actions are guided by their value judgments and shared social beliefs about what is right and appropriate given their situations (see Ryo 2015; Ryo forthcoming). Subject-centered approaches are uniquely situated to foster this understanding, given their focus on the immigrants' voices and lived experiences as they confront, acquiesce in, or resist the existing systems of governmental control that restrict their cross-border movement.

Second, I suggest that subject-centered approaches can produce knowledge that may focus our attention on not just the direct and immediate costs of immigration enforcement policies, but also their indirect and long-term costs. For example, immigration detention has become an increasingly important enforcement tool in the United States — a tool that the former secretary of the Department of Homeland Security has described as an "effective deterrent" to unauthorized migration (Preston 2014). There is little evidence that detention actually deters unauthorized migration (Sampson 2015). But emerging research does suggest that there are significant short-term costs of maintaining this system of detention, as well as long-term societal costs that may be harder to measure but are equally significant

<sup>8</sup> For in-depth discussion and debate on these questions, see, e.g., Bosniak (2006), Carens (2013), Wellman and Cole (2011).

(Ryo 2016; Ryo 2017; Ryo forthcoming). For example, my study based on survey and in-depth interviews with long-term immigrant detainees suggests that various structural and interactional factors in detention might work together to engender widespread legal cynicism among the detainees (Ryo forthcoming). By legal cynicism, I mean a deep sense of distrust of US laws and legal authorities, and skepticism about the US legal system's commitment to the rule of law. Because immigrant detainees are individuals embedded in domestic and transnational networks, they have the potential to widely disseminate delegitimizing beliefs about the US legal system and authorities. Such an outcome, I argue, has significant negative implications for democracy and governance in the long run.

Third, subject-centered approaches may help us to consider new and innovative strategies to achieving desired policy goals. For example, a longstanding body of research in other areas of law shows that laws that are incongruent with people's moral values are bound to generate widespread noncompliance. My study of unauthorized migration suggests that immigration law faces a similar challenge. As I discussed earlier in this paper, current and prospective unauthorized immigrants do not view violations of US immigration law as immoral. On the contrary, the immigrants in my study considered such violations to be the only viable morally-permissible option given their desire to work to support their families (Ryo 2015). In light of these findings, temporary worker programs that facilitate circular migration with transparency and predictability (rather than at the whim of a given political party in power), or focused development strategies that promote job opportunities in key sending communities, may promote expectations among current and prospective immigrants that there are viable, legal avenues of fulfilling their expressed moral obligations to support their families through work. These shared expectations in turn will likely encourage timely return migration among current immigrants, as well as motivate prospective immigrants to wait to enter legally rather than attempt to cross illegally.

## Conclusion

The purpose of this paper has been to explain the importance of subject-centered approaches to understanding immigration noncompliance, and to present a case for why we should care about the views of unauthorized immigrants. That unauthorized immigrants are nonmembers to our polity in the legal sense does not lessen the importance of attending to their voices. Understanding their beliefs, values, and perceptions may help us to recognize their basic humanity and moral agency — an important first step toward a concrete and critical engagement with the idea that immigrant rights are human rights. I have also argued that we should care about the views of unauthorized immigrants because doing so may help us to appreciate the indirect and long-term costs of our enforcement policies, and to engage in a broader range of public discussions about how we might promote greater voluntary compliance. In these ways, adopting subject-centered approaches to the study of immigration noncompliance may have an important role to play in the development of effective, ethical, and equitable immigration policies.

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## The Promise of a Subject-Centered Approach

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# Separated Families: Barriers to Family Reunification After Deportation

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## Executive Summary

This paper outlines the complexities — and unlikelihood — of keeping families together when facing, or in the aftermath of deportation. After discussing the context that limits or prevents reunification among immigrant families more generally, I outline several of the particular ways that families are divided when a member is deported. Drawing on case studies from longitudinal ethnographic research in Mexico and the United States, I describe: 1) the difficulties in successfully canceling deportation orders, 2) the particular limitations to family reunification for US citizen children when a parent is deported, and 3) the legal barriers to authorized return to the United States after deportation. I argue that without comprehensive immigration reform and concrete possibilities for relief, mixed-status and transnational families will continue to be divided. Existing laws do not adequately address family life and the diverse needs of individuals as members of families, creating a humanitarian crisis both within and beyond the borders of the United States. The paper concludes with recommendations for immigration policy reform and suggestions for restructuring administrative processes that directly impact those who have been deported and their family members.

## Introduction

In recent years, the United States has deported an unprecedented number of noncitizens, with more than three million in the last decade alone, including a record high year in 2012 of 409,849 deportations (ICE 2016, 2). And, apprehensions, the detention of foreign nationals, and the increased threat of deportations have come to define the weeks and months following the inauguration of President Trump. Transnational and mixed-status families face new risks of deportation as executive orders are announced and implemented, even when family life is not explicitly addressed.<sup>1</sup> Over the past decade, deportations have resulted in families divided like never before, and based on the current chaos,

1 See Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017), and Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), as well as memos from Secretary John Kelly (2017a; 2017b) outlining their implementation.

unpredictability, and even “delirium” caused by state-enacted removals (Kanstroom and Lykes 2015), this trend is likely to intensify.

As I argue, high rates of deportations and increased “deportability” (De Genova 2002), or the threat of deportation, are causing a humanitarian crisis that is displacing individuals and separating families in unprecedented ways. Immigration and deportation have long impacted families, but an overall increase in deportations coupled with a growing number of mixed-status families — there were an estimated 3.3 million mixed-status households in the United States in 2014 (Warren and Kerwin 2017, 1) — mean that today families face divisions like never before. Millions of people have been and will continue to be impacted, including noncitizens who are deported and their undocumented migrant family members, but also a high number of US citizens with family ties to deportees.

In large part, the current crisis stems from decades without policies that adequately outline possibilities for maintaining or allowing for family reunification. Instead, US immigration policy has been made up of a patchwork of particular laws, de facto practices, administrative procedures, executive orders, and, significantly, decades without new legislation that considers family separation. Not since the Immigration Reform and Control Act of 1986 (IRCA) has the United States passed legislation that included a broad path to citizenship for undocumented immigrants. Thus, without immigration law reform, immigrant families will continue to suffer — through migration, but increasingly as a result of deportation. Indeed, it is those on the ground — immigrants and their loved ones, including children, parents, siblings, and partners — who are “paying the price” (Capps et al. 2007) for an absence of laws that consider the humanity of immigrants and those connected to them.

The haphazard and unpredictable character of immigration policy and its absence in recent decades — and in recent months — has resulted in a situation that imperils families throughout the United States. The current policy context makes deportation a legal and practical dead-end for most immigrants and their families: once families experience the deportation of a loved one, there are few, if any, options for family reunification in the United States through legal channels. Building on policy analysis and longitudinal ethnographic research in Mexico and the United States, I outline the complexities and unlikelihood of achieving “family reunification” in the current climate. After providing background about the policies that shape family reunification and perpetuate family separation, I discuss three case studies as a way to illustrate the specific challenges that families face when a loved one is deported. I conclude with recommendations for policy reform as well as suggestions for temporary actions that might address family ties and better support family unity.

## **Background: Existing Policy (and Its Absence)**

The policies that direct family reunification are legally and logistically complicated. The principle of “family reunification” has been established through the passage of several laws over time, including the Emergency Quota Act of 1921, the McCarran-Walter Act of 1952, and the Immigration and Nationality Act (INA), or Hart-Celler Act of 1965 (Maddali 2016, 111).<sup>2</sup> Although immigrants with family members who are US citizens or lawful permanent

<sup>2</sup> See Maddali (2016) for discussion of the development of “family reunification” as a guiding principle over time.

residents may be able to change their status based on family relations, family reunification is, as Anita Ortiz Maddali (2016, 111) outlines, a principle that is “limited.” Many families do not include members with a status that makes them eligible for family reunification in the first place and certain family members are prioritized and/or excluded from the process, making “family reunification” a challenge — if not impossibility — for most immigrant and mixed-status families.

The laws that changed the nation’s immigration priorities to emphasize family reunification have brought (some) families together. Still, as I have argued elsewhere, such legislation has also divided families, especially through processes and procedures that engage specifically with individuals (Boehm 2012, 61-62; see also Thronson 2015). By singling “out the border and the individual as the sites for regulatory enforcement” (Sassen 1996, 10), the US government does not systematically identify migrants as members of families, even as its policies explicitly name family reunification as a priority. Thus, paradoxically, a focus on individuals creates mixed-status families and obstructs family reunification even as it continues to be ostensibly a guiding principle of US immigration policy.

Additionally, immigration laws influence families even when they do not explicitly focus on family life. As an example, consider the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. IIRIRA’s emphasis on enforcement and penalties rather than immigrant inclusion has had a devastating and lasting impact on families, separating relatives because of the law’s rigidity and the fact that it provides so few opportunities for relief (CLINIC 2005). The legal ramifications of IIRIRA, the “merger of criminal and immigration law” (Stumpf 2006, 369), and the increased criminalization of immigration more generally over time (e.g., Dowling and Inda 2013; Stumpf 2006) have translated into public discourse that crudely casts migrants as “criminals.” Depictions of migrants as members of families — mothers, fathers, children, partners, siblings, grandparents, aunts and uncles, cousins, and other kin relations — are largely absent from political and policy debates.

Families are also impacted by a variety of other barriers and challenges, including unpredictable and inconsistent yet virulent enforcement practices. Immigration enforcement, raids, and increased policing clearly have detrimental effects on communities, and especially on families and children (Capps et al. 2007; Dreby 2012; Thronson 2015). Under the Obama administration, the specifics of apprehension and deportation were, despite national priorities, often arbitrary depending on particular circumstances, place of residence, and the actions of individual law enforcement officers, immigration officials, and judges. Now, as a result of recent executive action, even ostensible national priorities have been suspended, such that under the Trump administration, randomness and chaos are ever more present.

And finally, administrative processes separate families and prevent family reunification. For example, not all familial relationships fit the preference categories outlined by immigration law (see Thronson 2015), significant backlogs in processing can result in wait periods that extend for a decade or more (CLINIC 2005, 3-9; Kerwin 2014, 336), and events that are commonplace — such as “entry without inspection” or the use of a borrowed social security number and other forms of “identity loan” (Horton 2016, 73) — can bar migrants from living in the United States for years or indefinitely (see Gomberg-Muñoz 2016). And,

the lengthy and extensive bureaucratic processes required for family reunification result in policies that are implemented in contradictory ways. These different factors mean that family reunification, even if codified through law, is never fully realized in practice and instead continues to be unattainable for millions of individuals and their loved ones.

So, while legislation has eliminated national origin quotas and established family unification as a guiding principle for US immigration law (DeSipio and de la Garza 1998, 42), US immigration policies repeatedly create circumstances that divide families (Abrams and Piacenti 2014; Thronson 2006; Thronson 2007). Existing laws provide an incomplete set of guidelines for considering family relations. And, because the principle of “family reunification” — already limited in the case of immigration — does not apply to families facing the deportation of an individual, the reunification of family members in the United States can be nearly impossible during deportation proceedings or after a family member has been deported. In most cases, families have little or no recourse or opportunities to come together after a deportation separates them across borders.

Thus, the nation’s contemporary immigration system is defined in large part by its gaps and a lack of sound legislation that might address the more than 11 million immigrants currently living in the United States without authorization and their families. This article’s proposals center on how to rethink immigration law and administrative procedures, and potential ways — through both legislation and the administration of policy — to ensure that families divided by immigration status and deportation can stay together. In the following discussion, I outline three cases that underscore some of the challenges or barriers to reunification that existing policies present. Family reunification — already complicated in the context of immigration — is that much more inaccessible when migrants are deported.

## “Exceptional and Extremely Unusual Hardship”

### *Case Study: Federico and Gaby*

For Federico and Gaby, deportation meant packing up a home and making arrangements for a sudden departure, but it also required gathering up a life of 25 years and making choices about what would have to be left behind. Federico and his family parted with nearly everything: “We lost the house, we lost many things. We gave things away. We tried to make arrangements so that we could leave, but, well . . . we lost a lot.” Many of the family’s losses were material, but, as Federico described, the less tangible losses were far more profound.

Born in a small, rural community in Zacatecas, Mexico, Federico migrated as a young man, in the 1980s, to Los Angeles, California. Several months later, his wife, Gaby, followed, and they made the United States their home, living for more than two decades in Southern California. After spending all of his adult life in the United States as an undocumented migrant, Federico wanted desperately to “fix his papers,” to change his status so that he would be authorized to be in the country. Federico was not comfortable living “hidden,” and so he consulted with an attorney and was told that he was eligible to apply for permanent residency. He felt a deep connection — and had given much — to the nation. As he told

me: “I value the way of life in the United States. The United States is a good country.” He worked for the same company for 16 years, had five US citizen children (ages 10-24), volunteered at prisons through his local parish, and was part of a strong network of family, friends, neighbors, coworkers, and church members.

He began the paperwork to process a change in immigration status for Gaby and himself, but after the applications were submitted, the couple was contacted by US Citizenship and Immigration Services (USCIS) and told that they were not actually eligible to receive green cards. Instead, Federico and Gaby were placed in removal proceedings and told that they were likely going to be deported. The couple also learned that the “attorney” who had required advance payment and submitted the applications was not an attorney at all, but a notary public. The notary had, erroneously and intentionally, told Federico and Gaby that they were eligible for US lawful permanent residency. They had been the victims of fraud. Their effort to obey the law and to do the right thing started a process in motion that had the seemingly inevitable end of deportation.

Federico immediately hired an immigration attorney. However, despite efforts to cancel the removal order, Federico and Gaby were told that, five years after first filing for an adjustment of status, they had to leave the country or face imprisonment. “When the letter arrived informing us that we had to leave, it was very difficult. I thought, ‘How am I going to do this? What am I going to do back in Mexico?’ After so many years here, so many years that my family lived here . . .” Federico’s voice trailed off, his eyes teary. “I feel it was caused by the judge’s bad decisions. I’m not saying that we were without fault, but judges should consider the family.”

Each time I visited with Federico and his family in Mexico, he spoke of the hardships they faced: Federico’s successful career had been disrupted and he was forced to start anew financially, the family could not live together in the United States with government authorization, and, especially painful, Federico and Gaby were unable to be present for the birth of their first grandchild. Federico repeated how much he hoped that he and Gaby would be able to return to the United States. He told me that they would only do so, however, if they were able to find a way to go “home” within the boundaries of the law. For some time, I received emails from Federico inquiring about the possibility of a pardon or an appeal. “Perhaps there is another way to receive permission to enter the country?” He asked about potential ways to change his status: Could an attorney find a way for them to return? Would a pardon be possible? Was there any way to “fix” the situation and ultimately reverse the deportation?<sup>3</sup>

\* \* \*

The case of Federico and Gaby points out some of the limitations that divide families as they face the possibility, or as the direct result, of the deportation of family members. Upon receiving the letter outlining their “removal,” Federico and Gaby immediately contracted with a highly recommended attorney and requested cancellation of removal. Yet, although their previous “attorney” was actually a notary public who had committed fraud by providing (incorrect) legal advice, Federico and Gaby were unable to successfully

3 For this and other vignettes about Federico and Gaby, see Boehm (2016). This excerpt is from pages 43-44 and 134.

stop the deportation.<sup>4</sup> The many hardships the family would face because of deportation were not deemed sufficient to allow the couple to stay in the United States so that all family members could remain together in the country.

According to the INA,<sup>5</sup> cancellation of removal for non-lawful permanent residents is possible only if the individual “has been physically present in the United States for a continuous period of not less than 10 years,” “has been a person of good moral character during such period,” “has not been convicted of an [specified] offense,” and, “establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” In Federico and Gaby’s case, the couple’s new attorney informed them that — despite the many reasons that a cancellation would seem logical and although the deportation did indeed create hardship for their children — their particular case was not likely to be approved. In order to do so, they would need to prove that their US citizen children faced “exceptional and extremely unusual hardship,” an option that is rarely attainable (Thronson 2015, 37).

And indeed, the rates of successful cancellations of removal corroborate what Federico’s attorney confirmed. The statutory cap is 4,000 per year, and from 2011 through 2015, the number of cancellations was on average about one percent of the number of removals (EOIR 2016, N1; ICE 2016).<sup>6</sup> Federico and Gaby undeniably faced hardship due to the pending deportation, but in their case — like the cases of so many and therefore not understood to be “extremely unusual” — the narrow definition of “hardship” did not account for the multiple struggles that deportation in fact creates. As outlined in the American Bar Association’s report, *American Justice Through Immigrants’ Eyes*, after the passage of IIRIRA, possibilities for relief through a cancellation of removal became even more unlikely (ABA 2004, 41), again underscoring how the period post-IRCA, from the 1990s to today, has made family unity that much more difficult to achieve.

Once deported, the couple explored the possibility of requesting what Federico called a “pardon.” He contacted several immigration attorneys to ask about the likelihood of successfully being granted permission to return, but little came of it. All the lawyers had the same read of Federico and Gaby’s situation: authorized return after deportation would be nearly impossible. They explained that he could apply for such permission — this would require completing and submitting an I-212, “Application for Permission to Reapply for Admission into the United States After Deportation or Removal” — but that such requests are not often approved. As the attorneys outlined, the statutory bar would run for 10 years, and documented return before that time was very unlikely.

And finally, as I discuss in the following section, Federico and Gaby’s case underscores the challenges to — and often impossibility of — family reunification for US citizens whose parents are deported. All five of Federico and Gaby’s children are US citizens, and yet, they did not have recourse once they received the removal order unless the children faced what the court would deem “exceptional and extremely unusual hardship.” In other words,

4 Federico did not mention the possibility of a U Visa or recount that his attorney considered this.

5 INA § 240A(b)(1), 8 U.S.C. § 1229(b)(1).

6 For example, in 2012 when the US government carried out 409,849 removals, 3,787 cancellations of removal were granted (EOIR 2016, N1; ICE 2016).

the fact that five of the seven family members were US citizens was not enough to ensure family reunification. Indeed, theirs was yet another family sentenced to separation if the five US citizens continued to live in their home nation.

## Penalizing US Citizens

### *Case Study: Cora, Joaquín, Dina, and Leo*

When Emy and Manuel made arrangements for their four children, ranging in age from three to 14, to cross the US-Mexico border, the children's safety was their priority. They found a respectable *coyote*, someone they could trust, and they made a substantial payment to ensure that the children made it safely to their destination. But this crossing was not a typical one: while most border crossings facilitated by guides involve movement of unauthorized migrants from Mexico to the United States, these children were US citizens who migrated in the other direction, from north to south.

After Emy had been deported, she and Manuel decided that it would be best for the children to join her in Mexico, but because both Emy and Manuel are undocumented migrants they were unable to easily travel with their children. If Manuel accompanied the children to Mexico, he risked apprehension should he try to cross the border back into the United States. Similarly, Emy was unable to easily enter the United States to meet the children there; the stakes of an attempted border crossing were even higher for Emy because of her recent deportation. So instead the couple hired a *coyote*, a US citizen, to travel with the children, accompany them across the border, and bring them to Emy. Within a day of departing from a border town in Texas, the children and Emy were reunited, but in Mexico and without Manuel. Because the family depended on Manuel's income, he stayed in the United States to continue working and the family was now divided transnationally.

Prior to detention and deportation, Emy had lived primarily in the United States for a period of more than 15 years. When a car accident killed her parents and her brother, Emy traveled to Mexico for the funeral and to support her family. After several months in Mexico, she decided it was time to "go back" or "return" to the United States, so she went to the border, intending to cross by land, wading through the Rio Grande/Rio Bravo and walking through the desert. But when she arrived, the *coyotes* told her that there had been a change in the plans: because of increasing apprehensions along the border in recent days, Emy would cross with documents supplied by the *coyotes*, a passport that was valid but belonged to someone else. Emy told me she was very hesitant to cross that way, but because Emy had already paid for her passage and was at the border without family or resources, she went ahead with the crossing. When attempting to enter the United States, however, her fears were actualized: she was stopped and questioned by immigration officials. They found her to be "inadmissible" and transferred her to a federal detention center.

Emy's deportation prompted the departure to Mexico of her four US citizen children. The eldest siblings, teenagers Cora and Joaquín, had been to Mexico as young children, but had few memories of their parents' home community. The two younger children, Dina and Leo, had never visited Mexico, so their transnational border crossing was a first. When I

spoke with Cora several months after her departure from the United States, she still seemed stunned by the sudden move. As she described it, one day she was at the mall with friends, and by the end of the week, she was in a dusty, rural community in Mexico's countryside. These children now faced undeniable hardship, though it was not legally defined as such: their mother's deportation meant that the children would have to live far from their nation and from their home.

For more than a year, Emy and the children lived in Mexico while Manuel lived in the United States. The children, all US citizens, found themselves living in a country that was not their own, probably until they were old enough to return to the United States without their parents. Because of their US citizenship, the children could, in principle at least, return to their country, but in all practical senses, they were confined to Mexico until they were older or until their parents could make alternative arrangements, presenting a form of hardship not addressed by US immigration law.<sup>7</sup>

\* \* \*

As was the case for Federico and Gaby's five children, Cora, Joaquín, Dina, and Leo found their family separated by the deportation of a parent, despite their US citizenship and despite the fact that they themselves had not been deported — not formally at least. For these children, their status as minors meant that they were not yet eligible to petition for an immigrant visa for their parents. Indeed, except for the possibility of cancellation of removal — as discussed, a process that is unlikely and unattainable in most cases of deportation — US citizen children have few legal options for relief that might keep their families together after deportation. Until they are 21 years old, children are not able to petition to be reunited with their parents. And, if parents are deported, even this possibility at some point in the future becomes extremely unlikely.

Here, again, family reunification is characterized by barriers and limited options for immigrant families. For this family, hardship took different forms. They were unable to structure family life so that all members lived together in the United States, and family reunification in Mexico would mean no income to support the family. All family members faced risks if Emy, now deported, and the children tried to return to the United States, and they faced certain economic hardship if Manuel were to leave his fulltime employment in the United States to join the family in Mexico. Paradoxically, the chain of events that resulted in Emy's deportation was caused by another unconsidered hardship: the death of three family members in a tragic car accident. As this case shows, such family separation does not only impact noncitizens: deportation has enduring effects on US citizens, especially children, even as US citizens would seem to be outside the reach of deportation regimes.

For some US citizen children, they are separated from primary caregivers as their parents "disappear" into detention or are deported (Rabin 2011). For other children, such as Cora, Joaquín, Dina, and Leo, the deportation of a parent results in their own "de facto deportation" (Kanstroom 2012, 135). Such informal expulsions of US citizens are, for the most part, unrecorded and undocumented, as young US citizens find themselves compelled to migrate to reunite with family in other countries if they are to continue living with their parents (see Boehm 2016). Some of the challenges US citizen children face stem from

<sup>7</sup> This excerpt is from Boehm 2016, pages 45-46, 80.

the “tremendous potential for deep conflict as immigration law and family law intersect” (Thronson 2015, 35). Other obstacles come from the lack of laws that explicitly outline or grant US citizen children the right to maintain family unity after deportation. Although “the best interest of the child” is a standard used in family law context, the same standard does not guide deportation proceedings, a point that underscores the multiple barriers to family unification after deportation.

For US citizen children—indeed for children regardless of citizenship or immigration status—the path to family reunification is a difficult or impossible one when a parent is deported. The fact that in 2012 there were 4.5 million US-born children whose parents were unauthorized (Passel and Cohn 2015) shows how widespread family separation after deportation is or is likely to become. Emy’s children expressed frustration that their options were to live in Mexico, far from their country of origin and their home, or live in the United States without their mother there to care for them. The bind these children face underscores what Jacqueline Bhabha (2014, 19) aptly calls “the elusive right to family life.” As parents and other family members are deported from the United States, US citizen children and youth increasingly find themselves unable to maintain “family” in any meaningful way.

## No Path to Authorized Return

### *Case Study: Jaime*

Just before he was deported, while still at a federal detention center, Immigration and Customs Enforcement agents brought Jaime the clothes he had been wearing the night he was arrested several months earlier. After a childhood and life of more than 15 years in the United States, Jaime had only this small ziplock bag with a few possessions. Three months in a county jail in rural Colorado, followed by several weeks at a federal detention center, had been demoralizing. Arrested just after his 18th birthday, Jaime admitted that jail was quite frightening at first, but he soon learned the ropes and kept his head down: “You let people do their thing, and you just do yours.”

Jaime — whom his aunt described as “a good kid who made a mistake” — was deported to Mexico. He had migrated as a toddler, and although he was an unauthorized migrant in the United States, his day-to-day life as a teenager was much like that of his US citizen peers: he worked part-time, socialized with friends on the weekends, and had a steady girlfriend. But that abruptly changed when he was detained. After Jaime and some friends were stopped by police officers and cited for having open containers of alcohol in their vehicle, their paths went in notably different directions. Jaime’s friends, US citizens, were arrested, quickly released, and ordered by the court to complete community service. In contrast, Jaime’s life took a jarring turn.

Jaime chose to go before an immigration judge without legal representation. He had met with an attorney prior to the hearing, but the attorney said that there were no legal options available — that deportation was likely — and so he advised Jaime and his family to save the money they would spend on legal services. During the immigration hearing, the judge asked if he had any family members who were from the United States. Feeling

hopeful, Jaime mentioned his two siblings who are US citizens. “No,” the judge clarified, “Do you have any *immediate* family members who are US citizens?” The judge explained that by “immediate family members,” he meant parents, children, or a spouse. “The judge just reads you your rights and then he asks, ‘Are you married to a citizen?’ No. ‘Do you have any citizen kids?’ No. ‘Are your parents citizens?’ I said, ‘no.’ ‘Well, then,’ said the judge. ‘I can’t do anything for you. You have to leave.’ And that’s it.” Jaime recounted how people who did have US citizen family members — what he described as the “right” family members, that is, parents, a spouse, or children — were assigned another court date, and the people who did not, “Well, that’s it.”

So, after months in prison and federal immigration detention, Jaime found himself in rural Mexico, a place he could not remember and did not identify as home. Upon “repatriation” to his “hometown,” Jaime had no memories of Mexico to draw upon. For Jaime, life and life’s recollections began in *el norte*. Although he was reunited with his grandmothers and extended family members in Mexico, he was very far from the family members he was close to, including his parents, siblings, girlfriend, and peers — the family and friends who had provided support in his day-to-day life. Within a matter of months after being caught up in deportation proceedings, Jaime’s kin and social networks were upended, presenting a kind of hardship that was unimaginable prior to his return.

Shortly after he arrived in Mexico, Jaime started to consider the possibility of returning to the United States. The long-distance relationship with his girlfriend was challenging, he wasn’t able to have much contact with his friends, and he missed his family tremendously. After just a few months in Mexico, and in consultation with his parents and siblings, Jaime decided to again migrate north. Jaime told me that he was unhappy: he missed his family, could not “get used” to being in Mexico, and did not, he felt, fit in. And so, he went “home,” back to the United States and back to the only life he had ever really known.<sup>8</sup>

\* \* \*

Jaime’s experience as he moved through various legal systems and after his deportation to Mexico show some of the ways that family ties are typically not enough to reverse a deportation or to bolster a request for return after removal. As his conversation with the judge during his hearing demonstrates, for Jaime, his “immediate” family members who were US citizens — namely two of his siblings — were not relatives who could have strengthened his claim for cancellation of removal. When Jaime explained that his parents were not US citizens, and that he did not have a spouse or children, the judge issued a deportation order and Jaime was “removed.”

After being deported to Mexico, Jaime was living far from those he identified as close or “immediate” family, even though the US government did not define them as such for the purposes of canceling a removal order. Jaime lamented that he did not have the “right” family member to cancel the deportation, and indeed, as David B. Thronson (2007, 66) writes, “[A] close family member with legal immigration or citizenship status does not guarantee that immigrants in mixed status families will achieve legal immigration status themselves.” For Jaime, hardship came directly out of his separation from immediate

<sup>8</sup> Jaime’s deportation is described throughout Boehm (2016). The vignette here is a compilation of his experiences from pages 38-39, 89, 97-98, 139-40.

family, as he faced isolation, disorientation, and a future life in Mexico that was difficult to imagine or take steps toward fulfilling. Here, legal definitions of “hardship” and “family” did not overlap with Jaime’s own understandings of family members and the challenges he experienced.

For Jaime, future options for family reunification through formal channels seemed extremely unlikely. After moving through both the criminal and immigration justice systems, Jaime was not hopeful that legal possibilities for return would come to fruition. And, his intuition was probably correct. The unlikelihood of Jaime being given a second chance — whether through a petition for admission after deportation, such as the relief that Federico and Gaby hoped for, or by way of a successful tourist visa application after living a decade in Mexico — meant that Jaime’s options were very limited. In this context, his decision to return to the United States without authorization was likely the only way he would be able to return at all. And, yet, in doing so he triggered a permanent bar,<sup>9</sup> thereby eliminating legal options for return in the future.

Jaime’s case — and indeed all the cases I have described here — demonstrates the many barriers to family reunification after deportation and the multiple forms of individual and family hardship that come in deportation’s wake. Regardless of the impetus for or conditions of the deportation, or the ties that individuals have to US citizens and the nation, the opportunities for family reunification in the United States and future return through legal channels are very limited. Even when trying to follow the law, as was the case for Federico and Gaby, there are few or no options. And, for those who have come into contact with law enforcement, regardless of the conditions or specifics of the case — such as the open container violation that resulted in Jaime’s deportation but did not result in prison time for the US citizens involved — authorized return can be an impossibility in every practical way.

During Jaime’s immigration hearing, the judge reminded him of his 10-year bar from the United States as the result of his deportation and encouraged him to wait out the time in Mexico. But Jaime was doubtful that any visa would be approved for him even after a decade had passed. And so, faced with few possibilities for returning with state authorization, Jaime decided to migrate without documents despite the high stakes in doing so. It was the only way he could ensure that he would be with his family once more.

### **Policy Recommendations**

Faced with the challenges of keeping or bringing families together, families affected by deportation find themselves divided, living across borders, with mixed statuses within families, living together but with the fear of imminent separation, and/or with few or no possibilities for a change in immigration status. A primary recommendation, therefore, is to create policies with enough flexibility to facilitate family unity in the United States. Strong policies should acknowledge — and support — the wide variety of family experiences and the diverse ways that families are structured and made meaningful. If such options are not possible for immigrants and their families, the rigidity of the current system is

<sup>9</sup> INA § 212 (a)(9)(A), 8 U.S.C. 1182(a)(9)(A).

likely to result in ongoing if not increased unauthorized migration, as families strive to come together across borders after deportation, even if they must do so through informal channels.

Thus, future comprehensive immigration policy reform should be attentive to family ties and the profound hardship that comes from family separation. First, a focus on maintaining family ties — rather than severing them — is policy that will strengthen both human and national security (Kerwin 2016). Second, a justice system that does not consider family or does not have the flexibility to acknowledge different family relations and their importance only perpetuates injustice, presenting “rule of law concerns” (Kanstroom 2012, 89) and threatening US compliance with human rights law (Thronson 2016). And, finally, from a humanitarian perspective, the nation should consider its role in contributing to this large-scale crisis. When families are separated by US immigration law, the result is a humanitarian crisis that is, in large part, of our own making. Indeed, humanitarian crises and efforts to address them are always embedded within political motivations and debates (e.g., Fassin 2007; Fassin 2013; Ticktin 2014). While policymakers and members of the public often frame unauthorized immigration as the product of individual choice and action, such logic is not tenable in the current climate. Today, millions of families — whose members have a variety of immigration statuses, including US citizenship — are impacted by US immigration laws and an absence of sound policies.

### *Relief, Flexibility, and the Possibility for Exceptions*

A first step — and one that could be implemented through both administrative and legislative channels — is to make the possibility for relief more robust. Such options could take different forms, and might include an expansion of the opportunities for exceptions, appeals, or pardons, and a mechanism for a meaningful review of the particular circumstances of a deportation. For example, relief through a U Visa might have been a possibility for Federico and Gaby as victims of a crime. Or, for young people, such as Jaime, who have lived the majority of their lives in the United States, there should be some option outside of deportation. In the three cases discussed above, migrants faced penalties that would not likely match the “crime” in any other aspect of the US justice system.<sup>10</sup>

Indeed, the “[e]limination of discretionary relief means factors that weigh against an individual’s deportation are now ignored” (ABA 2004, 4). Jason Cade (2015, 37-38) suggests that revisiting Judicial Recommendation Against Deportation (JRAD) might provide one such possibility for relief and could point “the way to an important administrative reform that would decrease the likelihood of unjustified removals.” The reality is that the experiences of individuals, the circumstances of their removal orders, and their family relations are particular, nuanced, and complicated. Reasonable immigration legislation needs to include flexibility, some possibility for alternative outcomes, and a way to account for the many different circumstances that shape unauthorized presence in the United States. Shouldn’t Federico and Gaby, upstanding members of the community who lived in the United States for decades, have five US citizen children, and were victims of a crime themselves, be given some possibility for relief?

<sup>10</sup> See discussion in Cade (2015, 36-37).

### *The Rights of US Citizens*

In addition, future immigration policy reform should expand options for family reunification when US citizens are affected. Current legislation does not consider — or at least does not adequately recognize — the millions of US citizens with parents who are deported or at risk of being so. For US citizen children, the deportation of a parent can essentially “[destroy] their right to live in an intact family” (Thronson 2007, 80). Here, US citizenship is compromised through relations with others, resulting in a form of “contingent citizenship” for those whose parents, partners, siblings, or other relatives are unauthorized migrants (Boehm 2011). For example, future legislation could expand definitions of “hardship,” remove limiting adjectives like “exceptional” to consider factors such as US citizen children’s right to live with their parents, and utilize the “best interest of the child” standard in immigration and deportation proceedings. Such steps could have potentially provided relief to Federico and Gaby and their children, as well as Emy and Manuel’s family. Don’t Manuel and Emy’s children — all US citizens — have the right to live with their parents in their country of origin?

### *A Path to Authorized Return*

And, just as immigrant advocates have argued that a path to citizenship should be part of immigration reform, so, too, should there be a path to authorized return after deportation. Although possible in theory — after living outside the United States for the full duration of time barred from the country or through the possibility of a petition for reentry — the reality is that authorized migration post-removal is unlikely. The full effect of a record number of deportations in recent decades is still unfolding. The range of consequences of policies that shut people out of the United States indefinitely, even when they are in every meaningful way members of the nation, is difficult to predict. One point is certain: current statutes — and the absence of immigration reform — create hardship for families that cannot be overstated. Families are, more often than not, altered indefinitely after the deportation of a loved one. Shouldn’t it be possible for Jaime, raised in the United States after arriving as a toddler, to return to his de facto home nation at some point in the future?

\* \* \*

To address this humanitarian crisis — a crisis that separates families and keeps them apart for years, decades, or indefinitely — an alternative approach is needed. Given the many barriers, struggles, and difficulties families face because of deportation, comprehensive immigration reform that acknowledges individuals as embedded in families is crucial. As Thronson (2015, 33) argues, despite the “ubiquitous yet inaccurate impression that the promotion of family unity is a key value underlying immigration law . . . distain for family unity . . . is evident in the failure of immigration law.” Indeed, we must find ways “to keep mixed-status US families intact” (Warren and Kerwin 2017, 7), and to provide opportunities for families to reunite when removal results in separation and division across borders.

Deportation can be a kind of life sentence for individuals who have been deported, but also for their family members. Given that “[f]amily life that spans international borders still abuts against the state’s exclusionary prerogative” (Bhabha 2014, 25), the expulsion of

immigrants divides them from loved ones in ways that may never be remedied. Currently, deportation is more often than not a dead end for families—a place from which there is no out, no hope, and no possibilities for return to the United States. Finding rational and just options that can in fact keep families together has never been more urgent.

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# US Immigration Policy and the Case for Family Unity

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## Executive Summary

As the Trump administration contemplates immigration reform, it is important to better understand what works and what does not in the current system. This paper reviews and critically evaluates the principle of family unity, a hallmark of US immigration policy over the past 50 years and the most important mechanism for immigration to the United States. Since 1965, the United States has been admitting a relatively high proportion of family-based migrants and allowing for the immigration of a broader range of family members. However, restrictive annual quotas have resulted in a long line of prospective immigrants waiting outside of the United States or within the United States, but without status. Further policy changes have led to an increasing number of undocumented migrants and mixed-status families in the United States. Several policies and practices contribute to prolonged periods of family separation by restricting travel and effectively locking in a large number of people either inside or outside of the United States. On top of that, increasingly aggressive enforcement practices undermine family unity of a large number of undocumented and mixed-status families. Deportations — and even a fear of deportation — cause severe psychological distress and often leave US-born children of undocumented parents without economic and social support.

A recent comprehensive report concluded that immigration has overall positive impact on the US economy, suggesting that a predominantly family-based migration system carries net economic benefits. Immigrants rely on family networks for employment, housing, transportation, informal financial services, schooling, childcare, and old age care. In the US context where there is nearly no federal support for immigrants' integration and limited welfare policies, family unity is critical for promoting immigrant integration, social and economic well-being, and intergenerational mobility.

Given the benefits of family unity in the US immigrant context and the significant negative consequences of family separation, the United States would do well to make a number of changes to current policy and practice that reaffirm its commitment to family unity. Reducing wait times for family reunification with spouses and children of lawful permanent residents,

allowing prospective family-based migrants to visit their relatives in the United States while their applications are being processed, and providing relief from deportation and a path to legalization to parents and spouses of US citizens should be prioritized. The cost to implement these measures would likely be minor compared to current and projected spending on immigration enforcement and it would be more than offset by the improved health and well-being of American families.

## **US Immigration Policy and the Case for Family Unity**

Over the span of a few months, the new administration has announced sweeping changes to immigration policy. In his speech to the US Congress on February 28, 2017, President Trump stated that increasing immigration enforcement and adopting a merit-based immigration system will benefit the country, citing improving jobs and wages and strengthening security as top priorities. At the same time, Trump's administration also revealed plans to restrict the number of employment-based visas, including H1-B visas that are currently the main pathway to the United States for highly skilled foreign-born. At this point, it is not clear what the new immigration policy will look like and whether it will prioritize family, employment or skilled-based immigration. But the consequences of the increased focus on immigration enforcement have been clearly visible across the country. Under the new guidelines imposed by the administration, all unauthorized immigrants, and those with legal status who have criminal convictions, are eligible for deportation regardless of familial ties in the United States. While it is not feasible to deport all 11.1 million unauthorized individuals, such measures amplify the fears of family separation among unauthorized immigrants, legal migrants, and US citizens alike. Such policies also reverse the US commitment to family unity, a hallmark of US immigration policy over the past 50 years and the most important mechanism for immigration to the United States. In what follows, we review the principle of family unity in US immigration policy and some of the current challenges to family unity: prolonged family separations, the increase of unauthorized and mixed-status families, and the devastating consequences of current enforcement practices. We argue that in the US context with virtually no federal support for immigrant integration and limited welfare policies, family unity is critical for promoting immigrant integration, social and economic well-being and intergenerational mobility, and thus should remain the guiding principle of immigration policy.

### **A Brief Overview of Family Unity**

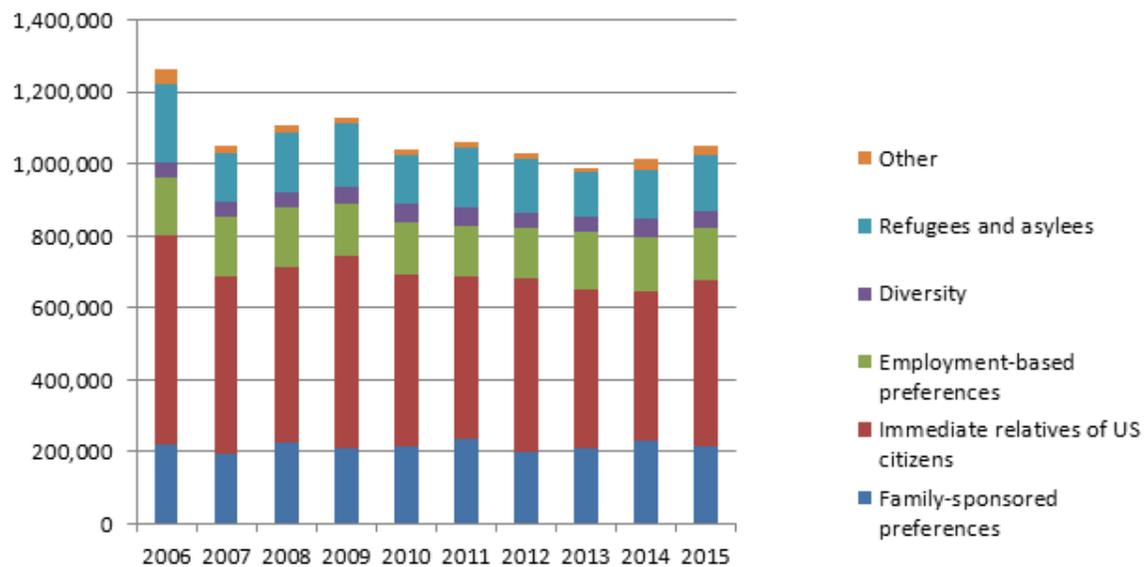
Since 1965, family-based immigration has been a cornerstone of US immigration policy. While immigration policies of other countries favor skilled-based migrants, the United States admits more immigrants who have family connections to Americans than any other category of migrant. The numerical limits set by the Immigration and Nationality Act (INA) of 1965<sup>1</sup> and expanded by the Immigration Act of 1990<sup>2</sup> allow for admission of 480,000 family migrants annually, compared to just 140,000 employment-based and

1 Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911.

2 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

55,000 diversity visa lottery immigrants. The law also allows admission of much broader categories of relatives compared to other countries' immigration systems. Besides spouses and minor children of US citizens, there are special categories for parents, adult children, and siblings of US citizens, and for spouses and minor children of lawful permanent residents (LPRs), regardless of their levels of education, occupation, or other skills. As a result, family-based migrants constitute roughly 65 percent of the total annual number of immigrants to the United States in any given year. In contrast, family-based migrants constitute only 30.2 percent of all immigrants to Australia, and the vast majority of those (83.3%) are spouses of Australian citizens (DIBP n.d.). In Canada, family immigrants are less than a quarter of all permanent immigrants (24.4%) with the vast majority (71%) also being spouses or partners of Canadian citizens (IRCC 2015).

**Figure 1. Immigrant Admissions to the United States by Major Class**



Source: DHS (2016, Table 6).

As Figure 1 shows, about 68 percent of family migrants (or 45% of total) are immediate relatives of US citizens, defined as spouses, minor children, and parents, and are admitted without numerical limitations under the total 480,000 cap. The rest are unmarried adult sons and daughters of US citizens (1st preference); spouses, children, and unmarried adult sons and daughters of LPRs (2nd preference); married sons and daughters of US citizens (3rd preference); and siblings of US citizens (4th preference). Immigrant admission under the family-preference categories is restricted by the total numerical limit of 226,000 per year and by category-specific ceilings as well as country-specific caps. Recognizing that the adult relatives of US citizens and LPRs may have families of their own, the policy allows for their immigration. The idea of family unity also exists in the policies governing temporary admission, refugee resettlement, and diversity immigration. For example, family members can apply for tourist visas together, and dependent's visas are issued to spouses and minor children of the foreign-born who come to the United States for relatively long periods of time on student or work visas.

## **Prolonged Family Separation**

Despite explicit emphasis on promoting family unity and a number of family-friendly provisions, the current immigration system is based on certain assumptions about families and immigration that may not reflect families' lived experiences. For example, the laws assume that there is a clear distinction between temporary and permanent migrants; that most families are nuclear consisting of a married couple and children; and that there are few immigrants in the process of adjustment of status, in a temporary protected status (TPS) or completely outside of the legal immigration system (unauthorized). As the result, instead of promoting family unity, the current immigration system often contributes to prolonged periods of family separation (Bergeron 2013; Enchautegui 2013; Enchautegui and Menjivar 2015; Kandel 2016).

Notwithstanding legal grounds for admission, the actual number of visas available for family preference immigrants is limited, especially for applicants from certain countries. Setting restrictive numerical quotas and prioritizing certain groups of relatives over others, coupled with per country limits, eventually results in backlogs and long waits before families are united (Bergeron 2013; Kandel 2016). The increased demand for immigrant visas was partly spurred by the provision of the INA that restricted immigration from the Western hemisphere. Before 1965, anyone born in a North or South American country could apply for an immigrant visa without numerical restrictions (and many did); now they are subject to numerical caps and have to compete with the foreign-born from all other countries for a limited number of visas. Given the large flows of migrants since 1965 and especially during the 1980s and 1990s, it is not surprising that the wait time for obtaining family-sponsored visas has increased dramatically over the years, disproportionately affecting immigrants from countries with large applicant pools, such as Mexico, Philippines, China, and India. Currently, the wait time for family-sponsored immigrants from most countries varies from about two years for the spouses and minor children of LPRs to 13 years for siblings and adult children of US citizens (DOS 2017). But adult children and siblings of US citizens born in Mexico have to wait more than 20 years to reunite legally with their relatives in the United States (*ibid.*).

Although shorter as compared to other types of family-based immigrants, prolonged wait times for LPRs to reunite with spouses and minor children (currently approximately two years) is of greatest concern. Research consistently documents negative and persistent effects of separation from immediate family members on the health and well-being of immigrant adults and their children, as we discuss further below (Abrego 2014; Dreby 2010; Suarez-Orozco et al. 2002). Ironically, long-term temporary residents can bring their spouses and dependent children to the United States relatively quickly by applying for dependent visas. But despite the laws supporting family reunification, in practice LPRs will be separated from their new spouses for the next two to three years.

What makes things worse for families are the restrictions on travel for prospective LPRs while their petitions are in process. A sharp distinction between temporary visitors and permanent migrants built into the current immigration system means that once a petition on behalf of a family-sponsored immigrant has been filed, the family-sponsored immigrant is no longer eligible for a visitor visa because it would be impossible to prove the absence of the intent to immigrate permanently, which is one of the conditions for receiving a

temporary visitor visa. Thus, prospective immigrants who are currently abroad are barred from visiting family members in the United States for many years. Partly in response to this, eligible prospective immigrants, family- and employment-based alike, prefer to apply for adjustment of their immigration status while in the United States. In fact, more than one-half of all new LPRs adjust status in the United States (DHS 2016). The adjustment time varies depending on the visa availability in specific immigration preference categories. Despite possible restrictions on travel during the adjustment process, those family-based migrants who hold valid temporary visas are usually able to become LPRs without leaving the United States. For unauthorized family-based migrants, this process involves much greater risk of permanent separation as most must return to the country of origin and seek approval of a waiver of inadmissibility, which, if denied, can lead to either three-year, 10-year, or permanent bars to readmission (Kerwin, Meissner, and McHugh 2011). By severely limiting in-person contact between family members and attendance at important family events like weddings, funerals, religious holidays, graduations, and anniversaries, these policies undermine family unity and ultimately weaken family support systems.

Although the current US immigration policy includes a relatively large list of relatives, it emphasizes legal definitions of family and assumes that formal, close kinship ties are the most instrumental. As a result, US immigrants are unable to reunite with certain relatives who may be extremely important for their family but fall outside of the defined set of eligible relatives. Two of the most common situations in which this may occur are familial relationships that are not officially documented (e.g., the absence of a formal marriage or adoption) and a relationship category that is considered too distant by the law (e.g., cousin, grandparent, godmother). For example, cohabitation without official marriage is widespread in many countries of Latin America and Caribbean, as are informal (de facto) adoptions and multigenerational families. Cohabiters and adoptive parents who did not formalize their relationship are unable to prove that relationship through official documentation to US immigration authorities. Also, godparents, aunts, uncles, and grandparents often play instrumental roles in children's upbringing, especially for families involved in international migration, but because these familial relationships do not qualify a migrant for a family-based visa, there is no mechanism for reuniting with them in the current immigration system.

Of course, the importance of extended family connections in particular cultures and family contexts present factual issues that are more difficult to prove when there is no formal marriage or birth certificate. In addition, concerns about possible fraud and even longer waits for visas if a wider range of relatives is allowed to immigrate are not unreasonable. However, other countries are taking steps in this direction. For example, Australia allocates "remaining relative," "aged dependent relative," and "orphan relative" visas. This system prioritizes relatives' contribution to or dependence on their family members in Australia over the formality of the ties (DIBP n.d.).

### **Unauthorized and Mixed-status Families**

Although family-based petitions are the primary mechanism by which people immigrate to the United States, a growing number of people have been completely barred from admission

and are ineligible to regularize their status. This has led to a significant rise in the number of mixed-status families. Recent estimates suggest that 16.7 million people in the United States have at least one unauthorized member of their household (Mathema 2017). Among those most impacted are immediate relatives, both parents and spouses, of US citizens. In the past, most immigrants who lived and worked in the United States for lengthy periods of time became eligible for legalization through US citizen immediate family members; now many do not. Today the average length of time an unauthorized person has lived in the United States is 13.7 years, and two-thirds of all unauthorized have been here for more than a decade, up from 35 percent in 1995 (Krogstad, Passel, and Cohn 2016). Of course, the longer someone lives in this country, the more likely that person is to form familial ties. One in three unauthorized persons — or 3.35 million people — are estimated to live with at least one US citizen child (Migration Policy Institute 2017), while 5.1 million children in the United States live with at least one unauthorized parent (Capps, Fix, and Zong 2016). Most unauthorized immigrants today are long-term residents with significant family and community ties.

The lack of legal conformity within families has significant consequences often overlooked by US policymakers. US citizens married to unauthorized migrants are not able to enjoy many of the benefits of their citizenship, such as the freedom to travel. They endure lengthy separations from their spouses and, in some cases, may become immigrants themselves (Lopez 2015). And US citizen children living in mixed-status families face a number of developmental challenges (Suarez-Orozco et al. 2011). Unauthorized parents typically have lower incomes, poor working conditions, and higher levels of poverty (Capps et al. 2013). This can make it difficult for parents to provide financial stability for their US citizen children. Other research shows that unauthorized parents have lower levels of social support and less access to public and community resources to help with child care than parents with legal status (Yoshikawa 2011). Moreover, simultaneous with increases in the number of mixed-status families, the past decade has seen a significant increase in deportations and bars on reentry (Lopez 2017). Thus not only are unauthorized family members at risk of family separation through enforcement, but so too are their US citizen children and spouses.

## **The Detrimental Effects of Enforcement on Families**

The social costs of immigration enforcement is significant and should not be overlooked by policymakers. The deportation of a family member leads to significant family trauma for unauthorized and US citizens alike. Families experience significant short-term and long-term economic and emotional hardship following a parents' detention or deportation (Dreby 2012; Warren and Kerwin 2017). They also experience strains in family relationships, especially between fathers and children as men are much more likely to be deported than are mothers (Dreby 2015; Golash-Boza and Hondageu-Sotelo 2013). Recent scholarship also shows significant short- and long-term mental health impacts on children when parents are detained or deported. Children have been shown exhibit significant behavioral effects, including changes in diet and sleep, frequent crying, anxiety, and fear during a deportation event. While some of these symptoms may decrease over time, studies show that withdrawal and angry or aggressive behavior persists (Brabeck, Lykes, and Hunter

2014). US citizen children also have been shown to experience higher levels of distress after a parent's deportation regardless of whether they remain in the United States or return to Mexico with their parents (Zayas et al. 2015).

It is not only a deportation or detention that negatively impacts families: the threat of what De Genova (2002) calls the fear of “deportability” alone has significant repercussions. Young children in Latino families in the United States have reported fears of separation even when their parents have never had any trouble with the law, fears that were even repeated by children whose parents were legal migrants to the United States (Dreby 2012). One study shows heightened levels of distress among children with unauthorized parents even among those who have not had a parent deported (Gulbas et al. 2015). Another shows a decreased use of social programs such as Medicaid and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) due to the risk of deportation (Vargas 2015). Policies that focus on enforcement and the criminalization of unauthorized migration have undermined the well-being of US citizens, legal immigrants, and unauthorized migrants alike.

### **The Benefits of Family Unity**

Debate over preferred US immigration policy — whether it should focus primarily on skill-based or family-based immigration — is at least as old as the INA itself. Will US society be better off if we admit immigrants based on their skills and education rather than on their family ties? Arguments are usually made based on the cost-benefit analysis with respect to the potential impact of each type of migration on the economy and society. Some policymakers also consider the breadth of services that exist for immigrants and the kind of new services they are willing to create (if any) for newcomers. Often missing from the discussion is a large body of research that points to multiple benefits of family unity for the economic, social and psychological well-being of US citizens, like the children and spouses of the unauthorized discussed in the previous sections, as well as the immigrants to the United States (Berkman et al. 2000; Cohen and Syme 1985). Helping immigrants preserve and rebuild their families may indirectly improve the health and well-being of the entire US population.

A recent comprehensive report concluded that immigration has an overall positive impact on the US economy, suggesting that a predominantly family-based migration system carries net economic benefits (National Academies of Sciences, Engineering, and Medicine 2016). This and other research emphasize that both high- and low- skilled immigrants are crucial for sustained economic growth (Bean et al. 2012). Even though family-based immigrants have lower human capital upon arrival compared to skill- or employment-based immigrants, over time these differences narrow because family migrants are more likely to experience upward socioeconomic mobility as compared to employment-based migrants (Duleep and Regets 1996; Jasso and Rosenzweig 1995). Highly skilled migrants often experience downward mobility post-migration because their foreign degrees, credentials, and work experience are not directly transferable to the US job market (Aydemir 2011; Akresh 2006). A possible mismatch between specific classifications of new immigrants and job availability prompted countries that initially favored skill-based immigration

(e.g., Canada, Australia) to settle on a system split between skill-based and employment-based admission. Unlike the United States, these countries also provide a pathway to permanent residency for temporary employment-based immigrants who spend some time in the country and have valid job offers. Although guaranteed to have jobs after arrival, employment-based immigrants in the United States (e.g., H-1B visa holders) may be reluctant to change jobs or ask for raises or promotions for fear of losing their legal status, which is tied to their current employment. Additionally, a pathway to permanent residency for most employment-based immigrants in the United States depends on their employers' willingness and ability to sponsor their immigration, which may force them to trade higher wages for a green card.

One the other hand, while it may take longer for family migrants initially to find jobs, their legal status in the United States does not depend on their employers. This gives them more freedom to make the best use of their skills and experiences and also motivates them to invest in education, which improves their employment opportunities and income levels in the long term (Akresh 2006; Vallejo 2012). Partly due to initial difficulties of finding employment in the mainstream economy, family-based immigrants are more likely to be self-employed and/or work in ethnic economies (Light, Bernard, and Kim 1999; Razin and Light 1998). Immigrant entrepreneurship plays an important role in their integration into US society, revitalizing ethnic communities and improving chances of upward mobility of second-generation immigrants (National Academies of Sciences, Engineering, and Medicine 2015; Sanders and Nee 1996; Vallejo 2012). Immigrants have higher business ownership and formation rates than nonimmigrants as roughly one out of 10 immigrant workers owns a business and 620 of 100,000 immigrants start a business each month (Fairlie 2012). Immigrant-owned businesses start with higher levels of startup capital than nonimmigrant-owned businesses with about two-thirds reporting personal and family savings as the main source of startup capital (Fairlie 2012). Data limitations often preclude comparison of entrepreneurship between employment- and family-based immigrants, but the fact that immigrants coming to the United States as children are more likely to start larger firms than immigrants arriving as adults (Kerr and Kerr 2016) suggests that the age at migration may play a more important role than the immigration pathway.

Assistance from family members in the United States is not limited to employment. Family-sponsored immigrants are also likely to receive help from their US-based relatives with housing, healthcare access, transportation, school enrollment, and enrichment activities for children. The informal exchange of goods and services goes both ways as recent immigrants, especially older parents, often assume caregiver responsibilities and contribute to unpaid household labor (Treas and Gubernskaya 2015; Treas and Mazumdar 2004). Many employment-based immigrants lack this kind of support, which is crucial for alleviating initial stress related to immigration. Moreover, there are virtually no federal or state assistance programs for newly arrived immigrants (except for refugees), and there is no indication that the current administration will institute such a program. In fact, all LPRs with less than five years of residence in the United States are explicitly prohibited from receiving federal means-tested public benefits. While other countries that prioritize skill-based immigration have a more comprehensive welfare state system of benefits and more robust immigrant integration policies (Bloemraad 2006), family support is the only kind of support the foreign-born in the United States can access and is vital to the health

and well-being of families. Policymakers promoting a skill-based immigration system and using other countries as examples need to take into account other programs, benefits, and services that are available to immigrants in those countries but not in the United States. For example, Canada has a publicly funded healthcare system that provides health insurance not only to citizens but also to permanent residents. Canada also allocates federal funds for immigrant integration services, such as free language classes and community and labor market integration services (Bloemraad 2006). These programs are likely to be as important for immigrant integration as their human capital.

### Policy Recommendations

Given the benefits of family unity in the US immigrant context and the significant negative consequences that family separation — both during family sponsored immigration and due to immigration enforcement events — the United States would do well to make a number of changes to current policy and practice so as to reaffirm the commitment to family unity. First, prolonged separation of LPRs from their immediate family members should end. Even a year in the life of a child spent forcefully separated from her parents can have long-term negative implications for her health and well-being, which may persist despite eventual family reunification.

Second, family members who are stuck in the long process of obtaining or adjusting to LPR status should be able to travel. Either establishing a temporary visa for this category of prospective immigrants or allowing prospective migrants to apply for visitors' visas will facilitate family unity and speed up subsequent immigrant integration. Risks that prospective immigrants will overstay their visas may be minimized by making it clear that violating temporary visa status requirements will preclude them from obtaining permanent status in the future.

Third, given the expanding evidence on the mental health and economic impacts of enforcement on families, the definition of hardship in granting waivers to deportation needs to be revised. Fathers and mothers of US citizen children should be afforded a path to legal status because deportation not only threatens children's well-being, but also potentially increases the burden on state-run welfare and foster care systems. Members of mixed-status families should be provided a pathway to legalization. A step in this direction would be to expand eligibility for in-country adjustment of status.<sup>3</sup>

Finally, it is important to note that preserving family unity does not necessarily mean increasing the number of permanent immigrants, and it would be a mistake to assume that all families want to be reunited in the United States. Temporary family separation is almost inevitable, especially in the beginning of highly uncertain immigration process. Additionally, many families today choose global arrangements in which members reside, at least periodically if not more permanently, in different countries (Coe 2014; Stephens 2007). Such transnational families take advantage of new technologies and the availability of temporary visas to maintain family unity despite the distance (Parreñas 2001; Wilding 2006). Making travelling to the United States difficult through expensive and uncertain visitor visa application processes, excessive vetting, and unwarranted scrutiny at the border

3 INA § 245(i), 8 U.S.C. 1255(i).

may prompt some family members to apply for permanent residency or to stay without proper documentation even if they had no previous plans to do so. Allowing for greater flexibility for migrant families may paradoxically decrease permanent settlement in the United States.

## Conclusion

Positive socioeconomic outcomes of family immigrants and their children and evidence of economic, social, and psychological benefits of family support suggest that family unity should remain a priority in US immigration policy. Families are a buffer that aids immigrant integration, provides a social and economic safety net for new Americans, helps to incorporate, and builds new businesses in the United States. And yet despite these benefits, the principle of family unity has faced significant hurdles over the past decade, including many unintended consequences for families such as lengthy visa backlogs and processing delays, visa restrictions, biased assumptions about family structure, bans on reentry, and separations due to enforcement practices. Such policies increase the likelihood of lengthy family separations and ultimately undermine families.

Going forward, the new administration should seek out ways to enhance family unity, rather than undermine it. Enforcement policies should deprioritize deportation of those with significant family ties to US citizens. The definition of family members eligible for immigration should match family members' lived experiences. And wait times in immigration applications must be reduced. After all, strong immigrant families create strong American communities.

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# Creating Cohesive, Coherent Immigration Policy<sup>1</sup>

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## Executive Summary

US immigration policy has serious limitations, particularly when viewed from an economic perspective. Some shortcomings arise from faulty initial design, others from the inability of the system to adapt to changing circumstances. In either case, a reluctance to confront politically difficult decisions is often a contributing factor to the failure to craft laws that can stand the test of time. We argue that, as a result, some key aspects of US immigration policy are incoherent and mutually contradictory — new policies are often inconsistent with past policies and undermine their goals. Inconsistency makes policies less effective because participants in the immigration system realize that lawmakers face powerful incentives to revise policies at a later date. US policies regarding unauthorized immigration, temporary visas, and humanitarian migrants offer examples of incoherence and inconsistency. This article explores key features of an integrated, coherent immigration policy from an economic perspective and how policymakers could better attempt to achieve policy consistency across laws and over time.

## I. Introduction

Although there is widespread consensus that US immigration policy is broken, there is little agreement on *how* it is broken. One view, for example, is that the United States is too tolerant of unauthorized immigration — it does not enforce its borders effectively or deport enough unauthorized immigrants. An opposing view is that the country should recognize unauthorized immigrants' contributions by enacting a widespread legalization program that includes a pathway to US citizenship. And while few people argue against enforcing the country's borders, researchers point to diminishing marginal returns to additional US border enforcement (Batalova and Terrazas 2012). Some economists even argue that the economic gains from having a flexible, low-cost unauthorized workforce may outweigh the costs associated with large-scale unauthorized immigration and hence, changing the current system would leave the country worse off (Hanson 2007).

<sup>1</sup> The views expressed here are those of the authors and do not reflect those of the Federal Reserve Bank of Dallas or the Federal Reserve System.

Disagreements about US immigration policy extend to legal immigration as well. Points of contention include how many temporary foreign workers should be admitted and their required skill set, as well as the relative importance of skills and education versus family ties in awarding permanent resident visas. Whether to admit refugees from predominately Muslim countries emerged as another area of disagreement during the 2016 presidential campaign, culminating in two 2017 executive orders attempting to ban most migrants from several countries and causing widespread protests in reaction.

This article focuses on a more fundamental way in which US immigration policy is broken: Taken as a whole, it is not a cohesive, coherent set of laws and regulations. In some cases, individual policies and practices actually undermine each other. The 1965 amendments to the Immigration and Naturalization Act (INA), also called the Hart-Celler Act, set up a system of issuing permanent resident visas based primarily on family ties or employment. Most changes to US immigration policy since then have involved tinkering at the margins of this system, not enacting large-scale reforms that would overhaul it entirely. Decades of tinkering have resulted in an immigration policy akin to Johnny Cash's psychobilly Cadillac: the parts don't fit together quite right, and something is definitely wrong.

A key failure of US immigration policy is that it is not forward looking or flexible. It too often fails to look ahead and consider the ramifications of current laws and regulations. Addressing these future consequences may be politically challenging, giving policymakers an incentive to put off action, but the failure to enact coherent, consistent policies has resulted in large-scale unauthorized immigration, long backlogs for permanent resident visas, and widespread dissatisfaction with the nation's immigration policy. This dissatisfaction can lead to nativist backlashes, as has been the case in the United States since the late 2000s, in Europe as a result of the recent refugee influx, and in the United Kingdom leading up to the Brexit vote. The backlashes can result in abrupt overcorrections by policymakers, as demonstrated in both the United States and Europe. Ultimately, this dissatisfaction reduces public support for admitting immigrants and for helping them once they are in the country.

This article explores three major areas in which US immigration policy has been neither cohesive nor coherent. First, US policies towards unauthorized immigrants have been inconsistent in ways that have fueled additional unauthorized immigration or created perverse incentives to remain unauthorized. Second, US temporary visa programs are not aligned with permanent visa programs, creating additional inconsistencies. Finally, some US programs for humanitarian migrants also suffer from incoherence and inconsistency. This last problem is not unique to the United States. As this article discusses, the European response to humanitarian migrants has also been disjointed and confused. Europe's recent experience may offer lessons for US policymakers in what not to do, and vice versa. The article then explores the key elements of a cohesive, coherent immigration policy that is internally and temporally consistent. Policy inconsistency is far from the only problem with the current immigration system, but it is a topic that has received less attention than other, more concrete subjects, such as the number and types of visas available and how to address unauthorized immigration.

Creating a cohesive, coherent immigration policy requires understanding the goals of an effective immigration system. For the United States, immigration policy goals currently — and historically — include enabling families to reunify, encouraging productive workers to

immigrate, and meeting humanitarian obligations. We agree that these are important goals, although as economists we would probably put more emphasis on the second one than many others might. Immigration policy can serve as a tool to advance national interests in domestic or foreign spheres, such as admitting investors with deep pockets or citizens of regimes that the US government opposes. Difficulties arise when these interests conflict. This is particularly likely to happen when the total number of immigrants admitted is capped, so more immigrants in one group means fewer in another. As this article argues, cohesive, coherent policies are likely to lead to more public support for immigration. This, in turn, would allow policymakers to ease limits on the total number of immigrants admitted and give lawmakers greater freedom to use immigration policy to pursue the nation's economic and political interests.

## II. Unauthorized Immigration

More than 11 million unauthorized immigrants were living in the United States in 2014 (Passel and Cohn 2016). Although large, this is actually below the population's peak of over 12 million just before the start of the Great Recession in 2007. Perhaps one of the biggest takeaways from the last few decades of US immigration policy is that a severe economic downturn may be the fastest and most effective way to reverse unauthorized immigration. But of course no one would recommend the country endure a recession in order to reduce unauthorized immigration, so what measures do policymakers actually take?

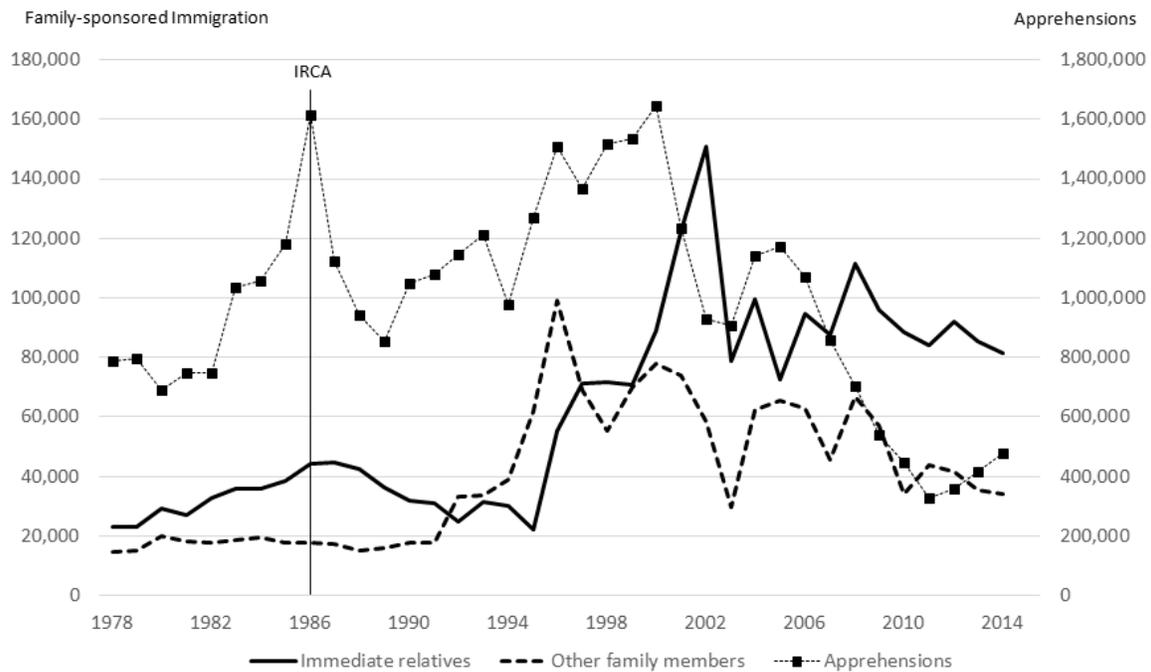
Policymakers typically enact tougher border enforcement measures in order to reduce the number of people entering the country illicitly and tougher interior enforcement measures in order to reduce the number of people living in the country illegally. Interior enforcement can involve involuntary removals — deportations — or making life so difficult for unauthorized immigrants that they choose to leave on their own, so-called “self-deportations.”

From the 1960s until the early 2000s, the United States emphasized border enforcement while largely neglecting interior enforcement. This was policy inconsistency: potential unauthorized immigrants outside the country faced far more barriers than unauthorized immigrants already in the country. Interior enforcement in the Hart-Celler era only began in earnest after 9/11, when the federal government enacted a number of measures aimed at bolstering national security that also made life more difficult for unauthorized immigrants (Orrenius and Zavodny 2009).<sup>2</sup> Before that, policy seemed almost Darwinian — border enforcement kept out the poorest, least-educated immigrants since they were the ones who could not afford to hire a smuggler or manage to get a tourist or temporary visa they could later overstay. Once someone made it in, they could largely live and work in the United States without fear of being deported, so many stayed. Lax interior enforcement undermined strict border enforcement. Another manifestation of policy inconsistency: Border enforcement tended to be counter-cyclical with regard to demand for unauthorized workers during this period, with authorities relaxing enforcement when sectors that use large numbers of unauthorized immigrant workers expanded (Hanson and Spilimbergo 2001).

<sup>2</sup> A notable exception is Operation Wetback during the 1950s, which involved both intensified border enforcement and the mass deportation of Mexican immigrants (Ngai 2004).

The United States kicked off another round of inconsistent policy making when it granted legal status to 2.7 million unauthorized immigrants as part of the 1986 Immigration Reform and Control Act (IRCA). Many of the newly legalized immigrants set down roots in the United States and wanted family members and friends to join them. Legal immigration from Mexico rose after IRCA, particularly as immigrants became naturalized US citizens able to sponsor their spouses, parents, and unmarried dependent children for legal permanent resident visas — “green cards” — categories of immediate relatives that are not subject to numerical limits (figure 1).

**Figure 1. Family-sponsored Immigration from Mexico and Apprehensions along US-Mexico Border, 1978-2014**



Source: Data are from the US Department of Homeland Security (or Immigration and Naturalization Services) and are for fiscal years.<sup>3</sup>

However, not enough green cards were available to meet rising demand in numerically limited categories. By 1992, Mexican immigrants faced a backlog in every numerically limited category of family sponsored visas. Long wait times to enter legally led to a resurgence of illegal entries. As figure 1 shows, migrant apprehensions along the US-Mexico border soon resumed their pre-IRCA pace. The 1994-95 Mexican peso crisis further fueled unauthorized immigration and added to the demand for visas. Policymakers could not have anticipated the Mexican economy’s collapse, but they could and should have anticipated that demand for visas would rise after IRCA. The failure to couple the legalization program with an increase in visas undermined IRCA’s goals by contributing to

3 Data taken from the US Department of Homeland Security (DHS), Enforcement Case Tracking System (ENFORCE) and the Performance Analysis System (PAS). For years prior to 2005, data are from the Statistical Yearbook of the Immigration and Naturalization Service (various years). For 2005-2010, data are from Sapp (2011). FY 2011-2014 data from DHS (2014), table 35. FY 2015 data from DHS (2015).

unprecedented levels of unauthorized immigration. Tougher border enforcement combined with lax interior enforcement also led to increased length of stay in the United States among unauthorized immigrants (Angelucci 2012). What had largely been a pool of male workers who circulated back and forth between Mexico and the United States became a base of families settled in the United States (Massey and Riosmena 2010).

IRCA's failure to reduce unauthorized immigration contributed to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. Among other provisions, IIRIRA imposed three- and 10-year reentry bars for most people who had been in the United States illegally. This gave unauthorized immigrants additional incentive to remain in the United States illegally rather than return home to legalize their status since doing so would have triggered the reentry bar. Given that the new rules discouraged immigrants who were clearly eligible for green cards from getting them, policymakers quickly backtracked and twice extended or created provisions that allowed unauthorized immigrants to file to adjust status without leaving the country so they could avoid triggering the reentry bar.<sup>4</sup> The IIRIRA is a prime illustration of an overcorrection by policymakers reacting to consequences that could have been foreseen and addressed when IRCA was crafted.

The growth in the unauthorized immigrant population has been unpopular with many Americans. Although many businesses and consumers benefit from having a large, low-wage labor force, there are concerns about possible adverse effects on competing American workers, the fiscal costs of unauthorized immigrants and their children, a breakdown of the rule of law, and the cultural impact of having a sizeable predominately non-English-speaking immigrant population. One of the more subtle downsides of having a large number of unauthorized immigrants is that the US public and media have focused on this group, which only comprises about one-quarter of all foreign-born living there. As a result, policymakers often focus on this group as well instead of addressing broader issues, including those regarding legal immigration such as temporary and permanent visas.

### **III. Temporary and Permanent Visas**

The disconnect between the temporary and permanent visa systems is another major example of incoherent, inconsistent US immigration policy. A well-designed immigration system that includes both temporary and permanent employment-based visas should allow workers to readily adjust to permanent residence status when their temporary visa expires if their employer is willing to sponsor them. Current policy prevents experienced foreign workers whom employers want to keep from staying and instead obliges firms to bring in new, inexperienced temporary workers because of a mismatch between the number of permanent employment-based green cards and the number of temporary work visas. The

<sup>4</sup> The 245(i) amendment to INA allowed unauthorized immigrants with approved green cards to adjust status without leaving the United States and becoming subject to the reentry bar. The 245(i) provision was in effect for eligible immigrants between 1994 and 1998 and for a four-month period in 2001. Today, only immigrants whose absence would cause extreme hardship to a US citizen may receive a waiver that allows them to adjust status under 245(i). The Obama administration also created a procedure to allow certain persons found to be statutorily eligible for an immigrant visa to apply for a waiver of the unlawful presence reentry bars, prior to leaving the United States for their consular interviews.

Immigration Act of 1990 allocated 140,000 green cards annually across five employment-based categories and 65,000 H-1B temporary visas for skilled foreign workers. The former number has remained fixed since then while the number of H-1B visas issued has more than tripled.<sup>5</sup> The fact that accompanying dependents are counted towards the green card cap but not the H-1B cap further exacerbates the imbalance.

The most obvious result of the imbalance is long wait times for temporary foreign workers trying to adjust to permanent residence. Table 1 shows the average wait time in five-year intervals for “EB-3” green cards for skilled workers and professionals.<sup>6</sup> During fiscal years 2012-16, immigrants receiving EB-3 green cards had applied for them an average of 36 months prior. The wait is even longer for immigrants from major source countries (China, India, and the Philippines) because of country caps.<sup>7</sup> Some immigrants who want to adjust to permanent resident status go to extraordinary lengths to do so, such as marrying a US citizen in order to get a green card.

**Table 1. Average Wait Time in Months of Third Preference Employment-based Immigrants**

Time Period	China	India	Philippines	Rest of World
1992-1996	9	4	26	0
1997-2001	24	28	1	0
2002-2006	16	19	16	12
2007-2011	74	89	61	61
2012-2016	62	127	75	36

*Source:* US Department of State’s Visa Bulletin. Data are averages by fiscal year.

Less obvious results of the imbalance include discouraging skilled workers from remaining in the United States while waiting for a green card and encouraging high-tech companies that rely on the H-1B program to hire large numbers of workers to instead open up facilities in source countries or in countries with less-restrictive immigration policies, such as Canada. The shortage of visas down the line also dissuades some highly skilled people from accepting a temporary foreign worker visa or even a student visa.<sup>8</sup>

<sup>5</sup> The American Competitiveness in the 21st Century Act expanded the number of H-1B visas without increasing the number of employment-based green cards. The Act expanded the H-1B program in four main ways: it increased the number of H-1B visas available from 65,000 to up to 195,000 for three fiscal years; it exempted employees of higher educational institutions and nonprofit and government research organizations from the cap; it exempted 20,000 recipients of a US master’s degree or higher from the cap; and it exempted H-1B renewals from counting towards the cap.

<sup>6</sup> EB-3 is the largest category of employment-based green cards, accounting for almost 60,000 visas in a typical year, or about 40 percent of the employment-based total.

<sup>7</sup> The INA limits the number of preference-based green cards issued to any single country to 7 percent of the total each fiscal year. Hence, countries as large as China, with 1.4 billion people, can receive at most the same number of such green cards — 25,620 — as countries as small as Luxembourg, with half a million inhabitants.

<sup>8</sup> Shih (2016) shows that the reduction in the H-1B cap in 2004 reduced enrollment of international students at US colleges and universities by about 10 percent. Kato and Sparber (2013) show that it particularly discouraged high-ability foreign students from attending college in the United States.

A final example of disjointed policy related to temporary and permanent employment-based visas is the inconsistent conditions for receiving the two types of visas. In order to hire a worker with an H-1B visa, most employers must simply attest that they will pay that worker at least as much as similar workers or the prevailing wage in the occupation and area, and that the employment conditions of similar workers will not be adversely affected.<sup>9</sup> In order to sponsor a worker for an EB-2 or EB-3 visa, employers must demonstrate that they have made a good-faith effort to recruit a US worker and that no qualified US worker is willing and able to do the job at a comparable wage. In effect, employers must meet a higher legal standard to sponsor a worker for a permanent visa than for a temporary one. Moreover, an employer who hires a worker on an H-1B visa is far from guaranteed that the worker can eventually qualify for a green card. Having the same legal threshold for both visas as well as more permanent visas allotted to temporary workers who want to remain would help lead to a more coherent, consistent immigration system.

### **IV. Humanitarian Migrants**

How countries should address humanitarian migrant streams has become a pressing issue as millions of Syrians have fled their country, hundreds of thousands of Africans have crossed the Mediterranean into Europe, and tens of thousands of unaccompanied minors have streamed north from Central America during the last few years. The United States — and many European Union countries — has often reacted in incoherent, inconsistent ways to these and other streams of humanitarian migrants.

The United States has an annual quota on refugee admissions but not on asylum seekers. The refugee quota is set by the president in consultation with Congress and was 70,000 per year in recent years but was raised to 85,000 in fiscal year 2016 and to 110,000 in fiscal year 2017 in response to ongoing humanitarian crises. President Trump reduced it to 50,000 within a week of taking office and implemented a 120-day moratorium on all refugee admissions. The quota is divided across major regions of origin, including Near East/South Asia, Africa, East Asia, Europe/Central Asia, and Latin America/Caribbean. This fixed regional quota system means that an unexpected humanitarian crisis in one country reduces the likelihood that other humanitarian migrants from the same region will receive refuge in the United States. It also gives humanitarian migrants an incentive to try to enter the United States illicitly in order to apply for asylum.

Refugees apply for admission from outside of the country, whereas asylum seekers are already in the country or at the border when they ask for protection. One reason this distinction is important is that US immigration policy does not cap the number of people

<sup>9</sup> H-1B dependent employers — firms with H-1B workers comprising 15 percent or more of their total workforce — must also attest that they will not displace any similarly employed US worker for 90 days and that they took good faith steps to recruit US workers and first offered the job to any equally or better qualified US worker. There are exemptions if the H-1B worker earns at least \$60,000 or has a master's degree or higher.

who can be granted asylum.<sup>10</sup> As a result, humanitarian migrants may undertake dangerous journeys to the United States in hopes of receiving asylum once they reach its borders instead of waiting abroad to be admitted as a refugee.

The Central American Minors (CAM) program is an example of how well-intentioned policies regarding humanitarian migrants can nevertheless be incoherent. Created in 2014, the program allows certain legally present parents in the United States (“qualifying parents”) to initiate an application for refugee status or parole for their “qualifying” minor children in El Salvador, Guatemala, or Honduras, as well as for certain other family members.<sup>11</sup> The goal was to reduce the number of children undertaking perilous journeys north — an important goal. But children can qualify for the program only if they have a parent lawfully present in the United States. This dramatically limits the program’s applicability since many of the children traveling north either do not have a parent there or are trying to reunite with a parent who lacks legal status. In addition, the program only grants lawful status in the United States for two years, not permanent residence; this short timeframe essentially kicks the can down the road. Participation in the program has been modest so far, although it is growing. As of February 2017, the program had approved around 11,000 applications, but fewer than 2,400 approved children had actually entered the United States. This compares with more than 40,000 unaccompanied children apprehended along the US-Mexico border in fiscal year 2015 and almost 60,000 in fiscal year 2016.<sup>12</sup>

The limited timeframe of the residence permits issued under the CAM program illustrates a credibility problem in several US programs for humanitarian migrants. Despite announcing *temporary* protective measures, policymakers are typically very reluctant to enforce the limited timeframe. Temporary protected status (TPS) is a case in point (Bergeron 2014). Since 1990, the United States has tended to grant TPS to unauthorized or temporary migrants already present in the country when a natural disaster or other crisis occurs in their home country. TPS is valid for six to 18 months, but policymakers can opt to extend it. Such extensions have become commonplace — Honduran and Nicaraguan beneficiaries have had TPS since early 1999, and Salvadorans since 2001. The temporary aspect of TPS seems to have fallen by the wayside. And after more than 15 years in the United States, it seems unlikely many of those beneficiaries would leave if their protected status was not renewed yet again. Further, their continued lawful presence in the United States may have led to additional unauthorized immigration as they are joined by family members and may have sowed confusion abroad about perceived amnesties. President Obama’s executive actions that aimed to grant deferred deportation to qualifying unauthorized immigrants — the Deferred Action for Childhood Arrivals (DACA) program in 2012 and

10 The number of people who receive asylum has averaged around 25,000 per year in recent years. One aspect of time-inconsistent immigration policy with respect to humanitarian migrants is no longer in place: Until 2005, the number of successful asylum seekers who could adjust to legal permanent resident status after one year of US residence was capped at 10,000 per year, while the number of people who could be granted asylum was unlimited. Removing the cap on permanent resident visas was a step toward coherent, time-consistent policy.

11 In November 2016, this program was expanded to allow for the admission of the qualifying US parent’s children who are married and/or over age 21, as well as the qualifying child’s biological parent and his or her caregiver in certain circumstances.

12 Statistics on CAM program participants are from Robles and Semple (2017); statistics on apprehensions of unaccompanied children are from US Customs and Border Protection (2016).

## Creating Cohesive, Coherent Immigration Policy

the Deferred Action for Parents of Americans program in 2014, the latter of which has been permanently enjoined — may have added to this confusion. DACA is also another example of a temporary program that has already been renewed once.

The United States is not the only country with difficulty creating coherent, temporally consistent policies regarding humanitarian migrants. In recent years, European countries have responded to the inflow of humanitarian migrants from Syria, Afghanistan, and other non-EU countries in a chaotic, disjointed manner. Under the Dublin Regulation, EU members had a key common policy regarding asylum seekers: Their claims would be processed in the first EU country they reached. This cooperation was intended to eliminate asylum seekers' incentive to travel to northern European countries with friendlier policies, stronger economies, and more generous welfare benefits. A combination of massive inflows in recent years, continued economic weakness in major countries of entry (Greece, Italy, and Spain), lack of cost-sharing, and unwillingness to more evenly allocate humanitarian migrants across countries all contributed to a breakdown of that cooperation.

Some countries — most notably Germany and Sweden — threw open their doors to humanitarian migrants and then faced public backlash as hundreds of thousands of migrants rushed in. Swedish policymakers responded to that backlash by largely slamming the door shut, whereas German policymakers have largely continued to welcome asylum seekers but pressured neighboring countries to stem the flow while redistributing asylum seekers within the country's own borders. Meanwhile, some other EU member states made few, if any, changes to their policies or tightened their immigration policies. The United Kingdom's Brexit vote was in part a backlash against EU migration as well as the European Union's handling of the refugee crisis. The United Kingdom is a popular migrant destination since it has both a relatively strong economy and the benefit of the English language, which many migrants already speak and understand. The Brexit vote dictated that the United Kingdom exit the European Union and recover control over its borders.

There are several reasons why EU coordination on immigration policy is inherently unstable and policies are inconsistent (Orrenius and Zavodny 2016). First, immigration-related costs tend to be concentrated among particular member states. Nations along the EU periphery face high costs of enforcing their borders and processing humanitarian migrants, and they have strong incentives to simply let migrants continue northward. The fact that there is little internal border enforcement under the Schengen Agreement enables this; it also makes the European Union a more attractive destination to migrants. There is also relatively little external border enforcement, although it bears noting that both internal and external enforcement have increased in the wake of the recent refugee influx.

Second, the EU countries differ markedly in their attractiveness to migrants and their capacity or willingness to absorb them. Migrants, both those already in the European Union and those arriving from the rest of the world, strongly prefer countries with large migrant networks, growing economies, and generous social safety nets. Myriad cross-country differences make it more difficult for member states to agree on immigration policies or on sufficient cost-sharing. These issues point to several potential lessons for US policymakers, as discussed below.

## V. What Would Cohesive, Coherent Immigration Policy Encompass?

Immigration policymakers who aim to create a cohesive, coherent system should keep several key factors in mind. First is the interconnected nature of many migrant streams. Policymakers should consider the likely effects of an immigration policy on future flows. If a policy will induce sizable inflows, as the 1986 legalization program did in the United States, policymakers should ensure that legal channels can accommodate those inflows. If they cannot, unauthorized immigration will rise.

Policymakers aiming to stem unauthorized immigration should recognize that tougher border enforcement can help keep unauthorized immigration in check but is costly and has far-reaching unintended consequences. At this point in the United States, where the southwest border is very heavily enforced, tougher interior enforcement measures would be more effective than building a wall or other forms of additional border enforcement. Interior enforcement can better address the root cause for many migration streams, namely employment opportunities. Requiring all employers to use E-Verify for new hires, for example, would help remove the jobs magnet that attracts many unauthorized immigrants.<sup>13</sup> Tightening interior enforcement would also be cohesive with maintaining current levels of border enforcement, reinforcing existing policies instead of undermining them. Creating more legal channels for less-educated immigrants to enter the country would also help reduce unauthorized immigration.

Policymakers also need to decide how to best deal with unauthorized immigrants already present in the country. Decades of inconsistent policies have created a situation in which the United States has no easy choices. It can crack down on unauthorized immigrants who have been living and working in the United States, either by deporting them or by making things so bad that they leave. Either one would be bad not only for those unauthorized immigrants but also for any US citizen children they have (Warren and Kerwin 2017). In addition, it would create sizable disruptions in some labor and product markets in the short to medium run. Alternatively, the United States can enact a legalization program and couple it with measures aimed at keeping future unauthorized immigration at a minimum. A major concern here is that a legalization program may result in yet more illegal inflows or visa overstays in hopes of another amnesty, undermining the goal of less unauthorized immigration. The Bush and Obama administrations made a third choice: They turned a blind eye toward most unauthorized immigrants once they were established in the country. While perhaps understandable in the short run, this policy inconsistency has only worsened the problem in the long run.

Second, policymakers need to build more flexibility into the immigration system. Rigid caps for permanent residents and some categories of temporary foreign workers have resulted in tremendous backlogs and inefficient lotteries and have discouraged countless potential would-be immigrants from applying or staying in the United States; they may even encourage some companies to open or expand operations overseas instead of domestically. The cap on refugees means humanitarian migrants may have to choose between living

<sup>13</sup> A national E-Verify mandate would likely be very detrimental to unauthorized immigrant workers and their families. It therefore should be implemented as part of broader reforms that grant some form of legal status to unauthorized immigrant workers who have been living in the United States for a long time.

in deplorable conditions in a third country and risking a dangerous journey to the United States in order to apply for asylum. Quotas should rise and fall in response to changes in origin-country economic, political, and social conditions and, in the case of employment-based visas, to changes in US economic conditions.

Such flexibility could be built in via automatic adjustment mechanisms, such as a formula that increases the number of temporary and permanent employment-based visas when the unemployment rate is low and falling and GDP growth is rising and reduces it when the opposite occurs. If a formula is too rigid for policymakers, they could instead use market-based mechanisms to allocate employment visas, such as auctioning off permits to hire temporary foreign workers (Orrenius and Zavodny 2010). Automatically creating more family-based visas for migrants from a given country in response to larger legal inflows from that country might also make sense, although a simpler solution is to just remove the country cap on permanent visas. Alternatively, the United States could create an independent commission, like the United Kingdom's Migrant Advisory Committee, that regularly advises on the number of visas or even sets quotas.

The EU experience dealing with sudden increases in migration and unprecedented numbers of humanitarian migrants offers several lessons for designing coherent policies. Sudden surges and historically large flows of migrants can result in public backlash against political parties, government institutions, and migrants themselves. In a spring 2016 Pew Research Center survey, 88 percent of the Swedish, 70 percent of the British, and 67 percent of Germans disapproved of the European Union's handling of the refugee issue (Connor 2016). Long-standing policies may be overturned and replaced with counterproductive measures; disapproval may spill over into support for anti-immigrant political parties. To the extent possible, lawmakers have a responsibility to prevent migration surges, keep migration legal, and maintain effective border controls. This requires recognizing that migration is endogenous; it is influenced by the policies in the receiving countries. Well-meaning policies may backfire if migrants who utilize them are later victimized through discrimination or other means or if public backlash reduces support for immigration and immigrant integration policies.

The EU experience also demonstrates the need for burden- or cost-sharing across regions, particularly when poorer areas receive the lion's share of migrants because of their location. In the United States, such cost-sharing should occur across levels of government. Estimates of the fiscal effects of immigration suggest state and local governments bear the fiscal costs of low-skilled immigration while the federal government benefits (National Academies of Sciences 2016). There should be a mechanism for federal government transfers to state and local governments to offset the costs of mandatory services to immigrants, such as public education and emergency healthcare.

Finally, policymakers should try to make commitments that remove the possibility of temporally inconsistent policies or that widen the gap between policy and practice. For example, instead of repeatedly extending temporary programs like TPS, why not grant permanent residence to program beneficiaries after one extension? The 1997 Nicaraguan Adjustment and Central American Relief Act offers a good example of a cohesive policy. Instead of continuing to extend TPS year after year to qualified migrants, the program granted permanent residence to migrants from certain countries with open asylum claims.

The program also was extended in 2000 to qualified family members. With regard to employment-based migrants, a consistent policy would readily grant permanent resident visas to temporary foreign workers who meet the qualifications for permanent visas when their temporary visas expire, not require them to meet a higher standard and then wait for years for a visa to become available. And removing the ability of a new administration to easily reverse course and renege on commitments to admit certain refugees or other immigrants seems like a must for temporally consistent policy.

## VI. Conclusion

Policy inconsistency in the US immigration system came to the forefront in the Obama administration, which may have desired to implement permanent improvements but ended up resorting to temporary piecemeal fixes. Among other measures, it issued executive actions to shield some unauthorized immigrants from deportation and allow them to work legally; eased rules that made it difficult for H-1B visa holders to switch jobs while waiting for a green card to become available and that prevented their spouses from working unless they also had a temporary foreign worker visa; extended the time that international students can work in the country after graduating from a US college or university with a STEM (science, technology, engineering, and math) degree before they must transition to a temporary foreign worker or permanent visa; and proposed the Immigrant Entrepreneur Rule, which would grant parolee status to qualifying immigrant entrepreneurs.

The fundamental problem with these programs and proposals is that they are executive actions — they are discretionary, piecemeal changes that can be readily reversed by future administrations. Indeed, the Trump administration quickly began the process of reversing some Obama-era immigration policies, again via executive order. Neither administration's executive orders are the major overhaul of immigration policy that the United States desperately needs. The big, bold actions that the country needs to fix its dysfunctional policy cannot — and should not — be accomplished via administrative fiat but instead via legislation duly deliberated and passed by Congress and signed into law by the president.

The outcome of the 2016 presidential race indicated that many Americans want a new, tougher immigration system. Globally, migration flows are rising, particularly of humanitarian migrants, and climate change seems likely to further exacerbate migration pressures. Policymakers who want to maintain the pre-2017 status quo or have even more generous policies, such as a large-scale legalization program, need to convince the American public of the desirability of such policies. Policies that aim to boost the economic benefits of immigration while also demonstrating the government's ability to manage migration would help build public support for immigration.

Inconsistency is one of many serious limitations of current US immigration policy. Other major concerns from an economic perspective include the inefficient random allocation of H-1B visas via a lottery in years when those visas are oversubscribed; limited fiscal cost-sharing between the federal government, states, and localities, and the concentration of adverse fiscal consequences in states and localities with large numbers of low-skilled immigrants; the rigid nature of immigration quotas by category and country of origin; and policies that tie temporary foreign workers to an employer and make those workers

vulnerable to exploitation. Such policies reduce the economic gains from immigration. The humanitarian costs of current refugee policies are even greater still. It is time for a more cohesive, coherent immigration system, not just on economic grounds but on humanitarian ones as well.

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# Segmentation and the Role of Labor Standards Enforcement in Immigration Reform

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## Executive Summary

Despite the fact that many low-wage, violation-ridden industries are disproportionately occupied by immigrants, labor standards and immigration reform have largely been treated as separate pieces of an otherwise interrelated puzzle. Not only is this view misguided, but this paper argues that strengthening labor standards enforcement would ensure that standards are upheld for all workers, immigrant and others. In addition, labor standards enforcement is instrumental to the erosion of sub-standard conditions in certain sectors, often referred to as the “secondary” labor market, that are associated with advanced market economies. Ensuring labor standards are upheld diminishes the incentive for employers to undercut wages by exploiting vulnerable workers, many of whom are immigrants. As this paper argues, strengthening enforcement must include not only “vertical” mechanisms, including strategic enforcement and penalizing and criminalizing egregious and repeated labor violators, but also “lateral” mechanisms, such as co-enforcement by workers and through worker and community organizations. The article illustrates the role of co-enforcement in labor standards through two case studies.

## Introduction

This article argues that domestic labor standards enforcement must be integrated into immigration reform proposals as immigrants are often employed in industries with high violation rates. Without the inclusion of strong labor standards enforcement as a central element of comprehensive immigration reform, it will be impossible to satisfy labor shortages in ways that do not advantage unscrupulous employers and depress wages and working conditions for US workers.

Questions about how labor markets are constituted and composed are inherently tied to theories of immigration and real world immigration policy choices. Nevertheless, debate over immigration has largely focused on issues such as border enforcement, and far less attention is devoted to the domestic nature of labor market standards and the extent to

which the state is capable of conditioning, regulating, and effectively governing the labor market. Labor standards enforcement is necessary in order to undercut firms' incentives to exploit vulnerable immigrant workers and ensure a level playing field and equitable wages and working conditions for all, including immigrant, native, and naturalized workers.

We begin by considering the deterioration of workplace standards in the United States and the lack of effective labor standards enforcement. Next, we discuss explanations for the deterioration and theories of the labor market with particular attention to segmentation theory in order to call into question the inevitability of a "secondary," unstable sector in which low-wage workers, many of whom are immigrants, are employed. The key thrust here is that the quality of workplace conditions and labor standards enforcement are inherently intertwined and that preventing the exploitation of vulnerable low-wage immigrant workers requires integrating into immigration reform proposals significantly strengthened labor standards enforcement. This should include: increased penalties for violations and connecting them to registration and licensing schemes (Yoon 2015); strategic enforcement that targets sectors with the highest underlying violation rates (Weil 2010); and enhanced institutional capacity such as increased resources and more investigators as well as co-enforcement of labor standards through partnerships between state and civil society (Fine 2015; Amengual and Fine 2016; Fine 2017) and strong protections of the right to organize. Two case studies are used to illustrate the role of co-enforcement in enforcing labor standards and ensuring the rights of immigrant workers are upheld.

## Immigration and Labor Conditions

A groundbreaking study of low-wage occupations in three metropolitan cities found that almost 26 percent of workers failed to receive the legally required minimum wage, 70 percent did not receive legally required documentation of earnings, and of those eligible for overtime, a whopping 75 percent did not receive the pay they were entitled to (Bernhardt, Spiller, and Theodore 2013, 817-18). Many of the industries most prone to violations such as wage theft and unpaid overtime are also industries that are most heavily populated by immigrant workers (Bobo 2009; Waldinger 1996; Capps et al. 2007). Indeed, as of eight years ago, over half of all workers born in Mexico and Central America were employed in seven notoriously low-wage, high-violation industries: construction, restaurants, retail, landscaping, agriculture, food manufacturing, and building services (CBO 2010, 15).

In some regions, the US Department of Labor (DOL) has found that compliance with the Fair Labor Standards Act (FLSA) fell below 50 percent in industries such as nursing homes, poultry processing, daycare, and restaurants. A 2013 study found that 41 percent of Latino immigrants working in the agriculture, construction, hospitality, and poultry processing industries in Nashville, Charlotte, New Orleans, southern Georgia and several towns and cities in northern Alabama had experienced wage theft (Bauer 2009). Most recently, a 2014 study found that between 3.5 and 6.5 percent of all wage and salary workers in California and New York were paid less than the minimum wage and estimated that 300,000 workers *a month*, in *every state*, suffered minimum-wage violations (ERG 2014).

As an example, in Los Angeles, many Filipino immigrant workers are isolated in small care-home facilities where they also reside. It is a shockingly underregulated industry.

## Segmentation and the Role of Labor Standards Enforcement

Workers are responsible for washing, dressing, medicating, and feeding multiple patients throughout the day. They are seldom able to get more than a few hours of uninterrupted sleep and are rarely compensated for all the hours they work. Recruiters and placement agencies are often part of an oppressive system that puts workers in facilities that pay below minimum wage and illegally deduct housing and food expenses.

At Dick Lee Pastry, in San Francisco's Chinatown, organizers and investigators working together found that for nearly four years, seven Dick Lee employees had not been paid minimum wage, overtime, or double time compensation as required by law, and that the company had falsified payroll records. Workers had been working six days per week on shifts of 11 to 14 hours, receiving "semimonthly" wages of approximately \$550, averaging between \$3.02 and \$3.91 per hour. Dick Lee owners sought to obstruct the investigation and retaliated against workers who spoke up by reducing their hours and firing one of them.

Health and safety violations, including fatalities, are also at unacceptable levels. In 2013, an average of 88 workers died on the job every single week — more than 12 workers a day (AFL-CIO 2015). Foreign-born Latinos are especially vulnerable, averaging 15 deaths a week. Many workplace injuries are preventable: in 2014 more than 6,000 Occupational Safety and Health Administration (OSHA) citations were issued to businesses failing to provide fall protections, over 5,000 for not communicating dangerous workplace hazards, 4,000 for not having proper scaffolding, and over 3,000 for not providing adequate respiratory protection (OSHA 2015).

As an example, car wash workers in Los Angeles and New York City, are frequently found to be working without protective gear, routinely exposed to dangerous chemicals and getting feet crushed or fingers caught in machinery. One in 13 workers in Texas is employed in the construction industry and the state has the fastest growing housing market in the United States, accounting for more new housing construction permits in the past few years, than New York, New Jersey, Pennsylvania, and Illinois combined. But it is also the only state in the union that does not require building contractors to provide workers' compensation and has the highest construction fatality rate in the country, along with very high rates of injury and wage theft. According to a 2013 University of Texas study, 52 percent of workers surveyed earned poverty-level wages and 22 percent had suffered wage theft. Undocumented construction workers were 2.5 times more likely to experience wage theft and twice as likely to be injured on the job (Workers Defense Project 2013).

There is little doubt that workers in low-wage industries benefit substantially from unionization. An empirical analysis of 15 low-wage occupations found that unionized workers in low-wage industries earn more than 16 percent more than their non-union counterparts and are significantly more likely to receive additional benefits (Schmitt et al. 2008). Unions have historically played a central role in setting and defending labor standards but private sector union coverage is at 7.3 percent (BLS 2017). Moreover, the ability of low-wage workers to unionize depends heavily on the protection of their rights as laborers and the enforcement of labor standards. While there are substantial benefits for unionizing, violations such as employer retaliation or intimidation of workers attempting to exercise their rights to organize are widespread (Bernhardt et al. 2009, 24-25). In addition, immigrants are especially hesitant to voice concerns and exercise their labor rights out of fear of retaliation (Gordon 2005; Smith, Avendano, and Ortega 2009; Gleeson 2010).

Immigrants are entering a domestic labor market that has undergone considerable deterioration over the past few decades. The erosion of labor markets and widespread violations, de-unionization, and decentralized firm management practices have upended traditional labor markets in myriad ways (Luce et al. 2014; Stone 2013; Weil 2014). An influx of immigrants is often commonly seen as undermining labor conditions, yet as Milkman (2008) documents, de-unionization and the erosion of labor markets in the three industries she investigates — trucking, construction, and building services — *preceded* the arrival of immigrants. In those industries, the shift to non-union subcontracting is what led native workers to leave those jobs. The industries then shifted to immigrant labor, but labor standards in the industries had diminished. As Milkman (2008) notes, immigrants tried to unionize by the late 1970s and 1980s, but by that time, de-unionization had penetrated so deeply that workers had little leverage against employers.

This deterioration of labor markets and working conditions, however, cannot be understood as an inevitable product of market forces. Much of the change has been shaped by a combination of firm management practices, outdated employment laws and the lack of effective labor standards enforcement. Labor markets are subject to social, political, and institutional processes that inevitably include the labor laws regulating the market itself, employer discrimination, the actions of the state, and the mediating effects of unions and worker organizations (Peck 1996, 11-13).

The well-known gap between laws and regulations on the books intended to insure against exploitation and the implementation and enforcement of these laws, however, is a pervasive problem for vulnerable workers. As Zatz (2008) demonstrates in delineating the role of law in shaping working conditions, labor protections are inherently legal and institutional structures, yet often circumvented through misclassification of employees as independent contractors and through the use of subcontracting. This problem is exacerbated for immigrant workers who may be particularly reluctant to raise concerns with employers (Gordon 2005; Fine 2006; Smith, Avendano, and Ortega 2009; Gleeson 2010).

A 2011 memorandum of understanding (MOU) between the DOL and the US Department of Homeland Security (DHS) specifically addressed the importance of keeping immigration enforcement separate from labor standards enforcement (DOL/DHS 2011). This agreement recognized the vital role of labor standards enforcement in its own right and both agencies agreed to keep labor enforcement activities and investigations separate from immigration enforcement. This is particularly important to ensure that immigrant workers can voice concerns and complaints about working conditions and exercise their labor rights without fear of reprisal. The MOU explicitly states, “Effective enforcement of labor law is essential to ensure proper wages and working conditions for all covered workers regardless of immigration status” (ibid., 1).

Some argue that this unstable and insecure realm of the labor market is an inevitable feature of modern, advanced economies. Due to demand for services and the nature of labor markets, low-wage jobs are a natural feature of an economy that has a built-in demand for low-wage migrant labor. Obscured, in this view, is the integrative capacity of the state as a force to intervene, shape, and structure domestic labor markets and the latent resources of societal stakeholders such as worker and community organizations in ensuring labor standards are upheld.

## **Segmentation and Labor: Probing the Inevitability of the Secondary Sector**

Prominent labor market theorists argued that modern industrial economies possess an inherent demand for immigrant labor as a consequence of the “segmented” nature of the labor market (Piore 1979). Piore argued that migration stems not from conditions in immigrants’ countries of origin such as low wages, but rather from an insatiable demand for low-wage labor in advanced economies. As detailed below, the need stems from three principal sources: structural inflation, social constraints resulting from the motivational bases of a hierarchical labor market, and the inherent duality of capital as a fixed factor and labor as a mobile and variable factor of production (*ibid.*, 31-43).

Structural inflation begins with the premise that jobs are not merely economic functions, as conventional economic theory assumes, but are imbued with social functions as well. Employees do not just do their jobs for the incomes they derive from them. The jobs employees do and the wages they earn are also indicators of social status. A variety of informal social expectations and formal institutional mechanisms ensure that wages correspond to the status and prestige attached to specific jobs. Raising wages for those performing unskilled jobs at the bottom of this hierarchy would disrupt the wage-status equivalency that workers above the bottom expect, leading to pressure to increase their wages as well. An illustrative example offered by Piore is that, under these constraints, the likelihood is very low that the owner of a restaurant would raise the wages of a dishwasher without raising those of the waiters or cooks. Instead of raising the wage of the dishwasher, the owner recruits low-wage migrant labor to perform the job with little structural disruption.

Since people are assumed to work for both economic and social reasons — income and status — the absence of the latter at the lowest levels of the job hierarchy presents a motivational problem for employers seeking to fill the lowest positions. Since there is naturally a bottom to any hierarchy, employers need to fill these jobs with employees who conceive of employment solely as a means to earn income and are unconcerned with the social implications for prestige or status. Motivational problems do not arise at the bottom of the employment hierarchy among temporary migrant workers, because they “are a group of people divorced from a social setting, operating outside the constraints and inhibitions that it imposes, working totally and exclusively, for money” (*ibid.*, 55). Social status in the home country is what counts, and workers and their families measure this by how much money they are able to send home.

The inherent duality of capital and labor constitutes the third source of demand for migrant labor (Berger and Piore 1980). Put simply, capital is a fixed factor of production and must be expended on permanent and stable areas of production such as high-skilled workers and machinery. Labor is variable and can be used by firms as a buffer to ensure sustained profitability by shifting the burdens of economic cycles to low-skilled workers to suffer the losses rather than the firm absorbing the costs. Variable labor is added on the basis of seasonal fluctuations in demand and the result is a dual labor market that creates distinctions between seasonal, expendable workers, and stable, high-skilled laborers. This dualism, and the distinctions it confers, produces a bifurcation of the labor force itself.

Segmentation theory, as applied to migration, explicitly considers both the economic and social dimensions of labor and how the interplay between the two spurs demand for migrant labor. The application of segmentation theory to migration emerged in response to conventional economic theories of migration that posited that the wage differential between a worker's home country and that which can be obtained in the destination country is the driving force of migration. Although there are a number of empirically tenuous assumptions that undergird this theory (Portes and Rumbaut 2006), the implication is that migration will flow uncontrollably, fluctuating in accordance with episodic economic expansions and contractions characteristic of capitalist economies.

Whether the flow of migration is amenable to state attempts to restrict or increase levels is heavily debated. Marshall (2007) argues that the state is capable of regulating the flow of immigration and should do so by setting admission numbers based upon a determination of a long-term labor shortage in an industry. Others argue that the migration flow is largely driven by market forces beyond the reach of the state and attempts to curtail it are futile (Massey 1988). Massey, Durand, and Malone (2002) also highlight the role of social capital and the process of "cumulative causation" that takes over once immigrants establish ties and networks in a country.

The state's capacity to control immigration is fundamentally distinct from controlling labor standards in at least two respects. First, as we outline below, in domestic labor markets, government authority can be complemented by worker-based labor market institutions that provide lateral enforcement. In domestic labor standards enforcement, unions, worker centers, community organizations, and high road firms supply enforcement capacity to government while in the realm of border enforcement, government acts alone. Second, if assured of protection from retaliation, immigrant workers have an incentive to come forward about labor market violations and exploitation, whereas in immigration enforcement, there is no incentive for immigrants to call attention to their circumstances.

According to segmentation theory, firms in host countries are the stimulus for migration, to which the labor market, workers and migrants alike, adapt. Missing from this approach, however, is the constitutive capacity of the state as an actor capable of conditioning and governing domestic labor market conditions. To the extent that firms have an incentive to recruit and exploit low-wage labor, often immigrants, the state is also capable of altering that incentive through setting wage and hour floors and health and safety standards, and actively ensuring these standards are enforced across all classes of workers.

The segmented nature of the labor market is borne out in two sectors of work — primary and secondary. The primary sector is characterized by stable, well-paying jobs with potential for advancement, while work in the secondary sector is inherently unstable, low paying, and often performed under poor conditions. Sociological work has explored the contours of this secondary labor market and how immigrants have navigated the secondary labor market and dealt with the often explicit segmentation at the hands of firms (Waldinger and Lichter 2003; Waldinger 2015). However, exploitation in the labor market is not inherently tied to the presence or absence of immigrants as has been commonly assumed. Reducing the number of immigrants in the labor market will not automatically diminish the exploitation of African Americans, women, and others who have been subject to persistently unequal treatment by employers.

Viable labor standards enforcement is instrumental to eroding in essence and in practice the notion that secondary sectors of the labor market are somehow inevitable features of modern industrial societies. Society can choose to value certain forms of labor more highly and place a premium on well-compensated employees to produce certain goods and services (Attewell 1990; Lafer 2004). Businesses can choose to pay workers performing vital functions such as health services higher wages and enshrine fair scheduling practices. And, most importantly, the state can condition labor markets by strengthening the policies and strategies it uses to set and enforce labor standards.

Evidence from comparable industrial societies further militates against the notion that low-wage, unstable work is inherent in modern economies (Alderman and Greenhouse 2014). In a comprehensive empirical analysis of low-wage work in the United States and Europe, Gautié and Schmitt (2010) find vast differences in labor market conditions across countries. For instance, Mason and Saavedra (2010, 39) find that in the United States, 25 percent of workers are engaged in low-wage work (defined as earning two-thirds of the national median wage), whereas in France the percentage is 11.1 percent, and in Denmark is even lower at 8.5 percent. Furthermore, greater numbers of immigrants do not result in larger proportions of low-wage workers. The authors note, “[T]he impact of immigration and migrant work is ‘filtered’ through national institutions. Strongly inclusive industrial relations systems appear able to absorb current levels of immigration and migrant work without significant increases in the national share of low-wage work” (Mason and Saavedra 2010, 10). The inclusive industrial relations regime refers to “formal — and sometimes informal — mechanisms to extend the wages, benefits, and working conditions negotiated by workers” in industries and sectors with greater leverage to those with less bargaining power (Appelbaum et al. 2010, 7).

The combination of formal and informal mechanisms in ensuring labor standards enforcement for immigrants entering the labor market is a key, but often overlooked, provision to be integrated into immigration reform. If the state, along with lateral enforcement with worker organizations and unions, effectively enforces labor standards, it erodes the incentives for firms to exploit vulnerable workers. In doing so, firms that depend on exploitation to keep wages low begin to face constraints. The pressure to uphold labor standards forestalls the depression of the wages of all workers as it erodes both the incentive, and the ability, to hold wages down through exploitative practices. In a well-functioning immigration system, migrant workers should not be used as a strategy for employers to evade basic labor and employment laws. Labor standards are increasingly diminished and this is especially true for low-wage industries that disproportionately employ immigrants from Latin America. Calls for greater numbers of labor inspectors have been important in drawing attention to the diminished capacity of the state in redressing deteriorating working conditions (ILO 2006). Exploitation of vulnerable laborers, many of whom are immigrants, must be counteracted by strong vertical strategic enforcement by the state (Weil 2010), complemented by lateral enforcement by worker centers, unions, and high road firms and business associations (Fine and Gordon 2010; Fine 2013; Fine 2015; Fine 2017; Amengual and Fine 2016). The state alone cannot ensure comprehensive labor standards enforcement as it lacks fundamental links to workers and their industries including the ongoing trust, communication, and daily presence necessary to systematically redress violation-prone industries.

As the empirical work on comparable developed economies above illustrates, the persistence of an insecure, low-wage labor market in modern economies is far from inevitable. Strong co-enforcement represents a substantial step toward undercutting the ability and incentives of firms to undercut and exploit immigrant workers. We now turn to co-enforcement and two cases studies that provide important examples of labor standards enforcement in practice.

## Labor Standards and the Corrective of Co-Enforcement

There are two dimensions of labor standards enforcement: government and society. These two dimensions are complementary, yet most proposals to improve enforcement consider only government and overlook the latent resources in society that are essential to establish a comprehensive labor standards enforcement regime.

Vertical enforcement comes in the form of the state, whether federal, state, or local. The vertical enforcement of the state entails power to set and enforce labor policies.<sup>1</sup> WHD's strategic enforcement strategy entails focusing at the top of industry structures, targeting entire business entities rather than individual workplaces, holding joint employers liable for violations, expanding the use of the "hot goods" provision of FLSA and ensuring that firms pay the full fines and penalties owed (Weil 2010). High-risk sectors include residential construction, eating and drinking establishments (especially fast food), hotels/motels, janitorial services, landscaping/horticultural services, retail trade, health care and home health care services, domestic work and agriculture (Weil 2012). Complaint-based enforcement had long been the dominant approach taken by the federal government, but by 2015, directed enforcement accounted for a remarkable 45 percent of investigations — an unprecedented percentage in WHD's history (DOL 2017). Yet, while state enforcement is essential, government does not have enough investigators to monitor all employer sites, nor is it likely to ever have an adequate number (Wial 1999; Bernhardt, McGrath, and DeFillipis 2008). Additionally, government is unlikely to have as much information about conditions on the ground as workers in the workplace, and it generally lacks the relationships with vulnerable workers that strong organizations can build.

This is why lateral enforcement mechanisms are necessary to an effective co-enforcement regime capable of sufficiently protecting workers' rights, particularly in low-wage industries. Indeed, effective deterrence in low-wage sectors necessitates co-enforcement: *worker*, *worker organization*, and *high road firm* participation in enforcement and *greater transparency* between government, workers and worker organizations. Without the tacit knowledge that workers have about workplace practices and problems and the relationships of trust they have with worker organizations, government will lack the information and trust required for vulnerable workers to come forward. Visually, this is akin to trying to squeeze the air out of a half-filled balloon. Pressing down from above, the air is displaced.

1 There are numerous important state policies besides strategic enforcement that can enhance labor standards enforcement including: joint employer liability; permitting investigations with or without complaints; strong remedies such as treble damages and attorneys' fees; tying enforcement to licensing; agencies filing liens, garnishing wages, revoking licenses for unpaid final orders, city contract debarment, no bidding on new contracts until a final order paid in full; settlement agreements and compliance monitoring; increased resources for more robust enforcement; third party complaints; private right of actions; reinstatement and high penalties.

Therefore, in order to contain the displacement, lateral mechanisms that surround the sides and abet the vertical force are necessary to ensure comprehensive coverage.

Co-enforcement of labor standards thus involves a joint effort, drawing in those closest to the action, with the most information and the greatest incentives to ensure compliance, asking them to partner with government to augment its capacity, and making them accountable to government in the enforcement of existing labor standards and health and safety laws (Amengual and Fine 2016; Anuradha and Moore 2004; Ayres and Braithwaite 1991; Ayres and Braithwaite 1992; Bovaird 2007; Cohen and Rogers 1992; Ostrom 1996; Thomas 2012; Moffitt 2012). Unlike situations where government contracts with a third party to take over a service that had previously been delivered by a government agency, co-enforcement complements, rather than replaces, government enforcement.

The following case studies of Seattle and California illustrate the ways that vertical state enforcement is complemented by lateral enforcement mechanisms embedded in civil society to hold the floor on labor standards. Both cases provide compelling evidence of the potential for future labor standards enforcement and the role it can play in immigration reform more generally.

### *Seattle and the Office of Labor Standards*

Seattle is the largest city in King County, which has a foreign-born population of approximately 441,000 — a 64 percent increase since 2000. The foreign-born population has grown more than five times faster than the native-born population, with Asians making up the largest group of foreign-born residents. A Pew Research Center report found the Seattle metropolitan area, which includes Tacoma and Bellevue, to be among the 20 areas with the highest populations of undocumented/unauthorized immigrants in the nation (Pew Research Center September 2016). Organizations that work with immigrants in Seattle spend a significant portion of their time and resources helping workers, especially those employed in restaurants, construction, landscaping, and the janitorial sector, with wage theft cases.

The city of Seattle became the first major city to adopt a \$15 per hour minimum wage in June of 2014 (Rolf 2016; Rosenblum 2017). Winning this wage was the most significant achievement of a dynamic coalition of labor, community and immigrant rights organizations, and progressives in city government. The Seattle Office of Labor Standards (OLS) was established three months later. OLS was only the second local labor standards enforcement agency in the country (San Francisco is the first) and included a substantial commitment to lateral enforcement from the beginning, building contracts with community organizations into its core budget and applying racial equity frameworks to its policies and procedures.

OLS enforces six municipal ordinances: Paid Sick and Safe Time, Fair Chance Employment, Minimum Wage, Wage Theft, Secure Scheduling, and the Hotel Employees Health and Safety Initiative. The city's vertical enforcement powers are robust. All six ordinances imbue the city with subpoena and criminal enforcement power, the ability to garnish wages, and the right to refuse to issue, revoke, or refuse to renew business licenses from employers found guilty of a violation (Karina Bull, pers. comm.). The minimum wage law contains

strong penalties for repeat violations as well as for retaliation, with explicit language about threatening to report the suspected citizenship or immigration status of an employee or a family member because the employee has exercised her rights under the ordinance.

The Labor Standards Community Outreach and Education Fund was set up to ensure outreach to demographic populations most likely to occupy low-wage jobs and experience workplace violations including female workers, workers of color, immigrant and refugee workers, lesbian, gay, bisexual, transgender, and queer (LGBTQ) workers, workers with disabilities, and youth workers. It also identified targeted industries with low-wage workers and high rates of violations including (but not limited to) construction, food services and drinking places, health care, home health care, hotel and motel, manufacturing, transportation and warehousing, personal and repair services, retail trade, security, building and grounds services, social assistance, education, and childcare.

The fund seeks to build trust with low-income worker communities so that workers are able to access labor standards enforcement and complaint resolution services throughout the city. As Jenn Round, one of the first OLS investigators put it, “It is obvious to everyone that most people, especially vulnerable workers, don’t want to talk to government. We are calling workers and a lot of times, no one calls us back. It can be really hard to get information. We understand that we are not going to be the trusted messenger for low-wage workers, and we need the trusted messenger. We will access more if we work with organizations” (Jenn Round, pers. comm.). OLS explicitly states that it is establishing collaborative relationships with community-based organizations in order to:

- Increase workers’ knowledge and understanding of the rights provided by Seattle’s labor standards through methods that are community centered, culturally relevant and accessible, and language specific;
- Expand workers’ access to resources to enforce, or otherwise resolve, labor standards violations;
- Build capacity among community organizations and service providers to provide labor standards services and information to a diverse range of workers, including low-wage earners, people of color, and immigrants and refugees;
- Foster increased collaboration between the Office of Labor Standards and community organizations serving Seattle’s workers, including through strategic enforcement strategies.

The fund’s largest contract is with the Fair Work Center, a nonprofit organization that was established to be a community base for workers because, in the words of its founding director, Nicole Vallestra Keenan, “We were passing and winning some of the most cutting edge laws, but workers were not seeing the benefits of that work . . . Employers were saying ‘maybe I will listen, and maybe I won’t’” (Nicole Vallestra Keenan, pers. comm.). The Fair Work Center provides Know Your Rights and Train the Trainer workshops on employment rights, including health and safety standards, wage and hour laws, and other labor standards. The Fair Work Center collaborates with a set of community-based organizations including the Latino Community Fund, Al Noor Islamic Community Center, Somali Community Services, Vietnamese Friendship Association, LGBTQ Allyship,

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Puget Sound Sage, and the Northwest Immigrant Rights Project. These organizations are contracted to translate and provide labor standards information to workers in culturally appropriate, language-specific, and otherwise accessible formats and languages. They also provide labor standards training, labor standards counseling, referral, and/or complaint resolution services to worker communities, and assist OLS with identifying and training workers to support investigations and enforcement. The Fair Work Collaborative estimates that its outreach has already touched more than 9,000 workers (Fair Worker Cent 2016).

The Fair Work Center's case briefs highlight some important issues. In one situation, a Korean immigrant who worked as an assistant to a hairdresser was working 45 hours per week but being paid about \$1,000 a month, less than \$5.50 per hour. She was misclassified by her employer as an independent contractor. The center also worked with a Mexican immigrant worker, employed as a painter at a large construction firm, who was also misclassified by his employer as an independent contractor and did not receive overtime pay. In a final example, a newly arrived refugee from Somalia was offered a job as a security guard, but the offer was rescinded after a routine background check falsely reported that he had criminal convictions from another state.

Casa Latina, the flagship worker center in Seattle, has long been targeting wage theft violations. It received a \$250,000 contract from OLS which has made it possible for the organization to hire an outreach coordinator, expand its organizing efforts to a new area of the city, and investigate roughly quadruple the number of wage theft cases it took on in 2015.

Since its founding, OLS has received 4,599 inquiries from employers, 1,388 inquiries from employees, conducted 280 investigations and recovered monetary remedies for 272 individuals (Seattle OLS 2016). OLS has received a high number of complaints and prioritizes by the number of workers affected, egregiousness of the violations, income level of employees, size and capacity of the business, alleged harm, industries with high levels of underlying violations, and whether retaliation is occurring (Kailin Tajjias pers. comm.; Dylan Orr, pers. comm.). It settles about half of its cases and closes between 8 to 10 cases per month (Tajjias pers. comm.). Some cases involve specific settlement agreements. For example, in a 2016 case involving non-McDonald's owned restaurant franchises, a manager was routinely penalizing workers who used the paid sick days they were entitled to by reducing their schedules for two weeks. The OLS settlement required the employer to provide every worker two days of Paid Sick and Safe Time and to provide a declaration that employees could use these days without repercussions (Jenn Round, pers. comm.). OLS also engages in compliance monitoring of every settlement agreement reached with an employer.

The OLS budget was dramatically increased from \$1.9 million in 2016 to \$5.3 million in 2017. During this same period, funding for community organizations was raised from \$1 million to \$1.5 million and contracts for business outreach were added. In March of 2017, the city council voted down efforts to fund OLS through a new regulatory fee on business, choosing instead to establish a dedicated account within its general fund that uses existing revenue from the city's business and occupation tax to fund the agency.

The integrated co-enforcement approach in Seattle throws into relief the interconnected nature of the state and civil society organizations and workers in labor standards enforcement. The complementary impact of vertical and lateral enforcement has slowly begun to chisel away at secondary labor markets and calls into question their inevitability.

### *Redefining Labor Standards Enforcement in California*

California has the highest number of immigrants in the United States and is confronting major wage theft and safety and health issues. In 2015, 27 percent of the population was foreign-born and half of the state's children had at least one immigrant parent. Most of California's immigrants are from Latin America (52%) or Asia (39%). Eight of every 10 immigrants (80%) in California are working-age adults (age 18 to 64), which means that more than a third (34%) of working-age adults in the state are immigrants (Public Policy Institute of California 2017). In California, noncitizens are estimated to be approximately 1.6 times more likely to suffer from a minimum wage violation. The 2014 study commissioned by the DOL referenced above, estimated there were 372,000 weekly minimum wage violations in California, representing approximately 3.8 percent of covered, nonexempt jobs. These violations were associated with \$22.5 million in weekly lost income (49.3 percent of the earned income of those experiencing the violations). Lost weekly income totaled almost \$28.7 million, which was 70.9 percent of the earned income of those experiencing violations (ERG 2014).

Over the past six years, the broadest implementation of co-enforcement has been taking place in California, following Governor Jerry Brown's appointment as labor commissioner of Julie Su, the former leader of the Asian American Legal Defense Fund. While under the previous administration, the Division of Labor Standards Enforcement (DLSE) and the Bureau of Field Enforcement (BOFE) had a policy not to collaborate with community organizations, Su saw these organizations as central to establishing a strong logic of deterrence. She met with the advocates early in her tenure, arranged for organizers in key sectors to make presentations to agency staff and created access to the field investigators whose main job was to enforce the law.

Su implemented major changes in vertical and lateral enforcement. In terms of vertical enforcement, her staff rewrote every intake form and removed any question that was indicative of immigration status. In addition, they removed questions such as, "how much overtime are you owed?" that assumed a level of legal knowledge that many low-wage and immigrant workers did not have. Su strongly believed calculating back wages was the responsibility of the state, not the workers. Similarly, the form on employer retaliation activity asked, "What was your protected activity?" Su argued that this was a legal term and that the agency needed to ask appropriate questions that did not assume knowledge that workers may not have possessed (Julie Su, pers. comm.).

While the labor commissioner has implemented sweeping internal changes in the way intakes are conducted, as well as investigations and hearings, Su believes that "the consistent turnaround in the agency's efficacy would not have been possible without the collaboration between the agency and community-based organization partners" (Su 2016).

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Su reports that working with community-based organizations is one of the more effective approaches to detecting violations: “They already have the trust of the workers, speak the language of workers, understand how violations occur and are often masked, and [they] are willing to collaborate with us by giving us leads and helping to bridge the trust gap between workers and law enforcement” (Su 2015). Su credits co-enforcement with community organizations with making strategic enforcement possible. Investigators used to conduct randomized sweeps, identifying their targets through the yellow pages and internet searches. They now work with community organizations that, because of their relationships with vulnerable workers in at-risk sectors, know where the violations are occurring and how they are masked.

As an example of targeting a highly noncompliant industry in partnership with civil society, Su entered into a partnership with the Warehouse Workers Resource Center in the Inland Empire, where hundreds of thousands of immigrant warehouse workers are employed, many as temporary workers and independent contractors. Resource center leaders briefed her staff on employment relations in the sector, which relied heavily on sourcing from unscrupulous temporary agencies that had high incidences of wage theft and subcontractors with high rates of safety violations. Based on what they learned about staffing practices and hours, agency investigators created a new operations plan to investigate targeted warehouses that were sourcing from the agencies, arriving at the workplace by 5:45 a.m. to speak with workers and assisting them in filing wage and hour claims, as well as meeting workers off-site, at local churches.

In October 2011, working together, the labor commissioner investigated the largest Walmart warehouse in the region, run by Schneider Logistics, and levied charges against two staffing agencies for more than \$1 million in violations. That same year, workers filed a lawsuit in federal court against three Walmart contractors and subcontractors, alleging millions of dollars in stolen wages over the previous 10 years. A federal judge issued several orders and injunctions in favor of the workers, including a temporary restraining order against a mass firing of workers who had filed the lawsuit. Finally in 2014, the Walmart contractor Schneider agreed to pay \$21 million in back pay to warehouse workers who had been systematically shorted on pay for years (Warehouse Workers United 2017).

In August of 2015, after an investigation uncovered wage theft violations affecting 12 workers, many of them recent immigrants from El Salvador, Su issued citations of \$459,573 to a janitorial employer. The investigation and a two-year pay audit from June 2012 to June 2014 revealed that managers threatened to fire workers who complained about working up to seven days in a row every week, for up to 9 hours a day, without breaks of any kind. Some of the janitors had initially contacted the Maintenance Cooperation Trust Fund (MCTF), a janitorial watchdog organization, about the workplace abuses and MCTF helped them file a complaint with the Labor Commissioner’s Office. “Janitors’ work is often hidden from public view, which can lead to abuse by unscrupulous employers. I applaud MCTF for assisting these workers in exercising their labor rights,” said Su. “MCTF’s partnership with my office has helped us tremendously in our effort to level the playing field for honest janitorial businesses and protect the wage floor in California” (Su 2016). The sanctions against Norcal Floor Services include \$456,073 in assessments for unpaid minimum wages and overtime, liquidated damages, and rest and meal period

premiums. Additionally, the labor commissioner assessed \$3,500 in penalties for violating overtime, minimum wage, rest and meal period requirements, and for failing to provide itemized wage statements. The janitors' payments ranged from \$560 to \$81,915, based on the amount of time worked during the audit period.

Su credits the agency's partnerships with labor and community organizations for helping it to achieve the highest amount on record of minimum wages and overtime wages assessed, as well as the highest amount of civil penalties for minimum wage and overtime violations assessed in a decade. In addition, she acknowledges the importance of partnerships that provide lateral enforcement to complement the agency's more efficient and targeted use of inspections, which resulted in the highest rate of civil penalty citations in 10 years (California Department of Industrial Relations, Labor, and Workforce Development 2013).

Convinced of the substantial benefits of co-enforcement for ensuring labor standards for workers, in early 2017, working with the National Employment Law Project, Su approached the Irvine Foundation to support an unprecedented level of formalized co-enforcement. She pitched them to support proactive industry-based strategies, in particular, geographic areas in partnership with community groups that would focus on high-violation industries: restaurant, carwash, agricultural, janitorial, and residential care homes. The goal of the project is "to build sustainable strategic enforcement system in California . . . By institutionalizing the public-private partnerships so they are embedded in the labor commissioner's policy and practices, as well as those of the funded organizations" (California Strategic Labor Partnership Proposal to the Irvine Foundation, unpublished data).

Su's co-enforcement efforts in California involving both vertical and lateral enforcement have yielded real gains for workers in the low-wage, high-violation industries in which many immigrants work. By explicitly reforming vertical enforcement authority and strategy while actively drawing on lateral enforcement mechanisms closer to workers and conditions on the ground in these industries, the California labor commissioner provides a strong and compelling illustration of co-enforcement to be emulated elsewhere.

## Conclusion

Political debate over immigration is likely to persist into the foreseeable future. While the nature of the discourse and the proposals on offer will inevitably shift depending on partisanship, world events, social movements and so on, redressing the conditions of the labor market that immigrants enter into must be central. Effective labor standards enforcement is, for the reasons we have outlined in this article, a crucial area of immigration reform that cannot be neglected in future proposals.

In the last few years, two pieces of federal legislation — the Wage Theft Prevention and Wage Recovery Act<sup>2</sup> and the Protect Our Workers from Exploitation and Retaliation Act<sup>3</sup> — that have been proposed in the US Congress have the aim to strengthen labor standards and take important steps toward consolidating the kind of effective enforcement outlined in this article. The two bills, either as standalone bills or as viable frameworks on which

2 Wage Theft Prevention and Wage Recovery Act, H.R.4763, 114th Cong. (2016).

3 Protect Our Workers from Exploitation and Retaliation Act, H.R.2169, 112th Cong. (2011).

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to build in future proposals, also serve as important indicators of the extent to which labor standards enforcement is beginning to penetrate political debate.

In 2016, Senator Patty Murray (D-WA) introduced the Wage Theft Prevention and Wage Recovery Act. This bill would yield substantial improvements by adjusting and strengthening provisions in the FLSA. Specifically, the bill would amend the FLSA and the Portal to Portal Act, to double the amount of unpaid wages or unpaid overtime compensation workers could receive if employers violated minimum wage or maximum hour rules; increase to treble damages the penalty for retaliatory discrimination or discharge of a whistle-blowing employee; repeal the requirement that an employee consent in writing to become a party plaintiff in an action to recover damages from an employer; require employers to make certain disclosures to employees regarding their work, including a pay stub corresponding to work the employee performed during the applicable pay period and make final payments to a terminating employee for uncompensated hours the employees have worked; and direct the DOL to refer any case involving a covered offender to the Department of Justice for prosecution. It also establishes a new fund, through the Wage and Hour Division, to award grants to assist “eligible entities” (i.e. worker organizations, center, and unions) in enhancing the enforcement of wage and hour laws.

In addition to strengthening the enforcement of wage laws, ensuring immigrant workers can report labor law violations without fear of reprisal is another key provision to consider in immigration reform. To this end, Representative Judy Chu (D-CA) introduced the Protect Our Workers from Exploitation and Retaliation Act (POWER Act) in 2011. The bill, in important ways, builds upon the memorandum of agreement between DHS and DOL discussed above by ensuring immigrants are able to report labor law violations and assist with investigations into labor violations at the workplace. The POWER act would enable immigrants to come forward to report abuse, exploitation, labor law violations, and serve as witnesses to workplace investigations, without fear of deportation under the Immigration and Nationality Act. The bill would corroborate and solidify the agreement issued in the DOL/DHS MOU which states that, “Effective enforcement of labor law is essential to ensure proper wages and working conditions for all covered workers regardless of immigration status” (DOL/DHS 2011, 1).

In addition to these proposals, temporary worker programs often have been discussed as a viable approach to immigration reform. A common practice of employers has been to use the immigration status as leverage against workers to hold down wages. Therefore, temporary programs must avoid reinforcing immigrant workers’ vulnerability by ensuring that new temporary visa proposals remove every link between work and immigration status that, historically, employers have used to depress migrant wages and control their employees. Temporary visa holders must possess rights equivalent to every other worker in the United States, and access to the same mechanisms to enforce those rights, including government agency enforcement, unionization, and private lawsuits. An essential aspect of any new temporary worker program must be strengthening these enforcement prongs to ensure that workplace rights are enforced and enforceable for *all* workers (Future Flow Working Group 2008).

Labor migration may be an unavoidable part of a globalized world, but as we have argued, secondary, unstable, low-wage sectors of the labor market to which many immigrants

are exposed are not. Downward pressure on wages must be addressed by mandating complete labor market equality between immigrant workers and other workers, and by working toward effective mechanisms to enforce basic workplace laws for all workers. Co-enforcement of labor standards that integrates strong vertical labor law enforcement with complementary lateral mechanisms including workers, unions, and organizations has yielded substantial improvements in working conditions and upheld worker rights, as seen in the cases highlighted above. Expanding the scope of immigration reform to include labor standards enforcement is fundamental to ensuring that the rights of immigrants are upheld and all workers, immigrants or otherwise, stand on equal footing not just with each other, but with their employers as well.

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# Mainstreaming Involuntary Migration in Development Policies

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## Introduction

This essay addresses the issue of how best to insert migration concerns into development planning, as a part of a process of thinking more broadly about US migration policies and interests. In particular, it explores the interplay between state fragility and involuntary migration, which is a pressing challenge for the United States and (particularly) for European states and one that cannot be addressed exclusively by refugee and migration admission policies. It argues for a greater commitment to processes that engage citizens of fragile states in addressing the indicia of state fragility and that, in turn, can create stronger states and reduce involuntary migration.

The essay defines involuntary migrants as persons who leave their home countries not just for economic advantage but because they believe their physical survival to be at serious risk, or because their most basic human rights have been effectively extinguished, or both. Long-lasting civil wars that resisted mediation have been one major cause of involuntary migration, as in the cases of Syria and Afghanistan. These civil wars have been both cause and consequence of aggressively abusive authoritarian regimes.

A much deeper cause of involuntary migration has been state fragility — states so weakened and tenuously held together that the very possibility of there being effective government within them is at risk. Degrees of fragility vary, of course, but the top 11 countries of origin of people seeking asylum in Europe in 2015 and 2016 are all manifestly countries of state fragility. They include — in addition to Syria and Afghanistan — Iraq, Kosovo, Albania, Pakistan, Eritrea, Nigeria, Iran, Ukraine, and Russia. The problem of state fragility, however, is far more widespread than this list suggests and the potential for large numbers of involuntary migrants seeking survival correspondingly greater. An important symptom of state fragility and insecurity in Africa, for example, is the continent's estimated 18.5 million displaced persons, a figure that includes internally displaced persons as well as those crossing national borders.

Clear-eyed perception of state fragility has been blurred by the term's murky association with related terms like state failure, state collapse, and state weakness. State fragility has also remained hidden in plain sight by a long-standing and pervasive tendency in academic and policy circles to assume that states are synonymous with governments rather than the overarching political frameworks within which governments function and which they are charged to sustain. Many causes of state fragility have been suggested, though how they relate to one another and their relative importance varies from case to case. In sub-Saharan Africa, the phenomenon is pervasive throughout the region and has been attributed, *inter alia*, to the flawed colonial origins of now independent states, malevolent external economic influences, consequences of Cold War

alignments, seriously errant development policies and practices, authoritarian rule, and civil wars resulting from these and other factors.

Ethiopia, by superficial appearances, is widely considered a strong “developmental state” because of its imaginative constitution that embraces ethnically organized federalism and because of a run of very strong gross domestic product growth rates. However, it has recently been proven a weak state notwithstanding its well-established authoritarian governing regime. By imposing comprehensively centralized rule, including unilaterally disregarding key provisions of the federal constitution it imposed in 1995, the Ethiopian Peoples’ Revolutionary Democratic Front (EPRDF) government has re-opened the basic question, unanswered since the fall of its last emperor in 1974, concerning on what terms, if any, the ethnic communities included in this ancient empire can agree to establish and live together in a post-imperial state. Exacerbating the situation have been 280,000 Ethiopian citizens displaced by drought, internal conflict, and forced removals occasioned by two major dam building projects, and an even larger number of involuntary migrants accepted from its collapsed neighboring state, Somalia.

The United States has recently returned its attention to the problem of state fragility with the formation of a high-level Fragility Study Group led by former Deputy Secretary of State William Burns, former Undersecretary of Defense Michele Flournoy, and Nancy Lindborg, former US Agency for International Development (USAID) assistant administrator and current president of the United States Institute of Peace. Their report issued in September, 2016 recognizes state fragility as a problem for those leading US development policy efforts. My contention, however, is that the report, *US Leadership and the Challenge of State Fragility*,<sup>1</sup> fails to address the essence of the problem, thereby effectively leaving unaddressed the problem of involuntary migration and how to confront this challenge within the framework of development policy. The report focuses on how the US government should organize to address fragility, stressing what it termed the “Four ‘S’ Framework”: concentrating *strategic* efforts where America’s interests are greatest; tackling *systemically* the inter-related security, political, and economic challenges in concert rather than in isolation; addressing these challenges *selectively* where US interests and leverage are greatest and the goals attainable; and seeking *sustained* domestic political support for these efforts, presumably both in the focal countries and within the United States itself.

The report defines state fragility as the “absence or breakdown of a social contract between people and their government [where] states suffer from deficits of institutional capacity and political legitimacy that increase the risk of instability and violent conflict and sap the state of its resilience to disruptive shocks.” With this definition, the report pinpoints at least some of the very conditions that have caused waves of involuntary migration, especially in 2015 and 2016. The report links its definition of state fragility to a central objective to be sought in overcoming it, Goal 16 of the Sustainable Development Goals, that calls for peace, justice, and accountable and inclusive institutions.

On the one hand, the report’s definition rightly identifies the heart of the problem of state fragility as the absence, loss, or breakdown of a social contract. On the other hand, it misses the mark by failing to recognize that the social contract at issue is much more than one “between people and government.” Competitive, multiparty, and democratic elections, conducted in accordance with the rule of law, are how social contracts between people and government are

1 See <http://www.usip.org/fragilityreport>.

supposed to be refreshed, renewed, and restored. State fragility, by fundamental contrast, occurs when free and fair elections cannot even be conducted because the state — the overarching political framework within which governments function — is in such disarray, rent by civil war, or set aside by over-the-top authoritarian rule that makes such elections impossible. It is these profoundly unbearable circumstances that are responsible for much involuntary mass migration. Countries with bad elections, mismanaged and corrupted by authoritarian rules are plenty bad enough, but generally insufficient in and of themselves to spur mass involuntary migration — although admittedly the tipping point when this occurs varies from country to country and in the perceptions of the victims. More likely, however, in these circumstances, individuals might still have sufficient political space to be able to decide voluntarily for political or economic reasons to relocate abroad in other countries. Thousands of Ethiopians, for example, have relocated in the United States for just such reasons.

The fundamental flaw in the report's definition is its failure to recognize that a viable state depends on the existence of two distinct contracts: a *government* contract that specifies the terms on which citizens establish a government to act on their behalf, one that free and fair democratic elections can address, and a social contract that establishes the terms of association among individuals and groups of citizens that must also be in place, achievable, or reparable if the overarching political framework — the state — is to exist and be viable. The report captures the government contract but not the social contract. Involuntary migration occurs when masses of citizens, voting with their feet, have determined that relations between citizens and their government have so broken down that acceptable terms for citizens to live together under one political roof have become unattainable.

This understanding of the state as sustained by accepted terms of association among individuals and groups for being governed together, as well as working relations between citizens and their government effected by democracy and the rule of law, harks back to the very foundations of the philosophy of liberalism. It originated in the seventeenth and eighteenth centuries as articulated by John Locke, Jean Jacques Rousseau, and even Thomas Hobbes, considered the first liberal for pioneering the idea that the state is grounded in the interests and will of the people. The key point is that all three emphasized that the liberal state is to be grounded in not just one but two contracts, both solemnized by consent of the people. The state comes into being, first, when people consent with each other on terms for political association — the *social* contract — and to establish a state. The second contract, the *government* contract, built on the first, establishes the terms on which citizens of this newly formed state agree to be governed within it. Implicitly, the idea of political liberalism ever since has recognized these two contracts as ongoing covenants, modified as needed by times and circumstances, rather than as one-off deals. For Western democracies, part of the meaning of their maturity has been that these terms, both social and governmental, have been sufficiently framed by democratically established constitutions that they can and have been adequately modified and upheld, for the most part, through democratic electoral processes. For most (still) newly independent countries of the Global South that has been much less the case, hence their demonstrable fragility.

The report overlooks failure or decay of the primary social contract, because it fails to take into account the extent to which the state as we understand it has been a twentieth century import in most of the countries of the Global South rather than something that evolved domestically within each country. The colonial state — if that is not an oxymoron — was, during imperial

times, superimposed on indigenous, often state-like entities. Since the mid-twentieth century, independent governments have inherited, worked with, and sought to legitimize the indigenous and the imported colonial varieties of states, as well as syntheses of both. That state fragility has been pervasive throughout the Global South demonstrates the inadequate progress in negotiating and renegotiating acceptable contracts, both government and social, in these complicated circumstances. Massive involuntary migration attests to the depth and extent of this failure. It follows that democracy alone, the governmental dimension, is not enough and is built on a house of sand where the primary *social* contract has been fatally abridged or is nonexistent.

Symptomatic of the prevalent elision of the concepts of state and government is a pervasive, if routinely implicit neglect in both the academic and policy literatures, to recognize citizen acquiescence on terms of political association as having anything to do with the building of a viable *state* except insofar as they are entitled democratically to elect and make demands of *government*. A key source of this blindness has been a universally routine, if nearly always tacit, reliance on Max Weber's definition of the state as a territorially-based compulsory association possessing a monopoly of the legitimate use of coercion. The definition commits this elision of government and state and allows little room for citizens, by their mutual acquiescence on terms, to be founders and sustainers of the state.

And yet, mass migration within and between states of the Global South as well as toward Europe and industrialized countries has dramatically attested the extent to which, without citizen engagement, the *state* itself, not just *government*, has been rendered significantly if not seriously fragile. Mass migration has been a consequence and also a cause of deeper state fragility of this kind. A compelling example is the case of Kenya. Land consolidation and registration initiated just before independence, along with programs to resettle landless, unemployed Africans on subdivided estates of departing European settlers, have been profoundly corrupted by successive independent governments. The result has been layers of injustice piled upon layers of injustice to the point that they are probably beyond the capacity of any government of the day to address. In 2008, failure to make a serious effort to address this problem nearly resulted in civil war, sparked by a much-less-than free and fair election. Those land issues remain largely unaddressed today, testimony to enduring state weakness and a train wreck in waiting.

What will it take to gain citizen participation and at least their acquiescence on terms of association with each other such that state strengthening can be accomplished and, as one signal benefit, involuntary mass migration as well as internal displacement can be substantially reduced? A key is to understand that both recognition and an effective response to sociocultural, economic, and political distress at grassroots levels are indispensable building blocks of stronger states and antidotes for mass migration.

Remarkably, the Fragile State Group authors paid scant attention in their report to the work of a prominent Washington, DC-based nongovernmental organization (NGO) that has done important work attributing state fragility to insufficiently addressed sources of great grassroots distress. For a decade and more, the Fund for Peace has monitored 12 categories of socioeconomic, cultural, and political distress at grassroots as well as national levels that it has found to be responsible for state fragility. It has scored 175 countries annually on the extent of their state fragility. Implicitly, the annual Fund for Peace reports have called not just for addressing these ills but for establishing processes for formulating terms on which they can be addressed satisfactorily and effectively. For example:

- terms for allocation of essential collective albeit divisible natural resources (e.g., land, water, and forest patrimonies);
- terms for effecting tolerance in local as well as national settings for residential ethnic, religious, and cultural diversity;
- establishing or resurrecting trusted informal and semiformal processes for dispute resolution;
- terms of instituting legitimate and effective governance at very local levels;
- terms for apportioning access to, and the benefits of, scarce developmental resources (e.g., education, health, transportation, and humanitarian assistance);
- terms for managing possession and use of small arms; and
- terms and processes for inclusive development advocacy, including mitigation of persistent extreme poverty.

In summary, involuntary mass migration has manifestly been driven by pervasive state fragility, key sources of which are endemic grassroots-level social, cultural, economic, and political distress. To obviate the necessity of migration, the United States should establish processes to address these causes of state fragility and distress, and, by extension, should lay the groundwork for building stronger, more durable states. Western NGOs have long been in a position to collaborate effectively with those in developing countries for these purposes even as they have done so in support of humanitarian relief and socioeconomic development objectives. Recent initiatives by some governments in sub-Saharan Africa and elsewhere to limit significantly the freedom of NGOs to work with their Western counterparts have been counterproductive for strengthening fragile states and, by extension, to diminishing involuntary migration.

Electoral democracy alone is insufficient, indeed a house built upon sand, absent citizen engagement at the grassroots in formulating terms on which these ills can be legitimately and effectively addressed. To meet this challenge implies larger and more interdependent conceptions of both the state and democracy than as they have been understood and conventionally practiced. Democracy entails not just electoral competition but consensual problem solving. Especially in the contemporary Global South, viable states must be built on foundations not just of coerced association but of citizen acquiescence.



# Immigration Policy and Agriculture: Possible Directions for the Future

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## Executive Summary

Presidential candidate Trump in 2016 promised to prevent unauthorized migration and deport unauthorized foreigners in the United States, and President Trump issued executive orders after taking office in January 2017 that could lead to a 2,000-mile wall on the Mexico-US border and the removal of many of the 11 million unauthorized foreigners, including one million who work in US agriculture. This paper emphasizes that, especially agriculture in the western United States, has long relied on newcomers to fill seasonal farm jobs. The slowdown in Mexico-US migration since 2008-09 means that there are fewer flexible newcomers to supplement the current workforce, which is aging and settled. Farm employers are responding by offering bonuses to satisfy current workers, stretching them with productivity-increasing tools, substituting machines for workers, and supplementing current workforces with legal H-2A guest workers.

Immigration policy will influence the choice between mechanization, guest workers, and imports. Several factors suggest that the United States may be poised to embark on another large-scale guest worker program for agriculture. If it does, farmers should begin to pay Social Security and Unemployment Insurance (UI) taxes on the wages of H-2A workers to foster mechanization and development in the workers' communities of origin by dividing these payroll taxes equally between workers as they depart and commodity-specific boards. Worker departure bonuses could be matched by governments in migrant-sending areas to promote development, and commodity-specific boards could spend monies to reduce dependence on hand labor over time. The economic incentives provided by payroll taxes could help to usher in a new and better era of farm labor.

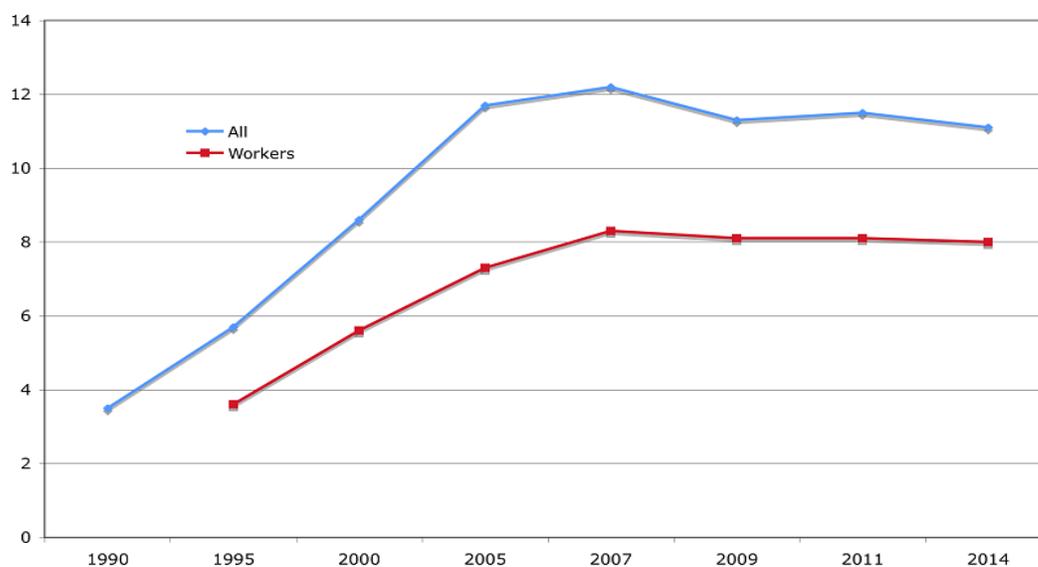
## Immigration and Unauthorized Foreigners

The United States is *the* country of immigration, with 20 percent of the world's international migrants and perhaps half of the unauthorized foreigners in industrial countries. The 43 million foreign-born US residents in 2014 were almost one-seventh of the 320 million Americans (Brown and Stepler 2016). Half of these migrants were Hispanic, including 28 percent who were born in Mexico and five percent each born in China, India, and the

Philippines (*ibid.*). A quarter of the residents of California and New York are migrants (*ibid.*). Miami is over half migrants, and Los Angeles has 40 percent migrants among its residents (*ibid.*).

A quarter of migrants, some 11 million, are unauthorized, and their fate has been intensively debated for more than a decade. The number of unauthorized foreigners rose rapidly in the late 1990s and again after recovery from the 2000-01 recession, peaking at over 12 million in 2007, and declining since (Passel and Cohn 2016a). About 55 percent of unauthorized foreigners are Mexicans (*ibid.*).

**Figure 1. Unauthorized Foreigners and Workers in the US, 1990-2014 (mils)**



*Source:* Pew Research Center.

Some eight million unauthorized foreigners were in the US labor force in 2014, comprising five percent of the 160 million-strong workforce that also includes 20 million lawful foreign-born workers (Passel and Cohn 2016b). The number of unauthorized foreigners fell nine percent since its peak in 2007, while the number of unauthorized workers fell four percent, suggesting that mostly non-workers left the United States during and after the 2008-09 recession (*ibid.*).

Workers can be categorized by industry or occupation. Using national household survey data, Passel and Cohn (2016b) estimated that 17 percent of those employed in the agriculture industry were unauthorized in 2014, followed by 13 percent unauthorized workers in construction and nine percent in hospitality. By occupation, 26 percent of those with farming occupations were unauthorized, followed by 15 percent in construction and nine percent each in production and service occupations (*ibid.*).

The US Department of Labor's National Agricultural Worker Survey (NAWS), which interviews workers employed on crop farms, but not H-2A guest workers,<sup>1</sup> has found a higher share of unauthorized workers. The NAWS estimated that 70 percent of the 1.8 million workers employed sometime during a typical year on crop farms were born in Mexico, and that 70 percent of foreign-born crop workers are unauthorized, so that half of US crop workers are unauthorized (DOL 2017). There are no statistical data on the characteristics of the estimated 700,000 workers employed on livestock farms, but they too are believed to include many Mexican-born and unauthorized (Rural Migration News 2011).

These data suggest that if new enforcement measures slow the entry of unauthorized foreigners and remove those in the United States, US agriculture could be among the first industries to be affected. Agriculture has faced labor supply crises in the past, and usually responded with a combination of labor-saving mechanization and a new source of foreign workers.

### **Newcomers and Seasonal Farm Jobs**

The United States developed three major farming and farm labor systems. In most of the United States, family farms produced crops and livestock with family workers until mechanization in the 20th century allowed many farmers to work off the farm and the remaining farms to become large and specialized. Plantations in the South relied on slaves and later sharecroppers to produce cotton and tobacco for distant markets, while fruit and vegetable farms in the West relied on newcomers for whom seasonal agriculture offered jobs rather than careers (Martin 2003, chapter 2).

Agriculture in the arid western states evolved differently. In most of the United States and in most countries, agricultural development involves the consolidation of small farms into fewer and larger farms. In the western states, Spanish and Mexican land grants and speculators assembled large tracts, often 50,000 or more acres (the average size of a US farm is 435 acres). These large farms were expected to be broken into family-sized units when the transcontinental railroad was completed in 1869, and falling transportation costs justified producing dried and canned fruit in the West's Mediterranean climate. These crops were labor-intensive, and it was thought that only large farm families would be able to provide the seasonal labor needed to operate small fruit farms successfully (Martin 2003, chapter 2).

However, large farms were not broken up because another source of seasonal labor was found. The Chinese who had been recruited to build the Transcontinental Railroad through the California mountains were driven out of western cities in the 1870s, and many became migrant and seasonal farmworkers. Economist Varden Fuller (1991) explained that the low wages paid to Chinese workers who picked fruit were soon capitalized into higher land

<sup>1</sup> The H-2A program allows US farmers anticipating labor shortages to have their need for guest workers certified by the US Department of Labor and approved by US Citizenship and Immigration Services so that the US Department of State can issue H-2A visas to the foreign workers that employers recruit. Most H-2A workers can remain in the United States up to 10 months to fill seasonal farm job. There is no cap on the number of H-2A visas available (Martin 2014).

prices, so that aspiring family farmers who arrived on the railroad had to pay high prices for land but found the value of their own labor equivalent to the low wages paid to Chinese who had no other US job options because of the discrimination they faced in cities.<sup>2</sup> As a result, relatively few of the southern and eastern Europeans who flooded into the United States between the 1880s and 1914 became family farmers in the western states.

Additional Chinese were excluded from immigrating in 1882. As the Chinese workforce aged, state officials warned large farmers that they “could not expect white laborers to spring out of the ground when the Chinese influx ceased,” and would have to raise wages and offer year-round work to attract and retain white farmworkers (Martin 2003, chapter 2). Farmers found another source of seasonal workers in Japan, which legalized emigration in 1886 (ibid.). Some Japanese workers were able to make the transition from hired hand to farmer by working for a share of the crop, gaining experience selling vegetables to consumers, and buying marginal farm land. This unwelcome competition led to a 1907 “Gentlemen’s Agreement” that stopped Japanese emigration to the United States and prompted California to enact laws in 1913 and 1919 to prohibit non-US citizens from buying farm land (ibid.).<sup>3</sup>

The next newcomers were South Asian Punjabis, and they were followed by Mexican guest workers between 1917 and 1921 in the first Bracero Program during World War I (ibid.). Filipinos from what was then an American colony were the most important group of newcomers during 1920s, and Dust Bowl migrants arrived in the 1930s during one of the largest internal desperation migrations in US history. Over 1.3 million people from other states moved to California during the 1930s, a state with less than six million residents in 1930 (ibid.).

Dust Bowl Okies and Arkies soon dominated the farmwork workforce, the only time in California’s farm labor history that a majority of seasonal workers were white US citizens. The accessibility of farmworkers in federal farm labor camps led to reports that condemned the system of large farms relying on seasonal workers to appear when needed and then fend for themselves, including John Steinbeck’s *The Grapes of Wrath*. However, farm labor reforms were divided between idealists such as economist Paul Taylor, the husband of photographer Dorothea Lange who wanted to turn farmworkers into small farmers, and realists such as Carey McWilliams, whose *Factories in the Fields* argued that large farms dependent on armies of seasonal workers were inevitable in irrigated and labor-intensive agriculture, but the workers employed on large farms should have the same labor protections and union organizing rights as nonfarm factory workers (McWilliams [1939] 2000).

Divided farm labor reformers and the exigencies of World War II allowed farm employers to persuade the US government to permit the recruitment of Mexican *braceros* again. During World War II, fewer than 75,000 a year entered the United States, but in the mid-1950s, the number of *braceros* increased to over 450,000 a year (Martin 2003, chapter 2). A government study in 1959 concluded that the availability of *braceros* held down farm

2 Fuller (1991, vii) noted that large fruit farmers had become accustomed to Chinese workers: “With no particular effort on the part of the employer, a farm labor force would emerge when needed, do its work, and then disappear — accepting the terms and conditions offered, without question.”

3 These state laws prompted many Issei, or first-generation Japanese immigrants, to naturalize or to buy farmland in the names of their US-born and thus US-citizen children, the Nisei.

wages and encouraged Mexican-Americans to move from agricultural areas to cities where they did not face competition from *braceros* (Rural Migration News 2003).

The Bracero Program was ended in 1964. Unions and churches argued that the Bracero Program was a government policy that slowed the upward mobility of Mexican Americans, just as government-sanctioned discrimination held back Blacks. Growers countered that they needed *braceros* because American workers would not do seasonal farm work, and that the availability of *braceros* kept agriculture competitive and food prices low.

In the mid-1960s, farm wages jumped and there was a wave of labor-saving mechanization. Processing tomatoes were rebred to ripen uniformly, and a machine was developed to pick them in one pass through fields, increasing production, lowering prices to consumers, and helping to fuel the fast food revolution. This labor-saving mechanization was controversial, since government funds were used to displace farmworkers and small farmers (Martin and Olmsted 1985). Similarly controversial was the United Farm Workers (UFW) union, which won 40 percent wage increases in table grape contracts in 1966 largely because *bracero* workers were not available (Martin 2003, chapter 2).

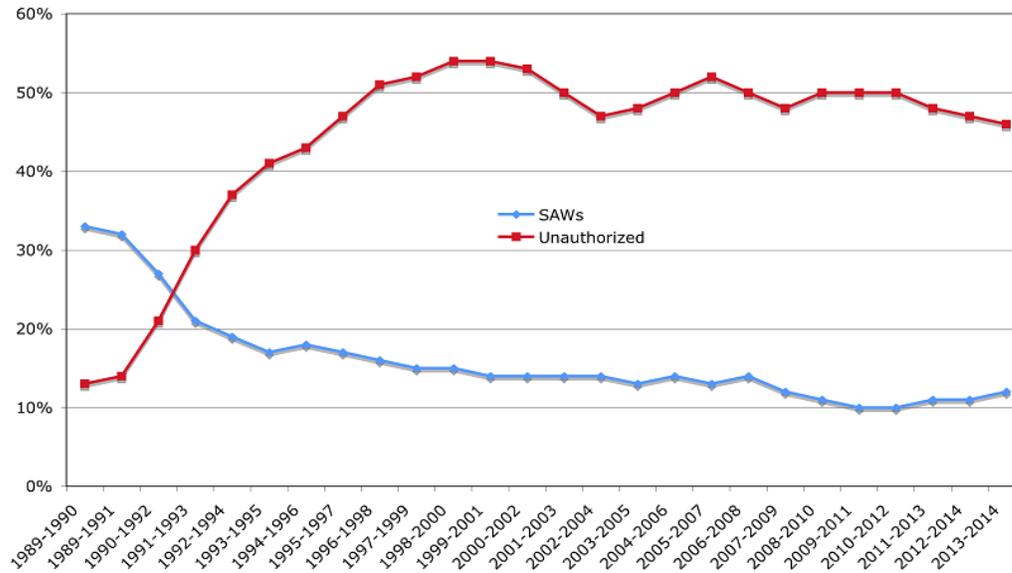
Unauthorized Mexico-US migration began to increase in the late 1970s, as farm employers turned to labor contractors who recruited rural Mexicans to replace UFW workers who went on strike for higher wages and benefits. Unauthorized Mexico-US migration rose with peso devaluations in the early 1980s and, with no penalties on US employers who knowingly hired unauthorized workers, their hiring spread to more commodities and areas.

The Immigration Reform and Control Act of 1986 (IRCA) imposed the first federal sanctions on employers who hired unauthorized workers and legalized over 1.1 million unauthorized farmworkers who had completed at least 90 days of farm work in 1985-86. These now legal workers spread throughout the United States, and those leaving agriculture were replaced by unauthorized newcomers from Mexico. The share of unauthorized farmworkers was less than 10 percent in 1990, after over 1.1 million unauthorized foreigners were legalized under the IRCA's Special Agricultural Worker (SAW) program and the unauthorized share has hovered around 50 percent since the mid-1990s (DOL 2017).

### Immigrants in Agriculture

Today, most hired farmworkers are Mexican-born men. The NAWS found that the foreign-born share of US crop workers was 55 percent in 1989-90, peaked at 83 percent in 1999-00, and is now 70 percent (*ibid.*). The remaining 30 percent of crop workers were born in the United States (*ibid.*).

In 1990, the crop workforce included 35 percent SAW beneficiaries and 13 percent unauthorized workers; the rest were US citizens and other legal immigrant workers (*ibid.*). As SAWs left agriculture, they were replaced by unauthorized workers, so that there were fewer than 20 percent SAWs and more than 50 percent unauthorized in the mid-1990s (*ibid.*). Today, the share of SAWs has stabilized at 10 percent, another 10 percent of crop workers are legal via family unification visas or another route, 30 percent are US citizens, and half are unauthorized (*ibid.*).

**Figure 2. SAWs and Unauthorized Crop Workers, 1989-2014**

Source: Pew Research Center.

The Commission on Agricultural Workers reported that, before IRCA introduced sanctions on employers who knowingly hired unauthorized workers in 1986, such workers were concentrated on fruit-growing operations in California and Texas and in farm labor contractor crews that pruned, hoed, and performed other seasonal tasks on western farms (CAW 1992). The distribution of unauthorized workers before IRCA reflected the risk of producer losses if the Border Patrol removed them during inspections. There was a higher share of unauthorized workers in winter citrus pre-IRCA because oranges can remain on trees for several weeks if necessary until new workers are recruited, than in more perishable summer vegetables, where a sudden loss of workers may result in loss of the crop.

IRCA changed enforcement in agriculture from a people chase to a paper chase. Instead of the Border Patrol driving into fields and attempting to apprehend workers who ran away, IRCA meant that most workplace enforcement involved audits of the I-9 forms completed by newly hired workers and their employers. If suspected unauthorized workers were found during audits, employers informed them that they needed to provide work authorization documents or risk termination. Audits ended the sudden loss of workers associated with workplace raids, and encouraged even producers of very perishable commodities to risk hiring unauthorized workers.

In the early 1990s, first SAWs and then unauthorized workers spread to all commodities and areas, as pioneers in Florida orange groves, North Carolina vegetable farms, and mid-western detasseling and fruit-picking crews told friends and relatives of opportunities. Farmers benefitted from this network recruitment, since current workers brought only qualified friends and relatives into crews and trained them.

Since 2000, the share of unauthorized workers has been about 50 percent in all commodities and areas, according to the NAWs (DOL 2017). Some commodities and areas rely largely on *legal* H-2A guest workers, including Florida citrus, North Carolina tobacco and vegetables, and New England and Washington apples.

### Trump and Agriculture

President Trump issued three executive orders during his first week in office, setting in motion plans to build a wall on the Mexico-US border, increase deportations, punish sanctuary cities that refuse to cooperate with the Department of Homeland Security, and reduce refugee admissions. The border memo envisions a \$21 billion wall and the addition of 5,000 Border Patrol agents to the current 21,000.<sup>4</sup> The interior enforcement memo lays out plans to double the number of Immigration and Customs Enforcement agents from 10,000 to 20,000 and prioritizes the detection and removal of unauthorized foreigners convicted of US crimes, but makes almost all unauthorized foreigners subject to deportation.<sup>5</sup>

The refugee executive order that received the most media attention would ban the entry of nationals of seven countries: Syria, Iran, Iraq, Somalia, Sudan, Libya and Yemen, and reduce refugee admissions to 50,000 a year.<sup>6</sup> Parts of this executive order were blocked by federal courts, and the order was effectively re-issued with some modifications in March 2017 and blocked again as unconstitutional religious discrimination.<sup>7</sup> Trump is expected to issue more executive orders dealing with workplace enforcement and guest workers.

US agriculture employs a higher share of unauthorized workers than any other industry. Current farmworkers are aging and settling, increasing worries about who will replace those who find nonfarm jobs. Agriculture may serve as the canary in the coal mine to indicate how industries reliant on unauthorized workers adjust to fewer newcomers and higher wages.

Farmers are responding to fewer unauthorized newcomers with 4-S strategies: satisfy, stretch, substitute, and supplement. By **satisfying** current workers, employers hope to retain them longer. Most farmers believe that the supply of labor inside US borders is fixed or inelastic, so that higher wages will not attract more farmworkers and instead will move them from lower to higher wage farms. Some are offering benefits such as low-cost health care to employees and their families or end-of-season bonuses to increase the loyalty of current workers. Some are improving the training of first-level supervisors to reduce favoritism and harassment.

The second strategy is to **stretch** the current work force with mechanical aids and management changes that increase worker productivity and make farm work easier. Most

4 Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

5 Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

6 Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

7 Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13780, 82 Fed. Reg. 13209 (March 6, 2017).

fruits and vegetables are over 90 percent water, and hand harvesters spend much of their time carrying harvested produce down ladders to bins or to the end of rows to receive credit for their work. Planting dwarf trees means smaller or no ladders and faster picking, and hydraulic platforms reduce the need to fill 50 to 60 pound bags of apples and oranges from ladders. Slow-moving conveyor belts that travel ahead of workers who harvest berries, broccoli, and other vegetables reduce the need to carry harvested produce, making workers more productive and harvesting jobs more appealing to older workers and women (Calvin and Martin 2010).

The third strategy is **substitution** or replacing workers with machines. Labor-saving mechanization is the story of agriculture, as the US went from 95 percent of US residents in agriculture in 1790 to less than two percent today. The production of the big-five crops — corn, soybeans, wheat, cotton, and rice — has been mechanized. There has also been enormous labor-saving change in livestock production, including, automatic feeders, sensors on cattle, and robotic milking systems. Most nuts are harvested mechanically, with machines shaking almonds and walnuts from trees and catching them or sweeping them into rows for pick up.

Fresh fruits and vegetables have defied mechanization for several reasons. Many are fragile, and human hands are gentler than mechanical fingers in picking grapes or peaches. Machines that shake apples or pears from trees damage a higher share of the fruit than hand harvesters, meaning a smaller share goes to market. Finally, machines are fixed costs and workers are variable costs: farmers must pay for a \$200,000 harvesting machine whether there are apples to pick or not, while they do not pay wages to workers if storms or disease destroy the apple crop.

The three decades from the 1980s to 2010 may have been an era of Mexican farm labor abundance that is coming to an end due to tougher US enforcement growth, work opportunities in Mexico, and likely a new wave of labor-saving mechanization in US agriculture. Machines are being developed to harvest a variety of crops, from apples to strawberries, but at current wages they are not competitive with hand harvesting. However, with labor costs continuing to rise, as suggested by the law that increases the California minimum wage from \$10 an hour in 2016 to \$15 by 2022, many private firms are rushing to develop harvesting machines.

The fourth adjustment to fewer unauthorized newcomers is to **supplement** the current workforce with H-2A guest workers. The H-2A program was created in 1952 and was used primarily by sugarcane growers in Florida and apple growers along the East Coast until the mid-1990s, when North Carolina tobacco farmers became the largest employers of legal guest workers (Rural Migration News 2017).

There is no cap on the number of H-2A visas that can be issued, but farm employers must obtain certification of their need for H-2A guest workers by satisfying three major criteria (*ibid.*). First, farmers must try to recruit US workers and provide reasons why any US worker who applies for a job is not hired. Second, farmers must provide free housing to H-2A guest workers and out-of-area US workers. Third, farmers must pay US and H-2A workers a super-minimum wage known as the Adverse Effect Wage Rate, which ranged from \$10.38 to \$13.79 an hour across states in 2017.

The H-2A program is expanding, doubling over the past decade to 165,700 farm jobs certified by the Department of Labor in FY 2016 on about 8,300 US farms (ibid.). Florida and North Carolina are the leading H-2A-using states, accounting for a quarter of all jobs certified, but Washington and California have had the fastest-growth in certifications, with the number of H-2A jobs certified doubling over the past five years (ibid.). Since California and Washington account for over 40 percent of US farmworkers, these states are likely to become the largest farm guest worker states if the H-2A program continues to expand (ibid.).

### Moving Forward

Satisfying and stretching the current farm workforce are short-term strategies to get farmwork done, while labor-saving substitution and supplementing are longer-term strategies. Farmers are grappling with the optimal strategy, which is likely to be determined by nonfarm developments, including the speed with which costs fall and performance improves for labor-saving machinery, potential changes to trade policy that affect imports, and changes that make guest workers cheaper or more expensive.

Farming labor-intensive commodities requires a great deal of capital, since planting an acre of peaches or pears requires an investment of \$15,000 per acre (football field) to generate revenue of \$5,000 an acre after a several year wait (Agricultural and Resource Economics, UC Davis 2017). Farmers making such investments need to decide whether to plant crops whose prices could be affected by imports and whether to invest in housing to accommodate farmworkers or machines to harvest their crops. Juggling this triangle is difficult. The cost of labor-saving machinery is likely to fall and performance to improve, but early adopters of machines pay high prices and a lock in costs, since the machines must be paid for even if weather destroys the crop or imports make it uneconomic to pick.

Such uncertainty encourages many farmers to advocate for the labor status quo, with guest workers replacing current workers who leave. Many farmers delayed turning to guest workers because of the high cost of building housing in the urban areas where most fresh fruits and vegetables are grown (almost all of California's fresh fruits and vegetables are grown in metro counties). With the cost of new housing for H-2A guest workers \$10,000 a bed or more, many farmers hoped that the guest worker provisions of the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 ("S.744") would become law.<sup>8</sup>

S.744 would have replaced the H-2A program with new W-3 and W-4 programs and eliminated the need to provide housing for guest workers. The W-3 program would be like the current H-2A program and tie a foreign worker to a particular US farm employer and job for up to three years, while the W-4 "at will" program resembles the Replenishment Agricultural Worker program in IRCA that was never implemented. W-4 visa holders would need an initial job offer to enter the United States, but could then "float" from one farm employer to another and remain legal so long as they were not unemployed more than 60 days. Minimum wages that would have to be paid to W-3 and W-4 guest workers would be reduced by \$1 to \$2 an hour, and farmers would have to provide their W-3 and W-4 guest

<sup>8</sup> S.744, 113th Cong (2013).

workers with a housing allowance equivalent to \$1 to \$2 an hour, depending on the local cost of housing. Employees would be responsible for finding their own housing.

Making it easier to hire guest workers is likely to prolong the age-old quest for another group of newcomers willing to accept seasonal farm jobs. If the United States is about to embark on another era of guest workers for agriculture, a better strategy would be to use the Social Security and unemployment insurance taxes that farmers currently do not pay on the wages of H-2A workers, in order to foster mechanization in the United States and development in worker sending communities.

Farmers and guest workers should participate in the payroll tax system to level the playing field with other farmworkers. However, by giving guest workers special Social Security numbers and segregating their payroll taxes, the monies collected could be divided to help farmworkers and farmers. Guest workers could receive refunds as they left the United States, say \$1,500 each,<sup>9</sup> to promote development in their areas of origin, and these worker savings could be matched to spur development. The other half of the monies could be used by commodity-specific boards to increase the competitiveness of production, so that those closest to the fields decide whether to spend the money on machines, housing for guest workers, or something else.

Transforming a farm labor system that has depended on, in the words of Varden Fuller, poverty at home and misery abroad to provide a willing supply of newcomers to the seasonal farmwork workforce, is not easy (Fuller 1991). Regulatory changes alone have not transformed the farm labor system, and more tinkering promises a temporary fix followed by another labor supply crisis in the future. Introducing economic incentives to transform both worker areas of origin and methods of production in the United States could be the policy that helps to usher in a new era in farm labor.

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<sup>9</sup> Based on guest workers earning an average \$1,500 a month or \$15,000 while employed in the United States for the current maximum of 10 months (Rural Migration News 2017). Social Security taxes are about 17 percent, with half paid by the worker and half by the employer, and Unemployment Insurance taxes range from three to six percent (ibid.).

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# National Interests and Common Ground in the US Immigration Debate: How to Legalize the US Immigration System and Permanently Reduce Its Undocumented Population

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## Executive Summary

The conventional wisdom holds that the only point of consensus in the fractious US immigration debate is that the system is broken. Yet, the US public has consistently expressed a desire for a legal and orderly immigration system that serves compelling national interests. This paper describes how to create such a system. It focuses on the cornerstone of immigration reform,<sup>1</sup> the legal immigration system,<sup>2</sup> and addresses the widespread belief that broad reform will incentivize illegal migration and ultimately lead to another large undocumented population.

The paper begins with an analysis of presidential signing statements on seminal immigration legislation over nearly a century. These statements reveal broad consensus on the interests and values that the United States seeks to advance through its immigration and refugee policies. They constitute additional common ground in the immigration debate. To serve these interests, immigration and refugee considerations must be “mainstreamed” into other policy processes. In addition, its policies will be more successful if they are seen to benefit or, at least, not to discriminate against migrant-sending states.

Not surprisingly, the US immigration system does not reflect the vast, mostly unanticipated changes in the nation and the world since Congress last meaningfully reformed this system (27 years ago) and last overhauled

1 Effective legal immigration policies constitute the cornerstone of reform because, without them, the immigration enforcement system and any eventual legalization program will not be able to deliver on their promises.

2 The paper treats US refugee admissions as a form of legal immigration.

the law (52 years ago). The paper does not detail the well-documented ways that US immigration laws fall short of serving the nation's economic, family, humanitarian, and rule of law objectives. Nor does it propose specific changes in categories and levels of admission. Rather, it describes how a legal immigration system might be broadly structured to deliver on its promises. In particular, it makes the case that Congress should create a flexible system that serves compelling national interests, allows for real time adjustments in admission based on evidence and independent analysis, and vests the executive with appropriate discretion in administering the law.

The paper also argues that the United States should anticipate and accommodate the needs of persons compelled to migrate by its military, trade, development, and other commitments. In addition, the US immigration system needs to be able to distinguish between undocumented immigrants, and refugees and asylum seekers, and to treat these two populations differently.

The paper assumes that there will be continued bipartisan support for immigration enforcement. However, even with a strong enforcement apparatus in place and an adaptable, coherent, evidence-based legal immigration system that closely aligns with US interests, some (reduced) level of illegal migration will persist. The paper offers a sweeping, historical analysis of how this population emerged, why it has grown and contracted, and how estimates of its size have been politically exploited.

Legalization is often viewed as the third rail of immigration reform. Yet, Congress has regularly legalized discrete undocumented populations, and the combination of a well-structured legalization program, strengthened legal immigration system, and strong enforcement policies can prevent the reemergence of a large-scale undocumented population. In contrast, the immense US enforcement apparatus will work at cross-purposes to US interests and values, absent broader reform.

The paper ends with a series of recommendations to reform the legal immigration system, downsize the current undocumented population, and ensure its permanent reduction. It proposes that the United States "reissue" (or reuse) the visas of persons who emigrate, as a way to promote legal immigration reform without significantly increasing annual visa numbers.

### **The National Interests Served by US Immigration and Refugee Policies**

All the partisans in the immigration debate agree that US immigration and refugee policies should serve the nation's interests, begging the question: What interests? Presidential

signing statements often poorly predict the impact of immigration legislation,<sup>3</sup> and their use in judicial interpretation is hotly contested (Yoo 2016, 1807-09). Yet, they can strongly illuminate the interests, principles, and goals that underlie the law. A review of signing statements on seminal immigration and refugee legislation — beginning with the national origins quota legislation of 1924 and ending with the 2002 legislation that established the US Department of Homeland Security (DHS) — reveals a rough consensus on these interests, as well as the traditions and values that gave rise to them. The historical touchstones and first principles of US immigration and refugee policy offer potential common ground in the immigration debate. They reveal a belief that:

- Families constitute the fundamental building block of society and their integrity should be preserved.
- Admissions policies based on national origin, race, or privilege offend the US creed and civic values.
- Fairness and process should characterize admission and removal decisions.
- Providing haven to persons fleeing persecution and violence reflects US history, tradition, and its core commitment to liberty, freedom, and dignity.
- Immigrants embody the US tradition of self-sufficiency, hard work, and drive to succeed, and further the nation's economic competitiveness.
- All US residents deserve access to “the benefits of a free and open society” (Reagan 1986).
- A system characterized by “fair, orderly, and secure” migration upholds the rule of law (*ibid.*).
- Illegal migration challenges US sovereignty, threatens US security, and devalues citizenship.
- Criminals and security threats flout US ideals, should not be admitted, and forfeit the right to remain.

The Johnson-Reed Act of 1924 represents an important point of departure in reviewing the interests and values served by the US immigration system over the last century. This discriminatory legislation restricted immigration levels from eastern and southern European nations to two percent of the number of their foreign-born residents in the United States in 1890. It also barred permanent immigration from Japan. In his signing statement, President Calvin Coolidge took exception only to the legislative bar on Japanese immigrants, favoring instead the existing Gentlemen's Agreement of 1907, which required Japan to prevent the emigration of its nationals to the United States (IMR 2011; Young 2017, 221).

Nearly 30 years later, President Harry S. Truman vetoed the Immigration and Nationality Act (INA) of 1952,<sup>4</sup> although Congress overturned his veto. Truman objected to the Act's retention of the national origins quota system, which he called “deliberately and intentionally” discriminatory and “insulting to large numbers of our finest citizens, irritating to our allies abroad, and foreign to our purpose and ideals” (IMR 2011, 192-93). Truman

3 In signing the Immigration and Nationality Act of 1965, for example, President Johnson said the legislation did “not affect the lives of millions” and would not “reshape the structure of our daily lives” (Johnson 1965). Yet, the legislation has done both. In signing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), President Clinton said the Act would not punish legal residents, although it manifestly has had that effect (CLINIC 2001, 48-56).

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

## National Interests and Common Ground in the US Immigration Debate

argued that the quotas violated the US commitment to equality, its “humanitarian creed,” and the “brotherhood of man” (ibid., 193-94). He also opposed its deportation provisions related to activities “prejudicial to the public interest” and “subversive to the national security” because they did not require “findings of fact made upon evidence” (ibid., 197). In addition, he resisted restrictions on the attorney general’s discretion to suspend the deportation of the family members of US citizens and residents (ibid.), and its denial of citizenship to dual national US-born citizens with foreign-born fathers (ibid., 198). Truman also urged Congress to remove the bars to Asian immigration (ibid., 199).

The Immigration and Nationality Act of 1965 repealed the national origins quota system and replaced it with a system that prioritized family ties and workers with needed skills and abilities.<sup>5</sup> President Lyndon B. Johnson said that the Act corrected “a cruel and enduring wrong,” overturned a law that “violated the basic principle of American democracy . . . that values and rewards each man on the basis of his merit,” and removed the “twin barriers of prejudice and privilege” from the immigration system (IMR 2011, 201-02). He said the Act upheld the American ideal of admitting those “enduring enough to make a home for freedom, and . . . brave enough to die for liberty” (ibid., 202-03). He averred that because the United States was “built by a nation of strangers” and “nourished by so many cultures and traditions and peoples” that its citizens felt “safer and stronger” in the world (ibid., 201).

The Refugee Act of 1980<sup>6</sup> established the US refugee resettlement program, sought to bring US law into compliance with the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees,<sup>7</sup> and made asylees and refugees eligible for lawful permanent resident (LPR) status after one year. In his signing statement, President Jimmy Carter said the Act reflected the nation’s “long tradition as a haven for people uprooted by persecution and political turmoil” and its “humanitarian traditions” (Carter 1980). He praised its “fair and equitable treatment of refugees in the United States, regardless of their country of origin” (ibid.). He also lauded the Act for assisting refugees to become “self-sufficient and contributing members of society” (ibid.).

The Immigration Reform and Control Act of 1986 (IRCA)<sup>8</sup> established the nation’s last large-scale legalization initiative, authorized increased border enforcement, and created a system of sanctions for employers that hired undocumented persons to work. IRCA made it an “unfair immigration-related employment practice” to discriminate in hiring, or recruitment, or referral for a fee, or firing citizens and certain legal residents based on national origin or alienage.<sup>9</sup> In signing IRCA into law, President Ronald Reagan said the Act “preserves and enhances the Nation’s heritage of legal immigration” and removes “the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens” (Reagan 1986). He said the Act would “go far to improve the lives of a class of individuals who now must hide in the shadows, without access to many of the benefits of

5 Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

6 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

7 Convention relating to the Status of Refugees, July 28, 1951, 189 UNTS 150 (*entered into force* April 22, 1954); Protocol relating to the Status of Refugees, January 31, 1967, 606 UNTS 267 (*entered into force* October 4, 1967).

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

9 IRCA, § 102.

a free and open society” (ibid.). He stressed the need “to humanely regain control of our borders” in order to preserve the value of US citizenship. IRCA, he said, sought to “establish a reasonable, fair, orderly, and secure system of immigration . . . and not to discriminate in any way against particular nations or people” (ibid.). It also precluded noncitizens from securing temporary or permanent residence if they had committed a felony or three or more misdemeanors, or they were likely to become a “public charge.”<sup>10</sup>

The Immigration Act of 1990<sup>11</sup> increased legal immigration levels; established the Temporary Protected Status (TPS) program for nationals of designated states experiencing conflict or natural disaster; created new nonimmigrant visas (primarily for skilled workers); eased naturalization requirements; strengthened IRCA’s antidiscrimination provisions; authorized funding for 1,000 more border personnel; and expanded the criminal grounds of removal. In his signing statement, President George H.W. Bush called the legislation “a complementary blending of our tradition of family reunification with increased immigration of skilled individuals to meet our economic needs” (G. H. W. Bush 1990). He vowed that it would contribute to “a more competitive economy,” support “the family as the essential unit of society,” and punish “drug-related and other violent crime” who “forfeit their right to remain in the country” (ibid.).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>12</sup> one of the most ambitious immigration enforcement bills in the nation’s history, created new federal, state, and local enforcement programs; authorized funding for border and interior enforcement; expanded the criminal grounds of removal; created expedited and accelerated removal programs; established multiyear bars to admission based on past presence without immigration status and past removals; limited relief from removal; expanded mandatory detention; and created more demanding sponsorship requirements for visa petitioners. In his signing statement, President William J. Clinton said that the legislation “strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system — without punishing those living in the United States legally” (Clinton 1996).

The Homeland Security Act of 2002<sup>13</sup> created DHS and reconceptualized the US immigration system as a homeland security concern. In his signing statement, President George W. Bush situated border security within an “unprecedented” and “unified government response” to defend US “freedom and security” and “to prevent and defend the United States from terrorist attacks” (G. W. Bush 2002).

The Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) sought to promote interests similar to those set forth in the signing statements, i.e., immigrant integration, secure borders, national security, and economic, military, and ethical strength.<sup>14</sup> Of all the “comprehensive” reform bills in last 15 years, S. 744 advanced the furthest, passing the US Senate on June 27, 2013.

10 IRCA, §§ 102(a)(4)(B) and 201(d)(2)(B).

11 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

12 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, 110 Stat. 3009 (1996).

13 Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat. 2135 (2002)..

14 S. 744, 113th Cong. § 2 (2013).

### ***Immigration Policy and Foreign Relations***

Beyond identifying underlying US interests and values, the signing statements recognize the close connection between foreign relations and immigration/refugee policies, which invariably implicate citizens of other nations, require cooperation from source, transit, and destination states,<sup>15</sup> and project US ideals and intentions. Successive administrations have viewed this system as a tool to strengthen the country and enhance its global standing.<sup>16</sup> The signing statements also frequently appeal to other states regarding US intentions and seek to anticipate and assuage their concerns.

In vetoing the Immigration and Nationality Act of 1952, for example, President Truman called for a bill that would be “a fitting instrument for our foreign policy and a true reflection of the ideals we stand for, at home and abroad” (IMR 2011, 195). President Johnson praised the Immigration and Nationality Act of 1965 for conveying “the light of an increased liberty for the people from all the countries of the world” (ibid., 204). President Reagan took pains to clarify that illegal immigration was not “a problem between the US and its neighbors” (Reagan 1986). President George W. Bush sought to ensure US “friends” that the Homeland Security Act’s was laying the groundwork for a more “welcoming” immigration system (G. W. Bush 2002).

By contrast, states have been acutely sensitive to US immigration laws and practices that they believe discriminate against their nationals, as evidenced most recently by the global reaction to the Trump administration’s executive orders to suspend immigration from Muslim-majority states and to cut refugee admissions (Markon, Brown, and Nakamura 2017).

US refugee policies, in particular, serve as an extension of its foreign policy, as was particularly evident during the Cold War (Scribner 2017). US leadership was also central to mobilizing the global response to the refugee crises created by World War II and the Vietnam conflict (Kerwin 2016).

### ***The Challenge of Meeting Evolving Needs and Changed Conditions***

US presidents have been frustrated by the infrequency of legislative reform on immigration and have stressed the importance of flexibility and discretion in implementing the law. In his veto statement to the Immigration and Nationality Act of 1952, for example, President Truman vented: “In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration” (Truman 1952).

President Carter praised the Refugee Act of 1980’s flexibility in allowing refugee admissions levels to change “in response to conditions overseas, policy considerations, and resources available for resettlement” (Carter 1980).

15 The Refugee Action of 1980, § 101(a), declared one of its purposes to be “encourag[ing] all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.”

16 Even Calvin Coolidge preferred a diplomatic approach (rather than a law) to prevent migration from Japan.

President H.W. Bush expressed concern regarding language in the Immigration Act of 1990, which referred to TPS as the “‘exclusive authority’ by which the executive could allow otherwise deportable aliens to remain in the United States based on their ‘nationality or region of origin’” (G. H. W. Bush 1990). As a result, Bush interpreted the legislation as not “detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases” (ibid.).

Disputes over the scope of executive authority in this area have been particularly acute in the last two administrations. President Barack Obama argued that Congressional inaction on immigration reform forced his administration to create the Deferred Action for Childhood Arrivals (DACA) program and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, which ultimately did not survive a legal challenge and change in administration.

The Trump administration’s executive orders to reduce refugee admissions and to suspend immigration from certain Muslim-majority states have also been subject to legal challenge and, at this writing, temporarily enjoined. However, while the scope of executive action will remain a contentious issue, the *need* to exercise discretion — based on US interests, a principled reading of the law, and limited resources — persists. The alternative is laissez-faire enforcement, without a plan or priorities (Kerwin, Meissner, and McHugh 2011, 14-15).

## **Migration Governance: Situating the US Immigration System in a Broader Policy Context**

Politicians, the media, and public demand both too much and too little from US immigration policies. On the one hand, none of the interests served by immigration policies — family, economic, or humanitarian — can be achieved *only* by them. The success and integrity of immigrant families depends both on their legal reunification, for example, and on a range of domestic policies and programs in host communities. The degree to which immigrants can contribute economically to the nation depends not only on the admission of talented, hard-working immigrants, but on the state of the economy and the relatively open job market. US refugee and humanitarian programs benefit from and (often) depend upon collaboration from other states, local communities, nongovernmental actors, and the affected populations themselves.

Refugee resettlement can save lives and leverage better conditions for refugees, like education, employment, and other integration opportunities in host communities.<sup>17</sup> However, resettlement to third countries is only available to one percent of the world’s refugees. Thus, diplomacy to prevent and mitigate refugee-producing conditions and development assistance to refugee host communities can benefit more refugees than resettlement.<sup>18</sup> The 9/11 Commission argued that the terrorist threat requires a response that enlists all elements of “national power” (National Commission on Terrorist Attacks

<sup>17</sup> These communities host upwards of 90 percent of the world’s refugees.

<sup>18</sup> Support for greater education, employment opportunities, entrepreneurial activity, and legal immigration options for refugees have proven particularly consequential and cost-effective investments.

Upon the United States 2004, 363-64). A similar claim can be made for immigration and refugee policy: Its goals can only be met in cooperation with other nations, multiple federal agencies, states, localities, and civil society.

In other ways, the United States expects too little from its immigration and refugee programs and, as a result, does not fully leverage these programs or fully exploit the drive, skills, and ideas of immigrants or refugees. This may be clearest in the case of highly skilled immigrants who cannot work in their chosen field due to credentialing barriers. However, it also occurs in less obvious areas. Prior to the 9/11 attacks, for example, US intelligence and law enforcement agencies did not draw on the Immigration and Naturalization Service (INS) for information on terrorist travel methods or profiles, or on immigrant communities for information on potential threats (Kerwin 2016, 94, 103).

In recent years, the state-led High-Level Dialogues on International Migration and Development, which occurs under the aegis of the United Nations, has documented the contributions of expatriates to poverty reduction, disaster relief, economic development, and reconciliation initiatives in their ancestral or birth communities. This process has also identified specific immigration policies that facilitate these contributions, like circular migration policies that allow migrants to secure education and training in migrant destination states; to lend their expertise, know-how and financial resources to their communities of origin; and to travel back and forth in order to sustain family and business ties. The Migration and Development dialogue has also led some states to “mainstream” migration into development planning and programs; that is, to attempt to maximize the development potential and inputs of immigrant communities. In the United States, it inspired the International diaspora Engagement Alliance (IdEA), a public-private partnership managed by the US Department of State and the US Agency for International Development “that promotes and supports diaspora-centered” economic and social development initiatives (IdEA 2016).

Immigrant and refugee concerns should also be “mainstreamed” into domestic policymaking. Immigrants have distinct needs, which should be reflected in educational, labor, workforce development, language access, credentialing, criminal justice, health care, citizenship, and many other policies on multiple levels. To this end, Els de Graauw and Irene Bloemraad (2017) have proposed establishing a horizontally and vertically integrated national integration initiative which would enlist federal, state, and local agencies, and diverse civil society actors in integration programs and partnerships.

Finally, it is essential that the United States distinguish between illegal migration and refugee and humanitarian flows, like the hundreds of thousands of migrants driven over the last five years from the violence-plagued Northern Triangle states of Central America (Musalo and Lee 2017). Large-scale migration flows invariably include persons with diverse motives and aspirations. However, the legal norms and strategies to protect refugees and asylum seekers differ substantially from the standard enforcement responses to illegal migration. Applying deterrence, detention, and expedited removal strategies to refugee-like populations violates the spirit and often the letter of international law (Gammeltoft-Hansen and Tan 2017, 30-32; MRS/USCCB and CMS 2015, 165, 182-83). Moreover, these tactics

will ultimately be ineffective in reducing the flight of persons who have no legal recourse from violence in their own states, and will have the perverse effect of contributing to the US undocumented population.

These examples underscore a governance imperative, i.e., that immigration/refugee officials engage the full range of government and private actors that will allow them to meet their institutional goals and responsibilities, that they participate in other processes that are essential to the wellbeing of immigrants and refugees, and that they treat refugees, asylum seekers, and humanitarian migrants differently than other irregular migrants. Over the years, there have been many proposals — both from government and nongovernmental sources — intended to ensure that immigration and refugee concerns benefit from and inform other policymaking processes. However, it remains far from clear whether this kind of “mainstreaming” occurs in an intentional way between federal, state, and local agencies or among federal agencies, or even whether the constituent agencies of DHS systematically engage on crosscutting policy issues and operational needs (Meissner and Kerwin 2009, 92-95).

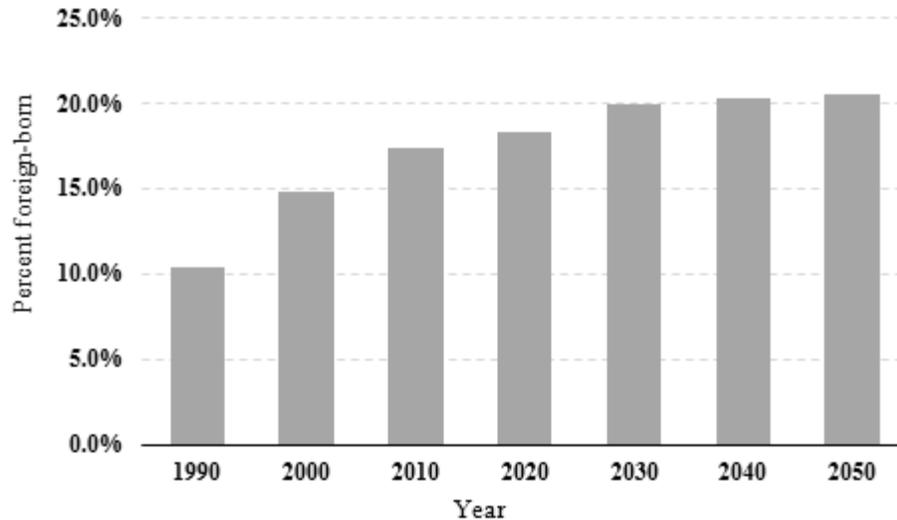
## **The Need for Cooperation from Other States**

As suggested by the presidential signing statements, US immigration and refugee policies can benefit from and their success often requires cooperation from other states, whether in responding to the causes of forced migration, promoting the humane treatment of migrants in transit, protecting migrants in destination states, or receiving returning nationals. Cooperation has been strongest on deterrence and enforcement policies that seek to deny refugees and immigrants access to developed states, and weakest on refugee protection and responsibility sharing (Frelick, Kysel, and Podkul 2016). Yet this need not be the case. For example, policies that combine third-country resettlement of particularly vulnerable refugees, with financial support to refugee host communities, can benefit individual refugees, and create more opportunities for integration of refugees in host communities.

The outline of potential win-win “labor migration” programs is apparent in data on the aging and shrinking workforces in developed states, and the younger populations in developing states that would willingly migrate to work. Many developed states need impossible-to-get numbers of immigrants from 2010 to 2050 just to maintain a stable work force and a steady ratio between residents age 65 and above, and working age residents between the ages of 20 and 64. This dynamic has been “mitigated” in the United States by the relative youth and high fertility rates of its large immigrant population (Reznik, Shoffner, and Weaver 2005-2006, 38).

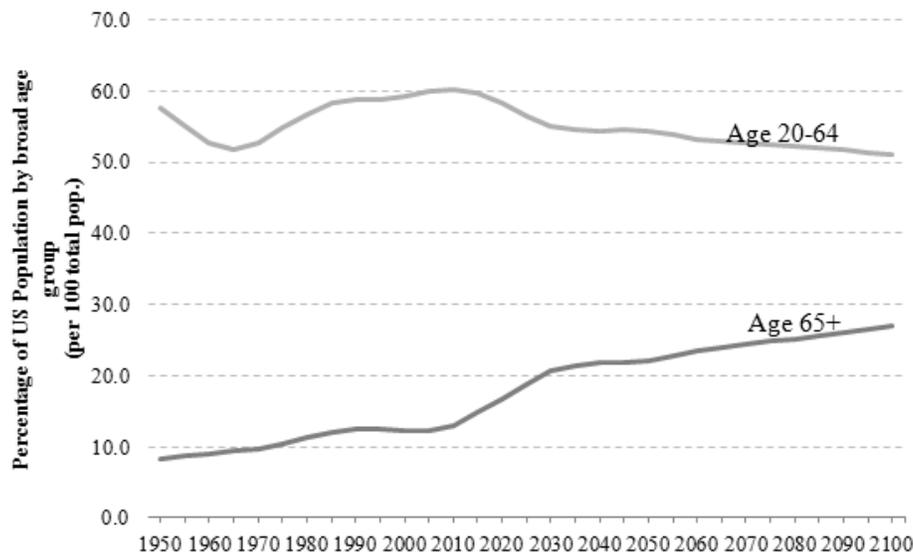
Foreign-born workers are essential to the US labor force, and their share is projected to rise over the next few decades. As figure 1 shows, about 10 percent of the US population between age 18 and 64 were foreign born in 1990. By 2030, the percentage is projected to double to 20 percent and will continue to increase, but at a slower rate, from 2030 to 2050.

**Figure 1. Percent of Foreign-Born in the Population Aged 18 to 64: 1990 to 2050**



Source: 1990 to 2010, census data; 2020 to 2050, Colby and Ortman (2014).

**Figure 2. US Population by Broad Age Group: 1950 to 2100**



Source: UN DESA (2015). Custom data acquired via website.

Nonetheless, the percentage of the US population age 65 and over is projected to increase from 13 percent in 2010, to more than 20 percent in 2030 (Ortman, Velkoff, and Hogan 2014, 2-3), pushing the Social Security and Medicare programs to the brink of insolvency.

Taking a broader historical view, the ratio of the US population between the working ages of 20 to 64, to the population at the standard retirement age of 65 and above, fell from nearly 7 to 1 in 1950, to 4.6 to 1 in 2010, and is projected to decrease further to 3.5 to 1 in 2020, 2.4 to 1 in 2050, and 1.9 to 1 in 2100 (figure 2).

The legal immigration of younger workers represents one of many strategies needed to mitigate this trend.<sup>19</sup>

## Creating Coherent Laws and Policies

Policy coherence would also contribute to the success of legal immigration and enforcement policies, and reduce illegal immigration. As Orrenius and Zavodny (2017) have documented, the United States regularly creates immigration laws and procedures that predictably lead to the need for more visas, but that make no provision for meeting this demand. It also erects unnecessary barriers to available legal immigration procedures.

As of November 2016, for example, 4.26 million persons had been determined by US Citizenship and Immigration Services to have a close family relationship that qualified them for a visa, but were enmeshed in backlogs based on statutory caps by country and by visa preference category (DOS-BCA 2016). An unknown, but certainly large percentage of persons in this situation reside in the United States with the US citizen or LPR family member who petitioned for them. When their visa priority dates become current, most will need to leave the country for consular processing. INA § 245(i) allows certain undocumented persons who pay a substantial fine to adjust to LPR status in the United States, but this process is now available only to beneficiaries of visa petitions filed on or before April 30, 2001.

To make matters worse, IIRIRA created bars to reentry based on unlawful presence in the United States, three years for those out of status for at least 180 days and 10 years for those without status for more than one-year. After leaving the country, potential visa beneficiaries can apply for a waiver to these bars, but many have opted to remain in the United States and forego the ability to secure a visa for fear they will not be able to return. In response, the Obama administration created a process that allows persons in this situation to pre-apply for a waiver to the reentry bars, which offers a reasonable assurance that they will be able to return (USCIS 2016). A coherent immigration system would incentivize “playing by the rules,” reduce backlogs, and permit the beneficiaries of family-based visa petitions to adjust status in the United States within a short period. Removing these barriers to legal status would advance the nation’s interest in unified families and the rule of law.

On a smaller scale, albeit a program with profound consequences, US law bars asylum claims not filed within one year of the applicant’s entry, with exceptions for cases involving “extraordinary circumstances relating to the delay in filing” or “changed circumstances which materially” affect asylum eligibility.<sup>20</sup> Yet beyond the narrow statutory exceptions, victims of violence, torture, and political persecution have many legitimate reasons —

19 Advancing the eligibility age for federal retirement programs and substantial increases in the number of US residents working past age 65 represent additional, complementary strategies to address this challenge.

20 INA § 208(a)(2)(B) and (D).

psychological, emotional, financial and evidentiary — for not applying for political asylum within a year of entry. This deadline — which has affected roughly 30 percent of affirmative asylum cases (Schrag et al. 2010, 688) — has not diminished meretricious or fraudulent claims (Acer and Magner 2013, 449; Kerwin 2015, 233-34). However, it does diminish the ability of bona fide asylum seekers to have their claims considered and, thus, constitutes another unnecessary barrier to legal status. Multiple legislative attempts to repeal this provision have failed (Nezer 2014, 126-27).

Policy coherence also demands that the United States attempt to forecast and plan for the migration and refugee flows generated by US actions in other contexts. In its 2016 report on global risk, the World Economic Forum predicted the increased “likelihood and impact” of involuntary migration, which it saw as strongly connected to conflict, violence, water crises, climate change, and economic factors (WEF 2016, 15). Yet, at present, the United States does not assess the potential “likelihood and impact” on migration of its own policies, much less act to reduce or respond to their inevitable human consequences. It should.

If US foreign interventions, for example, could reasonably be expected to displace large numbers of persons, the United States should take steps to minimize the dislocation or to secure haven for the displaced, including in the United States. This need may be most apparent in the case of US military engagements like the Vietnam War or the invasion of Iraq in 2003, or in proxy conflicts like US interventions in Central America in the 1980s and early 1990s (Kerwin 2016, 89, 93, 98; Musalo and Lee 2017, 52-57). Conflicts predictably generate large numbers of refugees and placed a heightened responsibility on participating states to address their needs (Hollenbach 2016, 160). Although not a perfect fit, “risk management” assessments by the US Department of Defense constitute one possible vehicle to project the migration implications of US overseas commitments and to take steps to minimize forcible displacement and its consequences.

Migration can also result from trade agreements. The North American Free Trade Agreement, which took effect in 1994, vastly disrupted the Mexican agricultural sector and prompted large-scale migration, but did not provide sufficient legal avenues of migration for displaced workers (Fernández-Kelly and Massey 2007, 99). Other regional integration processes facilitate entry or simplify migration in the case of workers tied to particular services or products, or more broadly liberalize the migration of nationals from participating states, thus reducing irregular migration.

### **The Importance of Flexible, Evidence-Based Immigration Policies**

Immigration has been a politically contentious issue throughout US history. Assuming this remains the case and global integration continues to accelerate, the United States will increasingly need an immigration system that can adjust its admission priorities and numbers, relying on the best, most current data and research, in order to meet its underlying goals. Yet, the US employment-based immigration system has not been substantially revised since 1990, and at present there is no mechanism in place to adjust visa categories

or admission levels based on changed US economic conditions or labor needs. The system's lack of flexibility and responsiveness represents a glaring deficiency.

In recent years, several proposals have emerged to remedy this problem and to make US legal immigration policies more flexible and responsive to US needs and interests. In 2006, for example, the Migration Policy Institute proposed the establishment of a Standing Commission on Immigration and Labor Markets to analyze data on labor market conditions, trends, and needs, and to make recommendations to Congress and the president on possible adjustments to levels and categories of admission (Meissner et al. 2006, 41-43). The commission's overarching goals would be to promote economic growth, prevent wage depression, and help maintain low unemployment rates (*ibid.*). Similarly, in 2009, Ray Marshall, former Secretary of the Department of Labor, proposed an independent Foreign Worker Adjustment Commission (FWAC), which would "assess labor shortages and determine the number and characteristics of foreign workers to be admitted for employment purposes" based on "analyses of domestic labor supply and demand of workers with appropriate skills and training" (Marshall 2009, 22). Unless Congress rejected FWAC's recommendations, they would become law (*ibid.*).

These ideas have been caricatured on one hand as an attempt to insert a clumsy, central planning mechanism between employers and necessary workers, and on the other for the possibility that a commission could be co-opted by business interests set on depressing wages and undermining working conditions.<sup>21</sup>

Pia Orrenius and Madeline Zavodny (2017, 190) argue that flexibility in admissions could also "be built in via automatic adjustment mechanisms, such as a formula that increases the number of temporary and permanent employment-based visas when the unemployment rate is low and falling and GDP growth is rising and reduces it when the opposite occurs" or via "market-based mechanisms to allocate employment visas, such as auctioning off [employment] permits" (*ibid.*). They also propose "[a]utomatically creating more family-based visas for migrants from a given country in response to larger legal inflows from that country" or simply to remove "the country cap on permanent visas" (*ibid.*, 189).

As it stands, there is no formal, independent body on which Congress or the executive can rely to:

- identify the nation's evolving labor, family, or humanitarian needs that might be met through immigration, including on a state and local level;
- identify shortages in skills and occupations necessary to promote that nation's economic competitiveness;
- assess the labor market contributions and other trajectories of those who enter via different categories of admission, including family-based visas;
- propose adjustments in legal admission levels and categories to reflect the nation's needs, interests, and fluctuations in its economy;
- conduct research on the views of immigrants on US immigration policies in order to

21 A less threatening version of these ideas might be the United Kingdom's Migration Advisory Committee, which is "an independent, non-statutory, non-time limited, non-departmental public body that advises the government on migration issues," producing reports on the impacts of immigration, limits on immigration, and labor shortages within occupations (Migration Advisory Committee 2017).

- strengthen the legal immigration system, develop strategies to advance policy goals, and better understand and address noncompliance with the law (Ryo 2017); and
- champion access by researchers to relevant datasets in order to build a more extensive evidence base on which Congress and the executive can make policy judgments in this area.

The absence of this kind of body is not just an opportunity foregone. Rather, the status quo undermines US competitiveness, a central goal of the immigration system. As Orrenius and Zavodny (2017, 189) point out: “Rigid caps for permanent residents and some categories of temporary foreign workers have resulted in tremendous backlogs and inefficient lotteries and have discouraged countless potential would-be immigrants from applying or staying in the United States; they may even encourage some companies to open or expand operations overseas instead of domestically” (ibid.). Moreover, the misalignment between US needs and available workers incentivizes illegal migration and the illegal hiring of undocumented immigrants. For example, the United States allots only 5,000 permanent visas per year, and has two narrow temporary worker programs for less skilled workers. These programs do not begin to cover the need for foreign workers, as was particularly evident during the height of illegal migration to the United States in the mid to late 1990s and early 2000s (Rosenblum 2012, 20).

By contrast, the Refugee Act of 1980 built a measure of flexibility into US refugee admissions by requiring the president annually, in consultation with Congress, to establish overall refugee admission levels and allocate refugee numbers by region and to an unallocated reserve. The system is not ideal: Annual caps mean that “humanitarian migrants may have to choose between living in deplorable conditions in a third country and risking a dangerous journey . . . in order to apply for asylum” (Orrenius and Zavodny 2017). Yet, it allows for adjustment in numbers and geographic mix of refugees based on US priorities, changed conditions, and need. Beyond refugee admission, the legal vehicles available to admit imperiled persons from abroad are limited to “parole” on a “case-by-case” basis for urgent humanitarian reasons or significant public benefit, and to visas for certain Iraqi and Afghani nationals who supported the US military and related entities (Kerwin 2014, 51-53).

A more robust refugee and humanitarian program would provide greater flexibility and more options for admitting refugees and humanitarian migrants who are at great risk (ibid., 62-63). It would also rely on available data to target development and diplomatic interventions; to anticipate and plan for large-scale humanitarian migration; and, to establish refugee admission and humanitarian parole priorities. As it stands, many states and international actors produce annual reports, indices, state performance rankings and data on development, human rights, the rule of law, civil rights, business friendliness, corruption, transparency, human capital, state fragility, poverty, and religious liberty. However, these credible reports do not inform US admission policies. They should.

Along these lines, a team of scholars from Georgetown University has been engaged in a promising initiative to forecast forced migration and other responses by families, households, and communities to what the scholars call “menacing contexts” (Collmann 2016). The research builds on “dread threat” theory, which addresses how “ordinary

people” assess the risks posed by hazardous activities and technologies (ibid., 274, 276). A “menacing context emerges when a dread threat” persists and leads to a community response, whether it is flight or strategies to mitigate the risk that involve staying in place (ibid., 277, 286). While in its preliminary stages, this work could ultimately be valuable in anticipating, preventing, and mitigating the consequences of forced migration.

## **Reducing Illegal Migration and the US Undocumented Population into Perpetuity**

The paper has, thus far, argued for reform of the legal immigration system, and assumed a robust immigration enforcement system. However, “legalizing” the US immigration system also demands that the US undocumented population be substantially reduced in size and kept at acceptably low levels in the future. To that end, this section provides a historical overview of this population, how and when it emerged, why it grew from being undetectable in the 1970 census count to peaking at 12 million in 2008 before declining to 11 million in 2015.

Reports of massive levels of undocumented immigration have surfaced since at least the 1920s. In 1925, the Immigration Service reported that 1.4 million immigrants were living in the country illegally (AIC 2016). Exaggerated numbers were generated for three primary reasons: to increase the budgets of agencies charged with regulating immigration, to frighten the public into voting for particular candidates, and to support the positions of anti-immigrant groups. Until 1983, the reports had another feature in common — *none* of them had any empirical basis.

This section of the paper contrasts the data-based estimates of the undocumented population with the exaggerated, self-interested claims, especially in the 1970 to 1983 and the 2015 to 2016 periods. It divides this review into three time periods: before 1970, 1970 to 1982, and 1983 to the present. It concludes that a properly structured legalization program, combined with underlying legal immigration reform and strong enforcement, would not trigger large-scale illegal migration and could lead to a permanently reduced undocumented population.

### ***Before 1970***

Before the 1970s, the topic of undocumented immigrants and illegal migration was raised at different times, but generally was not perceived to be a pressing national issue. In the 1920s, the focus was primarily on preventing entries from Asia and southern and eastern Europe. According to a 1923 article in the *New York Times*, W. H. Husband, commissioner general of immigration, sought “to stem the flow of immigrants from central and southern Europe, Africa and Asia” which had been “leaking across the borders of Mexico and Canada and through the ports of the east and west coasts” (AIC 2016).

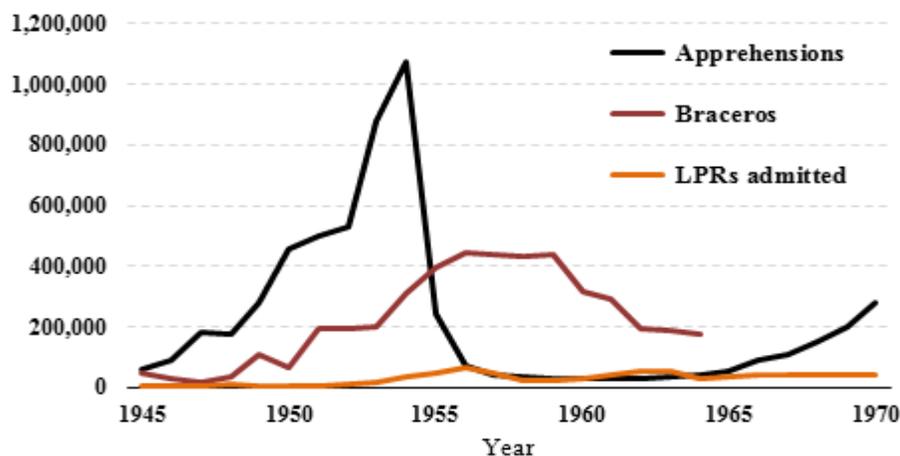
Comparing DHS data on admissions from 1920 to 1929 with the 1930 census count of the foreign-born population admitted during that period does not show any growth in the undocumented population in the 1920s. A total of 4.3 million immigrants were admitted from 1920 to 1929, but only 2.5 million foreign born were counted in the 1930 census.

This indicates that to the extent there was any undocumented immigration in the 1920s, it was far overshadowed by emigration from the United States. This analysis casts doubts on the Immigration Service’s claim of 1.4 million immigrants living in the country illegally in 1925.

The Great Depression and World War II reduced the flow of immigrants during the 1930s and 1940s. During that 20-year period, a total of 1.5 million immigrants were admitted, and 930,000 emigrated (Warren and Kraly 1985, table 1).<sup>22</sup> Because of ageing and emigration, the foreign-born population dropped by 3.5 million, from 13.1 million in 1930 to 9.6 million in 1950.

The 1950s were more eventful in terms of undocumented migration, and much of the focus was on temporary migration between Mexico and the United States. As figure 3 shows, the number of apprehensions increased with the admission of *braceros*<sup>23</sup> in the early 1950s.

**Figure 3. Migration from Mexico, by Category: 1945 to 1970**



After a large-scale enforcement operation in 1954, apprehensions fell sharply and remained at a relatively low level even as the Bracero Program was being phased out from 1960 to 1964 (figure 3). By 1970, the total undocumented population had reached almost one million.<sup>24</sup>

As the pre-1970 period came to a close, two significant events set the stage for an unprecedented expansion of the US undocumented population. The first, the Bracero Program, gave Mexican workers extensive experience in the US labor market and helped to reinforce the migration pattern already established by the hundreds of thousands of

22 Of the 930,000 emigrants, 640,000 were non-US citizens and 290,000 were US citizens.

23 The Bracero Program involved a series of agreements between the United States and Mexico that began in August 1942 when the United States and Mexico signed the Mexican Farm Labor Agreement. The program was designed to prevent labor shortages in perishable agriculture in the United States. A detailed description of the Bracero Program is available in Martin (2003).

24 This figure was derived based on estimates of “Entered 1960-1969” shown in Warren and Passel (1987), table 2, adjusted for emigration, mortality, and undercount from 1970 to 1980.

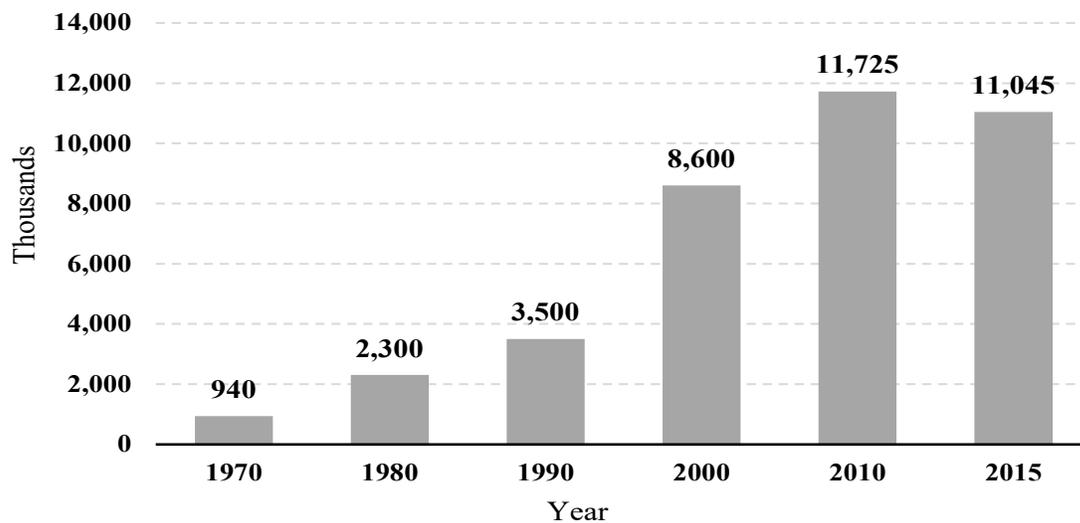
Mexicans who had begun migrating on their own at the end of the war (figure 3). The second event was the passage of the Immigration and Nationality Act of 1965. The Act established the first numerical limit on immigration from the Western Hemisphere. In addition, it had the effect of increasing immigration from other areas of the world. Immigration from Asian countries, especially India, increased sharply.<sup>25</sup> Undocumented immigration from Mexico began to increase during the 1970s, and increasing numbers of undocumented immigrants began to arrive from India and other countries.

*The 1970 to 1983 Period*

The pre-1970 period might be characterized as a pre-undocumented period. It saw relatively low undocumented population growth, little national concern about this population, and no empirically based estimates of the population. By contrast, the 1970 to 1983 period was marked by a growing undocumented population and increasing national concern about the undocumented, but, as in the earlier period, *no* empirically-based estimates of the population. The combination of a growing population, increasing concern over it, and the lack of credible estimates produced a period of uninformed speculation that made the search for solutions on this issue even more difficult.

Figure 4 shows the best empirical estimates<sup>26</sup> of the number of undocumented residents living in the United States from 1970 to 2015.

**Figure 4. Undocumented Residents in the United States: 1970 to 2015**



25 The Act may also have increased undocumented migration from Asian and other countries because it failed to set aside visas for the relatives (who would arrive later) of its beneficiaries.

26 While there is a (hopefully small) range of error around these estimates, each of the estimates shown in figure 4 is based on US Census Bureau and DHS data along with assumptions that are supported by other demographic data. The estimates generally agree with similar estimates derived by the Pew Research Center and DHS.

## National Interests and Common Ground in the US Immigration Debate

The estimates in Figure 4 provide perspective on the discussion that follows. In contrast to some of the speculative estimates made during this period, there is now convincing statistical evidence that in this period the actual population varied from 1.0 to 2.5 million and average annual growth was in the 100,000 to 200,000 range (figure 4).

Arthur Corwin (1982) provided a detailed description of what he termed “the numbers game” in the period from 1970 to the early 1980s. He reported that in 1972, Immigration and Naturalization Service (INS) Commissioner Raymond Ferrell estimated that as many as one million undocumented immigrants lived in the United States. Ironically, this is one of the few good statistical guesses during this period. The estimates leaped upward in 1974 as Attorney General William Saxbe estimated the number to be between four and seven million. That same year, INS Commissioner Chapman spoke of a “silent invasion,” and estimated the number to be between four and 12 million.

In 1975, the INS awarded a contract to Lesko Associates to derive estimates. In the absence of any data, a panel of immigration experts and academics concluded that the undocumented population was 8.2 million, of which 5.2 million were from Mexico. Next, Commissioner Chapman asked the INS district directors to estimate the size of this population. The resulting district-by-district survey led to a total estimate of 5.5 to 6 million, and the results were presented to congressional committees in early 1976. From 1971 to 1977, the INS budget doubled from \$121.9 million to \$245 million. In 1980, at the request of the Select Committee on Immigration and Refugee Policy, Census Bureau demographers reviewed the various studies and estimates and concluded: “The total number of illegal residents in the United States . . . is almost certainly below 6.0 million, and may be substantially less, possibly only 3.5 to 5.0 million.” With hindsight, we can see that even these estimates were far too high, although at the time they were generally considered to be too conservative.

The report by Corwin is more than a compilation of unfounded estimates of the population during this period. It also includes important insights into the unforeseen consequences of the numbers game. The tendency to fabricate numbers without regard for facts set a pattern that persists today. It also established a template for increasing funding for the INS. Corwin noted that by the “use of plausible statistical estimates, and a whirlwind public relations campaign . . . Commissioner Chapman, with assistance from understanding Congressmen, was able to bring about a considerable improvement in the pathetic resources of the INS,” leading to increased “apprehension totals” (Corwin 1982).

Even more importantly, the large budget increases, based on unfounded estimates, led to sharply increasing numbers of apprehensions, setting the stage for a rapid increase in the resident undocumented population. Because it became more difficult to work in the United States temporarily, visit home for the holidays, and then return to the United States, increasing numbers of undocumented residents chose to settle in the United States.

The end of the Bracero Program, limits on immigration from Western Hemisphere countries, increased border control, and insufficient numbers of visas set the stage for rapid growth in the undocumented population. Even so, it would take about 25 years for the population to reach the speculative levels of the mid-1970s (figure 4).

### *1983 to the Present*

In early 1983, the Reagan administration estimated the undocumented population to be 6.5 million and the Congressional Budget Office estimated it at 4.5 million (Pear 1983). However, that same year demographers at the Census Bureau derived the first empirically based estimates of the undocumented population in the United States (Warren and Passel 1987). First, they estimated that 12 million foreign born resided legally in the United States in 1980. Then, they subtracted that number from the 14.1 million foreign born counted in the census. The difference, or the residual, was 2.1 million counted in the 1980 census. The finding that the population in 1980 was roughly two million, rather than three or four times that number, probably contributed to IRCA's eventual passage.

IRCA included four legalization programs:

- a general legalization program for persons without status from January 1, 1982 to the date of the bill's enactment, and who met continuous presence and other requirements;
- a Special Agricultural Worker (SAW) program that covered persons who had performed seasonal agricultural work for at least 90 days in a 12-month period in 1985 and 1986;
- an updated registry program for persons who arrived in the United States prior to January 1, 1972; and
- a smaller program for certain "Cuban-Haitian" entrants who arrived prior to January 1, 1982 (Kerwin 2010, 3-4, 7).

After IRCA's passage, the INS had to determine the number of potential applicants living in each state in order to set up legalization offices. The Statistics Division adopted the methods developed by the Census Bureau, along with a range of assumptions about undercount, to project the number likely to apply at the national and state level. Applications were projected to be between 1.3 million and 2.6 million. In fact, ultimately 1.6 million applied for the general amnesty program, and applications were within the projected ranges in nearly all of the states. This result strongly validated the residual method, which became the standard for estimating the undocumented population.

Figure 5 shows the change in the undocumented population from 1990 to 2014. Population growth increased for about three years after IRCA before returning to pre-IRCA levels. The relatively high growth for 1990 in the trend line in figure 5 was likely the result of relatives coming to join IRCA beneficiaries.

After falling to pre-IRCA levels from 1992 to 1994, growth rose to about 500,000 per year in 1995 and 1996. Population growth fell sharply in the decade from 2000 to 2010, reaching zero growth in 2008 (figure 5). Since 2008, the total population has declined by about one million.

IRCA is often cited as a case study in how legalization programs invariably spur further illegal migration. However, IRCA's well-known shortcomings need not be replicated in a future legalization program. IRCA failed to prevent growth in the US undocumented population for five principal reasons. First and foremost, it did not reform the US legal immigration system. Neither IRCA nor subsequent legislation established a legal immigration system

that could accommodate the high demand for lower-skilled work in the mid- to late 1990s and early 2000s. Illegal migration spiked during this period to fill the void.

**Figure 5. Annual Undocumented Population Change: 1990 to 2014**



Second, IRCA did not provide “derivative” status to the close family members of general legalization or SAW beneficiaries. Instead, only after program beneficiaries became LPRs could they petition for their family members to join them. The resulting glut in petitions led to the current multiyear backlogs in the family-based immigration system.

Third, IRCA did not legalize enough undocumented persons, paving the way for the subsequent growth of this population. Perhaps as many undocumented immigrants did not meet its eligibility standards, as those who did. As an example, the general legalization program applied to persons who lacked status for the entire period from January 1, 1982 to the bill’s passage. Even a single day in legal status during this period was disqualifying.

Fourth, the SAW program attempted to address the labor needs of the perishable agriculture industry, which overwhelmingly employs workers between age 18 and 30. By 2000, however, virtually all SAW-legalized workers had effectively “aged out” of perishable agriculture work and been replaced by undocumented workers (Martin 2017, 256). As a result, there were no shortages to trigger IRCA’s program to replenish agricultural workers. Fifth, the INS did not aggressively enforce IRCA’s employer verification and sanctions program, and these programs were easily circumvented by the widespread use of fraudulent documents.

### *The Current Undocumented Population*

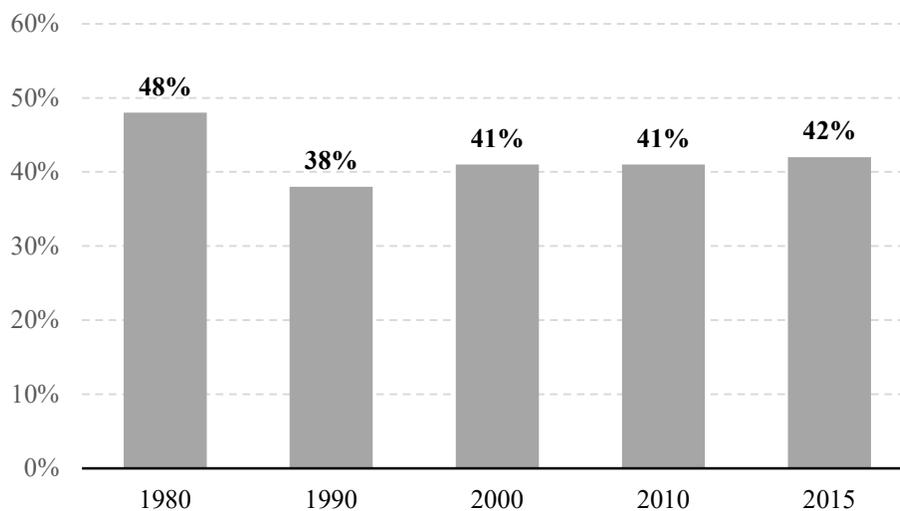
Much of the public discussion about undocumented immigration has focused on illegal entries across the southern border (often labeled as “entry without inspection,” or EWIs).

The substantial numbers of undocumented residents who overstay temporary visas has received less attention. Unauthorized immigrants from all but a few countries (primarily Mexico and some Central American countries) are overstays.<sup>27</sup> The Center for Migration Studies (CMS) recently released a report focusing on the percent of the 2014 undocumented population that are overstays (Warren and Kerwin 2017b). Its major findings include the following:

- In 2014, about 4.5 million US residents, or 42 percent of the total undocumented population, were overstays.
- Overstays accounted for about two-thirds (66 percent) of those who *arrived* (i.e., joined the undocumented population) in 2014.<sup>28</sup>
- Overstays have exceeded EWIs every year since 2007: 600,000 more overstays than EWIs have arrived since 2007.
- Mexico is the leading country for both overstays and EWIs; about one-third of undocumented arrivals from Mexico in 2014 were overstays.
- California has the largest number of overstays (890,000), followed by New York (520,000), Texas (475,000), and Florida (435,000).

The CMS report focused on the undocumented population residing in the United States in 2014. To determine long-term trends in the proportion of the population that are overstays, CMS derived estimates of the percent of the undocumented population that were overstays as far back as 1980,<sup>29</sup> as shown in figure 6.

**Figure 6. Percent of the Undocumented Population That Were Overstays: 1980 to 2015**



27 The term “overstays” refers to foreign-born persons who enter the United States legally on a nonimmigrant (temporary) visa and remain beyond their approved period of admission.

28 The proposed 2,000-mile border wall will do nothing to address visa overstays.

29 The percentages shown in figure 5 are based on the total population estimates shown in figure 4.

This overview of the US undocumented population offers several lessons on “legalizing” the US immigration system. It illustrates how:

- Baseless estimates of the US undocumented population can hamper effective policymaking.
- The failure to act in the area of legal immigration can lead to large increases in the undocumented population.
- The United States created and allowed to flourish demand for labor from Mexico during World War II and its aftermath, and a large circular flow ensued.<sup>30</sup>
- The United States in the 1960s and 1970s increased enforcement and interrupted that flow without setting up a mechanism (acceptable to labor and business) to legalize and channel the flow through ports of entry.
- The Bracero Program, limited immigrant visas, and ramped up enforcement did not stop illegal immigration, but led the undocumented increasingly to stay in the United States.
- The failure to create the necessary visas for close relatives that were sure to join their legalized close relatives led to increased illegal migration (figure 3).
- The SAW program failed to anticipate that its beneficiaries would “age out” of perishable agriculture work, and their jobs would largely be filled by undocumented workers.

It remains to be seen whether the Trump administration’s threatening rhetoric and early surge in immigration enforcement will meaningfully reduce the undocumented population. If past is prologue, it could (instead) further entrench, marginalize, and discourage the integration the US undocumented and their families (Massey, Durand, and Pren 2014, 1042-43; Warren and Kerwin 2017a). While a credible system of immigration enforcement will be necessary to minimize the size of the undocumented population now and in the future, enforcement alone cannot achieve this goal. It must be combined with legal immigration reform and a legalization program that does not repeat the mistakes of past programs.

### **Finding the Numbers to Facilitate Reform**

Some of the proposed reforms set forth in this paper could reduce legal immigration numbers by, for example, reducing visas in categories in which there are sufficient US workers. Others might require increased legal admissions to respond, for example, to family-based visa backlogs or to the immigration needs created by US immigration laws and foreign policy commitments. However, increases in legal immigration numbers can be offset, at least in part, by reissuing the visas of those who have left the country.

Emigration has always been an integral part of the process of immigration to the United States, even though it has gone largely unrecognized. About 10 million, or one-third, of the 30 million immigrants admitted from 1900 to 1980 emigrated (Warren and Kraly 1985). In 2001, the Census Bureau derived estimates of foreign-born emigration for use in their national population estimates program (Mulder et al. 2001). Average annual emigration was estimated to be 265,000 in the 1990 to 1999 decade. In the period from 2010 to 2015,

<sup>30</sup> We know this migration was circular because, even with the large flow of labor from Mexico from the war to 1970, there were only 105,000 Mexican born aged 65 and over in the 1970 census.

a total of 5.15 million immigrants were admitted by DHS, but the Census Bureau's count of the foreign born increased by only 3.73 million during the same period. Based on these numbers, average annual emigration was 284,000 in the most recent five-year period. These examples make it clear that 250,000 visas could be reissued each year without exceeding the INA's numerical limits.

The recommendation to reissue the visas of emigrants each year was first raised in 1985 (Warren and Kraly 1985). The authors stated: "Recognizing and measuring the emigration of former U.S. immigrants would allow U.S. immigration policy to become more flexible and responsive to changing circumstances." If this proposal had been adopted as part of IRCA, a total of 6.5 million visas would have been available from 1987 to 2017. As Warren and Kraly noted, these visas could have been used for emergency situations, as well as to speed up the reunification of families already in the United States. As a result, the undocumented population would be far smaller today, possibly only one-half of its current size.

The policy of reissuing visas would help to achieve some of the goals described in this paper. For example, reissuing 250,000 visas of emigrants each year could reduce the backlog of 4.3 million family-based visas by more than one-half in nine years and, thus, substantially reduce the US undocumented population in less than a decade.

## Policy Recommendations

### *Fix the Legal Immigration System*

This paper has identified several interests and goals to be served by US immigration and refugee policies, and has argued that these interests can only be met through:

- coordination with other nations, multiple federal agencies, local government, and relevant NGOs, preferably through a national integration program;
- improved migration governance;
- incorporation of immigration and refugee concerns into a larger set of policy processes; and
- fact-based, flexible, and timely legal immigration and refugee policies.

As the Council on Foreign Relations' Independent Task Force on US Immigration Policy concluded in 2009:

. . . [G]etting legal immigration right is the most critical immigration policy challenge facing the administration and Congress. Although not enough on its own, the most effective way to combat illegal immigration is to have an immigration policy that provides adequate and timely means for the United States to admit legal immigrants.

(CFR 2009, 49)

To that end, the paper endorses previous calls for an independent commission to advise Congress and the executive on US labor market and economic needs that might be met

by immigrants. Such a commission could also study the perspectives and perceptions of immigrants regarding the US immigration system in order to create stronger legal immigration policies, develop new strategies to achieve US policy goals, and promote greater compliance with the law (Ryo 2017). The paper also proposes that the United States rely upon the abundant datasets, indices, state rankings, and reports on the conditions that drive migration, in order to target its development and diplomatic interventions; anticipate and plan for large-scale migration; and inform its refugee admission and humanitarian parole priorities.

It stands to reason that more closely aligning US immigration policies with the nation's interests and, where possible, with the needs of sending, transit, and other host states would channel more migrants into legal immigration streams and reduce illegal migration. The paper also offers a way to carry out these reforms without substantially increasing legal immigration numbers, i.e, by reissuing the roughly 250,000 visas of persons who emigrate each year.

Legal immigration reform must be the centerpiece of broader reform legislation because, without it, the US immigration system cannot advance *any* of the compelling national interests that it is intended to serve. Moreover, illegal migration and the undocumented population will persist at unacceptable levels, putting immense pressure on the enforcement system. At present, this massive system often works at cross purposes to other social values (Meissner et al. 2013), including those the immigration system is supposed to advance. It divides and impoverishes US families (Chaudry et al. 2010; ABA 2004; CLINIC 2001, 39-45; CLINIC 2000); threatens social cohesion (Warren and Kerwin 2017a; Heyman 2014); subverts US humanitarian goals (Kerwin 2015, 213-22); and undermines due process and the rule of law (MRS/USCCB and CMS 2015, 180-84; ACLU 2014; ABA 2010). Absent reform, its continued growth will only exacerbate these anomalies.

### *Legalize the Current Undocumented Population*

The authors have repeatedly argued in favor of a large legalization program based on the transitional nature of immigration status and the high (and growing) percentage of undocumented residents with long tenure and strong equitable ties to the United States (Warren and Kerwin 2015, 99-100). This paper underscores the need for such a program, and the related need to eliminate barriers to legal immigration like the three and 10 year bars and the cutoff date on eligibility for in-country adjustment of status under INA § 245(i). The great majority of undocumented residents: (1) will ultimately qualify to become legal residents under current law if given the time; (2) have developed such strong ties to the United States that their removal would work disproportionate harm on them, their US families, and their broader circles of association; or (3) arrived as children and would like to become full members of their nation. At present, the US undocumented population includes:

- a high percentage of the 4.26 million trapped in family-based visa backlogs;<sup>31</sup>
- a high percentage — perhaps 15 percent — who may be eligible for an immigration

31 In any given year, a high percentage of new LPRs, including family-based visa beneficiaries, formerly lacked immigration status (Jasso et al. 2008).

- benefit or relief, but do not know it or cannot afford to pursue it (Wong et al. 2014; Kerwin et al. 2017, 9);
- a large number who will ultimately fall out of this status: between 1982 and 2012, 6.5 million left voluntarily, were removed, or died;
  - 1.9 million with 20 years or more of US residency, 1.6 million with 15 to 19 years of US residency, and 3.1 million with 10 to 14 years of US residency (Warren and Kerwin 2015, 98-100);
  - 3.9 million parents of US citizens or LPRs who would have qualified for the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program and 2.5 million undocumented residents brought to the United States at age 15 or under (ibid., 95); and
  - roughly one million who are counted as undocumented in standard estimates, but whose status is provisional, including persons granted TPS, asylum seekers, parolees, and others.<sup>32</sup>

A legalization program that offered a path to LPR status for these populations would advance many of the goals that US immigration policy exists to serve, and would allow enforcement resources to be directed at a far smaller population.

While politically fraught, legalization programs have been a regular feature of US immigration legislation. Between World War II and the Refugee Act of 1980, for example, the United States admitted and subsequently extended LPR status to several large refugee-like populations, including displaced persons after World War II, Hungarians after the Revolution of 1956, Cubans in flight from the communist revolution, Chileans after the military coup in 1973, Indochinese after the fall of Saigon, and Soviet Jews and other religious minorities (Kerwin 2012, 31). It has also legalized undocumented immigrants based on long tenure and good moral character, including through IRCA's general legalization and registry programs, and to persons granted "cancellation of removal" (previously "suspension of deportation") based on continuous residence for at least 10 years, good moral character, and "exceptional and extremely unusual hardship to a US citizen or LPR spouse, parent or child."<sup>33</sup> Since 1986, the United States has legalized 2.15 million persons that belong to discrete groups (not counting IRCA's general legalization program), defined by work (farmworkers and nurses), equitable ties, and nationality (Kerwin 2010, 2-3).

### ***Keep the Undocumented Population Low***

Once the United States meaningfully reduces the undocumented population, it should ensure that this population remains at acceptably low levels in the future. As discussed, the kind of legal immigration policies set forth in this paper — coherent, flexible, fact-based, and closely aligned to US interests — represent one way to keep the population low. Removing

32 Some categories of legal or quasi-legal residents, such as asylum seekers, parolees, persons who have filed for (but not officially received) LPR status, and TPS recipients, are included as undocumented residents in virtually all of the current estimates of 11 million. Passel and Cohn (2009) noted that their residual estimate of 11.9 million unauthorized residents in 2008 included "immigrants from certain countries holding temporary protected status (TPS) or people who have filed for asylum status but whose claims are unresolved." They reported that: "*This group may account for as much as 10% of the unauthorized estimate.*" Emphasis added.

33 INA § 240A(b).

barriers to legal status like the three- and 10-year bars and the limited eligibility of the 245(i) program — would also reduce the undocumented population. Affording asylum seekers a reasonable opportunity to make their claims, as opposed to threatening them with detention and expedited removal, will uphold the rule of law and provide a disincentive to illegal migration. Offering support for legal screening of low-income undocumented immigrants, combined with reduced application fees and a concerted public education campaign, would prompt many of those who qualify for legal status to pursue it (Wong et al. 2014).

Congress should also advance the registry cutoff date. Nearly two-thirds of the US undocumented population have lived in the United States for at least 10 years, including five million for at least 15 years (Warren and Kerwin 2015, 100). Moving forward the registry date at regular intervals would help to ensure that the long-term undocumented population never again approximates its current size. The US registry program provides LPR status to certain, long-term undocumented residents, with good moral character, who would not be ineligible for citizenship, and who are not inadmissible on security and other grounds.<sup>34</sup> This program initially covered persons who arrived prior to June 3, 1921 and resided continuously in the United States until the passage of the Act of March 2, 1929.<sup>35</sup> The arrival cutoff date has been advanced several times since 1929. However, it has not been advanced since the passage of IRCA more than 30 years ago, which is the longest gap in advancing the date since 1929. Moreover, registry has historically been available to undocumented persons who have resided in the United States from between eight to 18 years. However, it now extends only to persons that have resided continuously in the United States since January 1, 1972, which is 45 years ago (table 1).

**Table 1. Summary of Changes to the Registry Provision**

Date of change	Eligible if entered before Jan. 1	Years between date enacted and year eligible
1929	1921	8 years
1940	1924	16 years
1958	1940	18 years
1965	1948	17 years
1986	1972	14 years
Currently	1972	45 years
Average years between date changes		Average years above
14.5		14.5

Source: USCIS.

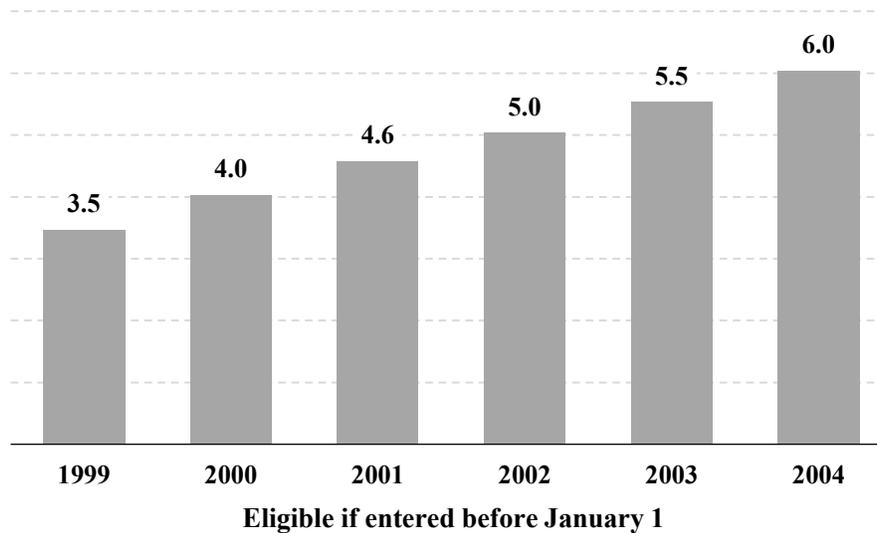
Figure 7 shows the number of undocumented persons who would qualify to register if the date were moved ahead. If Congress advanced the cutoff date to January 1, 2002, for example, five million undocumented persons would be potentially eligible.

34 INA § 249.

35 Act of March 2, 1929, ch. 536, 45 Stat. 1512-1513 (1929).

**Figure 7. Number Eligible for Selected Registry Dates**

\*Assumes legislation is enacted in 2017 (*in millions*)



The registry date should also be moved up automatically by one year, each year thereafter. A “rolling” registry program would ensure that the United States would never again have another long-term undocumented population, comparable to the present one. Another way to accomplish this goal would be to allow undocumented persons to apply affirmatively for “cancellation of removal,” rather than to have to wait until they are placed in removal proceedings.

The US deportation and detention system offers far fewer due process protections than the criminal justice system and its shortcomings have contributed to the large US undocumented population. For example, there is no statute of limitations for administrative immigration violations, as opposed to immigration-related crimes. Moreover, the INA affords very few possibilities for undocumented persons to gain legal status based on long-term residence and equitable ties to the United States. DHS can exercise prosecutorial discretion in deciding which undocumented persons to apprehend and place in removal proceeding. However, Immigration and Customs Enforcement (ICE) trial attorneys and Department of Justice immigration judges have little statutory discretion to negotiate or offer undocumented persons an option (other than removal) based on the equities. ICE trial attorneys can agree to close or terminate cases, but their discretion is tightly circumscribed. As immigration judges regularly remind the persons before them, they do not preside over a court of equity (Ahmed, Appelbaum, and Jordan 2017, 208).

The three principle options for persons in removal proceeding are: to be found not removable as charged, to be granted relief from removal, or to be ordered removed. By contrast, prosecutors have broad discretion in charging defendants and negotiating plea agreements, which is how the overwhelming majority of criminal cases are resolved (Weiser 2016).

Finally, the concept of *mens rea*, which speaks to the need for criminal knowledge and intent, cannot be invoked as a defense to deportation. The result is particularly egregious

in the cases of undocumented persons brought to the United States as children. Congress should provide greater equitable relief from removal, more options (like fines) that would allow government attorneys to settle cases in ways short of a removal order, and should vest greater discretion in immigration officials so that they can take into account the blameworthiness and intent of immigration violators before placing them in the removal adjudication system. These three reforms would help to reduce and maintain the US undocumented population at a low level. Combined with the other proposals set forth in this paper, they would go far to “legalizing” the US immigration system.

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