

CARDOZO LAW REVIEW  
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THE COSTS OF TRUMPED-UP IMMIGRATION  
ENFORCEMENT MEASURES

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*Currently, our country spends \$18 billion each year on immigration enforcement, which is nearly \$4 billion more than the combined budgets of the FBI, DEA, Secret Service, and ATF. President Trump hopes to substantially increase that annual number with his proposed heightened enforcement measures that result in more arrests, more ICE officers roaming our streets, airports, and courtrooms, more detentions, more deportations, and more wall. This essay begins by examining each of these measures that were outlined in the new executive orders and concludes that all are expensive, ineffective, unnecessary, and inhumane.*

*Just as being “Tough on Crime” was proven a waste of financial resources and human capital, so too are “Tough on Immigration” policies. In reforming the misguided immigration enforcement measures, there are three notable issues.*

*The first issue is that the new enforcement measures are a break from the past practices in that they implement enforcement practices without compassion and, result in unprecedented fear in immigrant communities. Although the level of cruelty is new, the objectives to*

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*pursue enforcement-only measures did not originate with President Trump. For the past 20 years, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) fundamentally changed immigration law by expanding who could be deported and cutting off numerous ways people used to earn status.*

*The second point is that even if President Trump were to leave office tomorrow, an enforcement-only immigration policy would not end. The legal framework has been pursued because of an underlying narrative that immigrants are harming the country and draining resources; however, this narrative is contrary to reality. Not only do immigrants contribute talents, pay taxes, and provide labor and skills otherwise unavailable, but immigrants uniquely contribute to our character as Americans. The continued pursuit of enforcement-only immigration policies will measure losses not only in the dollars spent but also by what collective and national values are lost.*

*The third is a more pragmatic intervention. The choice is not between the status quo and open borders. To the contrary, by repealing IIRIRA and updating enforcement with new technologies, we can return to a system that lets immigrants earn legal status through families, work, conduct, and contributions.*

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## INTRODUCTION

In his first week of office, President Trump signed two executive orders seeking to substantially increase immigration enforcement measures.<sup>1</sup> Trump's executive orders direct Immigration and Customs Enforcement (ICE) to abandon any priorities in who it should deport, hire 15,000 more officers to effectuate arrests, direct cities and states to assist in enforcing immigration law by punishing sanctuary jurisdictions, build more detention centers to house non-citizens, expand the use of expedited removal—a process by which persons can be deported without hearings—and build more wall along the U.S. southern border.

Part I of this Article explains that due to fiscal concerns and legal deficiencies, these new policies have not yet been fully implemented, and the parts that have been, are irrational or ineffective. In the first 100 days, the policy did increase immigration arrests by nearly 40% from 2016. But among those arrested, only 6% have been convicted of serious crimes. Moreover, the 15,000 new border patrol officers can only be hired if applicants are not required to have background checks. A federal court has stayed the punitive measures against sanctuary jurisdictions because the administration is without legal authority to conscript local actors to perform federal functions. State and federal courts are finding that the ICE requests to detain persons violate the Constitution. Detention centers are run by for-profit prisons that enrich corporations. Expedited removal is being expanded in ways to deny hearings to those who may be eligible for remedies. And the Senate has blocked appropriations to the southern wall that starts at \$21 billion.

Part I further highlights that the financial costs of immigration enforcement are substantial. Prior to Trump, the federal government annually spent \$18 billion on immigration enforcement, which is nearly \$4 billion more than the budgets of the Federal Bureau of

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<sup>1</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017); Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, Customs & Border Prot., et al. (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) [hereinafter Kelly, *Enforcement of Immigration Laws*]; Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, Customs & Border Prot., et al. (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf) [hereinafter Kelly, *Implementing the President's Border Security*].

Investigations, Drug Enforcement Agency, Secret Service, and Bureau of Alcohol, Tobacco, and Firearms combined. Trump claimed his new measures were needed to stop the drug rings, human-traffickers, and undocumented individuals who cross the border with the intent to harm and kill Americans.<sup>2</sup> But Trump's proposals to increase immigration enforcement is based on lies that immigrants pose a threat of criminality. In reality, immigrants commit fewer crimes than citizens,<sup>3</sup> the crime rate in the United States remains at a twenty-year low,<sup>4</sup> and, since 2009, the flow of immigration has ebbed to the lowest level in fifty years.<sup>5</sup>

The trumped-up reasons for trumped-up immigration enforcement is coming at a substantial cost, not simply in the billions of dollars spent, but also by what is lost in failing to legalize status for immigrants. The "Tough on Crime" era left us with mass incarceration, broken communities, and a 75% recidivism rate. Both Republicans and Democrats now embrace "Smart on Crime" initiatives to stop crime without more prisons and with shorter sentences.<sup>6</sup> Being "Tough on Immigration" is equally nonsensical and wasteful. Accordingly, it is critical to respond with a call to pursue "Smart Immigration" measures, which ensure that our country continues to benefit from immigrants and immigration.

There is no doubt that the Trump administration should be criticized for these new practices. ICE is arresting crime victims at courthouses, patients in hospital beds, and persons seeking legal status at their routine check-ins, and even at interviews where they are requesting status. This cruel and arbitrary enforcement is generating a climate of fear.

As explored in Part II, President Trump did not newly-create a

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<sup>2</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8,793, 8,793 (Jan. 25, 2017).

<sup>3</sup> See Philip Bump, *Surprise! Donald Trump Is Wrong About Immigrants and Crime*, WASH. POST (July 2, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/07/02/surprise-donald-trump-is-wrong-about-immigrants-and-crime> (citing studies and results from multiple sources showing that there is "no correlation" between immigration and violent crime, and that incarceration rates among young men are lowest for immigrant populations); Alex Nowrasteh, *Immigration and Crime—What the Research Says*, CATO INST. (July 14, 2015, 11:49 AM), <http://www.cato.org/blog/immigration-crime-what-research-says> ("[I]mmigrants are less crime prone than the native-born population.").

<sup>4</sup> See Alan Neuhauser, *U.S. Crime Rate Rises Slightly, Remains Near 20-Year Low*, U.S. NEWS & WORLD REP. (Sept. 26, 2016, 10:30 AM), <https://www.usnews.com/news/articles/2016-09-26/us-crime-rate-rises-slightly-remains-near-20-year-low>.

<sup>5</sup> Ana Gonzalez-Barrera, *Apprehensions of Mexican Migrants at U.S. Borders Reach Near-Historic Low*, PEW RES. CTR. (Apr. 14, 2016), <http://www.pewresearch.org/fact-tank/2016/04/14/mexico-us-border-apprehensions>.

<sup>6</sup> Not all agree with this framing of how and why the U.S. has been engaged in over-incarceration. For a thoughtful discussion on how the Tough on Crime policies may be engaged in a larger project of targeting and punishing marginalized people, see César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1497 (2015) ("That imprisonment is now viewed as normal represents the triumph of a particular political project.").

framework to prioritize enforcement. First, for the past 20 years, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) fundamentally altered immigration law by dramatically expanding who could be deported and cutting off numerous ways people used to earn status. Those close to the process freely admit that IIRIRA was enacted with a full awareness of its flawed policies, but the politicians embraced it to avoid looking soft on crime and immigration. Scholars have rightfully been criticizing IIRIRA for years, and have done so by voicing compelling concerns over proportionality and formulating theories of equality and fairness.<sup>7</sup> The new bald nativism advanced by President Trump must be countered with stronger frameworks.

Second, ending enforcement-only immigration measures begins with recognizing the contributions immigrants make. Immigrants—both undocumented and legal—pay taxes, start small businesses, dominate skilled and unskilled sectors, and are necessary to sustain social security. Further, immigrants contribute to our national well-being and identity. From personal experience, I did not become patriotic until I saw my country through the eyes of my immigrant clients who reaffirmed the values of tolerance, hard work, generosity, parental sacrifices for children, and a meaningful dedication to give back to their new country.<sup>8</sup>

Third, immigration policy is not a choice between open borders or the status quo. A potential middle ground is returning to immigration

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<sup>7</sup> See generally Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661, 714–23 (2015) [hereinafter Cade, *Enforcing Immigration Equity*]; Jason A. Cade, *Return of the IRAD*, 90 *N.Y.U. L. REV. ONLINE* 36, 39–53 (2015) (proposing that federal enforcers rely on “disproportionality rules of thumb” when making deportation enforcement decisions); Carrie L. Rosenbaum, Symposium, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California Trust Act*, 18 *CHAP. L. REV.* 481, 513 (2015); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 *DUKE L.J.* 1723, 1763 (2010); Lucas Guttentag, Keynote Address, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 *DUKE J. CONST. L. & PUB. POL’Y* 1 (2013); Juliet Stumpf, *Fitting Punishment*, 66 *WASH. & LEE L. REV.* 1683, 1684 (2009) (“One sanction—deportation—is the ubiquitous penalty for any immigration violation. Neither the gravity of the violation nor the harm that results governs whether deportation is the consequence for an immigration violation. Immigration law stands alone in the legal landscape in this respect.”).

<sup>8</sup> For important criticisms of the viewpoint that immigrants must prove their value to justify their legal entry and status, see Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of “Illegality,”* 52 *HARV. J. ON LEGIS.* 355, 357–58 (2015) (“This dynamic is visible in advocacy for legalization schemes wrapped in talking points about immigrants who are valedictorians, parents, and innocent children. Instead of confronting the construction of “illegality” and the distribution of harm to those living in this category, advocates make appeals to the recognition of the humanity of immigrants based on their purportedly hard-working, law-abiding nature. The inclusion of enforcement enhancements in legalization bills translates into a guarantee of increased harms for those “unrespectable” immigrants whose humanity remains unrecognized.”) (citation omitted).

law before 1996 when immigrants could earn a right to stay, those who committed crimes were given second chances, and for those who gave back, there were multiple paths to legalization.<sup>9</sup> For this reason, repealing IIRIRA is an important policy goal, and embracing immigrants as the core of our American identity is a critical means for that to occur. If we continue to pursue enforcement-only immigration policies, our losses will not be measured merely in the dollars spent, but also by what collective and national values are lost.

## I. THE FINANCIAL COSTS OF HEIGHTENED ENFORCEMENT MEASURES

In pursuing immigration enforcement policies, President Trump's two executive orders from January 2017, and their implementing memoranda, outline his administration's plan to prioritize up to eight million people for deportation, hire 15,000 agents to arrest them, build private prisons to detain them, and deport them by depriving them of hearings. In addition, the Trump administration will build a newly-fortified wall along the southern border that will keep out newly-arriving immigrants. As set forth below, these heightened enforcement measures will cost billions of dollars and ultimately be a waste of resources.

### A. *Expanding the Priorities for Deportation into the Millions*

The Obama administration's prior policy was to focus immigration enforcement efforts on those convicted of serious crimes.<sup>10</sup> But the reality was that fewer than 20% of those deported under the prior administration had serious felonies.<sup>11</sup>

There are multiple reasons for this disconnect. The primary one is that the current use of categories to identify which crimes will have immigration consequences is incredibly over-inclusive. The genius of criminal law is that a statute—by design—can capture a wide range of conduct, so that a prosecutor can get a conviction for burglary for both the hapless shoplifter who impulsively stole a small item for thrills and

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<sup>9</sup> There are many thoughtful scholars and advocates that disagree with this framing that suggests there are bad immigrants and good immigrants. *See id.* Likewise, there are many individuals who either are indifferent or hostile to immigration reform out of concern that there are insufficient resources or means to provide for all. In an attempt to find a pragmatic way forward, I do accept the premise that immigration policy must draw lines, legalizing some immigrants and excluding or deporting others.

<sup>10</sup> Elliot Young, *The Hard Truths About Obama's Deportation Policies*, HUFFINGTON POST, [http://www.huffingtonpost.com/entry/hard-truths-about-obamas-deportation-priorities\\_us\\_58b3c9e7e4b0658fc20f979e](http://www.huffingtonpost.com/entry/hard-truths-about-obamas-deportation-priorities_us_58b3c9e7e4b0658fc20f979e) (last updated Mar. 1, 2017).

<sup>11</sup> *See id.*

a hardened criminal who planned and executed a sophisticated scheme. It is then in criminal court where a prosecutor exercises discretion to charge the appropriate offense, and a judge imposes the proportionate sentence to reflect the seriousness (or lack thereof) of the crime and the depravity (or redeemable potential) of the defendant.<sup>12</sup>

Immigration law, however, makes decisions to deport based on criminal conviction alone.<sup>13</sup> And this is neither an efficient nor effective way to determine who is actually dangerous. Deportable offenses include misdemeanors<sup>14</sup> and “violent crimes” include spitting at a police officer during an arrest or, until overruled by the Supreme Court, driving while intoxicated when there is a risk of injury.<sup>15</sup> For instance, one of my clients—a man with a citizen wife and children and who had been in the United States with a green card for 40 years—was deported for an aggravated felony that involved stealing a \$2 can of beer.<sup>16</sup> Another green-card holder with a citizen wife and children is currently fighting a deportation order issued because he was convicted of petty theft, an infraction that is less than a misdemeanor, two decades ago.

But secondarily, despite the rhetoric of targeting only the bad guys,

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<sup>12</sup> See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 857 (2015) (“Discretion can be individualized—where civil authorities make a back-end determination about how to proceed in a given case—or it can be systemic, where agencies set general enforcement priorities.”); Cade, *Enforcing Immigration Equity*, *supra* note 7, at 700–09 (arguing that “DHS has used criminal history of almost any type as an irrevocable marker of undesirability”).

<sup>13</sup> For criticisms of immigration laws’ over-inclusive capture of crimes, see Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013) (over-inclusive use of misdemeanor convictions in determining which offenses have immigration consequences); Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2107–26 (2017) (analyzing recent Supreme Court and federal circuit cases that reduce and eliminate the nature and type of convictions that have immigration consequences); Kevin R. Johnson, Symposium, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1026 (2016) (arguing against crimes as immigration grounds due to the “racially disparate impacts” of the criminal justice system); Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 487 (2015) (“Most fundamentally, one might first ask why we deport long-term legal residents who commit crimes, instead of simply punishing them in the criminal justice system as we do citizens.”); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 262 (2013) (anticipating Mathis’ more robust categorical approach to “correct[] for the absence of procedural and substantive rights for the noncitizen”); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 477 (2007) (criticizing IIRIRA’s expanded immigration grounds that are based on criminal offenses); Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It’s Hard to Get Them*, 92 DENV. U. L. REV. 933, 936 (2015) (arguing to “repeal the current crime-based grounds of removal . . .”).

<sup>14</sup> *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (involving misdemeanor offense for possession of one Xanax tablet).

<sup>15</sup> *United States v. Carthorne*, 726 F.3d 503, 516–17 (4th Cir. 2013).

<sup>16</sup> *Lopez-Valencia v. Lynch*, 798 F.3d 863, 868 (9th Cir. 2015). The author’s clinic represented the client. Facts of the conviction are on file with the author.

ICE routinely arrests those without prior convictions, although claiming otherwise.<sup>17</sup> According to studies by Professor Ingrid Eagly, a sizeable number of “criminal aliens” (a term that does not differentiate between those with and without legal status) who were removed under the auspice of crime-based removals in fact had been brought to the attention of the authorities due to traffic violations.<sup>18</sup> Indeed, among those detained, it is estimated that fewer than 10% were actually convicted of violent crimes.<sup>19</sup> Despite the rhetoric of protecting the public from harm, the reality appears that taxpayers have spent billions of dollars to remove those with non-existent crimes, minor offenses, or traffic violations.

The Trump administration abandoned any pretense of having a humane enforcement policy. The new written priority for deportation are those who were convicted of “any criminal offense” (including the Department of Homeland Security’s (DHS) own example of a traffic violation for driving without a license), an “arrest” (even though the charges were dropped or dismissed), those who committed conduct that may be a crime (which is up to the immigration officer to decide), those with final orders of removal (even though they may be fighting those cases, like my clients are, in the federal courts), and those who “pose a risk to public safety” (which is without current definition).<sup>20</sup>

This new policy sweeps in lawful permanent residents along with undocumented individuals. Conservative estimates say that six to eight million individuals will be included as top priority for deportation.<sup>21</sup> Depending on what a “risk to public safety” means, it could absolutely sweep in much more.

Despite the rhetoric to the contrary, there is no doubt that this policy does not target dangerous felons. Among the first people targeted under Trump’s new deportation policies were mothers of citizen children whose crimes related only to securing documentation to work and pay taxes.<sup>22</sup> Indeed, in Trump’s first 100 days, ICE arrested 41,300

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<sup>17</sup> Julia Preston, *Despite Opposition, Immigration Agency to Expand Fingerprint Program*, N.Y. TIMES (May 11, 2012), <http://www.nytimes.com/2012/05/12/us/ice-to-expand-secure-communities-program-in-mass-and-ny.html>.

<sup>18</sup> Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1218 (2013).

<sup>19</sup> Sharita Gruberg, *How For-Profit Companies Are Driving Immigration Detention Policies*, CTR. FOR AM. PROGRESS (Dec. 18, 2015, 9:29 AM), <https://www.americanprogress.org/issues/immigration/report/2015/12/18/127769/how-for-profit-companies-are-driving-immigration-detention-policies>. For a strong criticism of immigration detention policies, see generally García Hernández, *supra* note 6.

<sup>20</sup> Kelly, *Enforcement of Immigration Laws*, *supra* note 1, at 2.

<sup>21</sup> Brian Bennett, *Not Just ‘Bad Hombres’: Trump Is Targeting Up to 8 Million People for Deportation*, L.A. TIMES (Feb. 4, 2017), <http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html>.

<sup>22</sup> Emily Allen, *Protestors Rally Around Woman Who Took Sanctuary in Denver Church*, FOX31 DENVER (Feb. 18, 2017, 10:18 PM), <http://kdvr.com/2017/02/18/protesters-rally-around->

non-citizens, which is a 38% increase from 2016.<sup>23</sup> After falsely claiming that 75% these people had criminal convictions, the data showed that “only six percent of [those arrested] had convictions for violent crimes and the fastest growing category of arrests was immigrants with no convictions at all.”<sup>24</sup> Not surprisingly, the abandonment of a prior focus on those with criminal convictions has resulted in the dramatic increase in arrests of those “otherwise law-abiding undocumented immigrants,”<sup>25</sup> which results in fewer deportations due to a practice that “clog[s] the already backlogged immigration courts.”<sup>26</sup>

B. *Hiring of 15,000 New Immigration Officers and Reviving the Ineffectual Secure Communities Program*

To arrest the millions of newly-anointed priority deportees, the Kelly memoranda that implemented Trump’s executive orders relating to border security and internal enforcement measures have authorized the hiring of 10,000 new ICE officers and 5,000 new Custom and Border Patrol (CBP) agents.<sup>27</sup> Such an expansion will have an immediate impact on those agencies. ICE currently employs 20,000 employees, 12,000 of whom are agents, and the CBP employs 19,828 agents.<sup>28</sup> The proposed surge in personnel will increase the size of the

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woman-seeking-sanctuary-in-denver-church; Suzanne Gamboa, *Arizona Woman Deported, Possibly the First Under Trump Immigration Orders*, NBC NEWS (Feb. 9, 2017, 7:45 PM), <http://www.nbcnews.com/news/latino/arizona-woman-deported-possibly-first-under-trump-immigration-orders-n718986>.

<sup>23</sup> Aria Bendix, *Immigrant Arrests Are Up, but Deportation Is Down*, THE ATLANTIC (May 17, 2017), <https://www.theatlantic.com/news/archive/2017/05/under-trump-immigrants-arrests-are-up-but-deportation-is-down/527103>.

<sup>24</sup> Bryan Schatz, *Trump Is Asking for \$4.6 Billion for His Immigration Crackdown*, MOTHER JONES (May 23, 2017, 11:49 PM), <http://www.motherjones.com/politics/2017/05/trump-budget-border-wall-immigration-enforcement>.

<sup>25</sup> Taylor Dolven, “*Now Everybody Is a Target*”: ICE Is Aggressively Prosecuting Immigrants It Used to Let Go, VICE NEWS (Aug 11, 2017), <https://news.vice.com/story/ice-is-aggressively-prosecuting-immigrants-it-used-to-let-go>.

<sup>26</sup> Maria Sacchetti, *Trump Is Deporting Fewer Immigrants than Obama, Including Criminals*, WASH. POST (Aug. 10, 2017), [https://www.washingtonpost.com/local/immigration/trump-is-deporting-fewer-immigrants-than-obama-including-criminals/2017/08/10/d8fa72e4-7e1d-11e7-9d08-b79f191668ed\\_story.html?hpid=hp\\_hp-cards\\_hp-card-politics%3Ahomepage%2Fcard&utm\\_term=.04b2ca87e004](https://www.washingtonpost.com/local/immigration/trump-is-deporting-fewer-immigrants-than-obama-including-criminals/2017/08/10/d8fa72e4-7e1d-11e7-9d08-b79f191668ed_story.html?hpid=hp_hp-cards_hp-card-politics%3Ahomepage%2Fcard&utm_term=.04b2ca87e004) (“[D]eportations have remained lower than in past years under the Obama administration. From January to June, Immigration and Customs Enforcement deported 61,370 criminals, down from 70,603 during the same period last year.”).

<sup>27</sup> Kelly, *Enforcement of Immigration Laws*, *supra* note 1, at 2 (10,000 ICE officers); Kelly, *Implementing the President’s Border Security*, *supra* note 1, at 3–5 (5,000 CBP officers).

<sup>28</sup> Josh Keefe, *How Many Immigration Border Officers Are There? Trump to Increase ICE Enforcement Agents by 80%*, INT’L BUS. TIMES (Feb. 21, 2017, 3:18 PM), <http://www.ibtimes.com/how-many-immigration-border-officers-are-there-trump-increase-ice-enforcement-agents-2495482>.

immigration apprehension force by 80%.<sup>29</sup> The costs for this personnel expansion, by DHS's own estimates, will start at 1.3 billion dollars.<sup>30</sup> Because the hiring process takes at least 200 days to complete, the government has proposed eliminating the current lie detector test that has disqualified two-thirds of past applicants for failing to disclose prior drug use and their own criminal records.<sup>31</sup>

In addition, the executive orders call for the revival of the defunct Secure Communities Program, which is a request—not a requirement—for local and state communities to devote their resources to assist the federal government in apprehending non-citizens.<sup>32</sup> The executive orders call for the deputizing of local and state law enforcement personnel and a promise to penalize non-cooperating jurisdictions by withholding federal funding from them.

The Secure Communities Program, run from 2008 to 2014, and its successor program called Priority Enforcement Program, have been met with much criticism.<sup>33</sup> These programs ask cities, counties, and states to run background checks on all of whom they arrest to identify non-citizens.<sup>34</sup> Those who are not citizens are placed in detention until an immigration officer or judge determines if, in fact, the person is deportable, and, if he or she is, whether a remedy does or does not exist.

Although the federal government heralded this system as valuable

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<sup>29</sup> *Id.*

<sup>30</sup> Daniel González, *Trump Plan to Hire 15K Immigration, Border Agents Could Cost Billions, Take Years*, AZ. CENT. (Mar. 7, 2017, 6:02 AM), <http://www.azcentral.com/story/news/politics/border-issues/2017/03/07/president-donald-trump-plan-hire-immigration-border-agents-cost-billions/98651772>.

<sup>31</sup> Julia Horowitz, *Trump's Tall Order: Hiring 15,000 ICE and Border Patrol Agents*, CNN MONEY (Mar. 3, 2017, 4:43 PM), <http://money.cnn.com/2017/03/03/news/economy/hiring-immigration-agents-ice>; Elliot Spagat, *Border Patrol May Loosen Lie-Detector Hiring Requirement*, AZ. CENT. (Mar. 8, 2017, 12:30 PM), <http://www.azcentral.com/story/news/politics/border-issues/2017/03/08/border-patrol-may-loosen-lie-detector-hiring-requirement/98908980>.

<sup>32</sup> See Exec. Order No. 13,767, 82 Fed. Reg. 8,793, 8795, Section 10 (Jan. 25, 2017).

<sup>33</sup> For excellent and thorough discussions of the concerns arising from immigration detention practices, see generally Ming H. Chen, Symposium, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016) (a neutral assessment of the issue but noting the criticisms made by cities and localities in the operation of this program); Juliet P. Stumpf, *D(E)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259 (2015) (discussing the myriad criticisms of Secure Communities and discussing whether PEP can avoid them).

<sup>34</sup> Stumpf, *supra* note 33, at 1268–69 (“Ordinarily after booking an individual, police submit the arrestee’s fingerprint information to Federal Bureau of Investigations (FBI) and DHS databases to search for outstanding warrants. Secure Communities’ innovation was to send matching fingerprints to ICE for comparison with immigration databases and a determination whether to seek custody of the arrested individual. Immigration agents had already started entering civil immigration warrants into these databases, resulting in state and local arrests both for crimes and civil immigration violations. Secure Communities took advantage of these databases in a different way and used them to check all arrestees across the nation to identify removable noncitizens.”).

in identifying, detaining, and removing criminal aliens, critics have been less kind. Critics point to the facts that the program sweeps in sizeable numbers of non-dangerous individuals; states and local governments were not reimbursed for the millions of dollars spent on detention (Los Angeles spent \$25 million for one year alone); there was disparate enforcement;<sup>35</sup> and money spent on detaining non-citizens come from local budgets that would otherwise be spent on schools, teachers, and filling potholes.<sup>36</sup> Moreover, the Boston police commissioner, among others, explained that this program interferes with his job to keep the community safe because it prevents victims of and witnesses to crimes to come forward.<sup>37</sup>

Such concerns are not theoretical. In the first three months of 2017, the Los Angeles Chief of Police reported statistics showing that among all ethnicities, only Latino individuals had a 25% drop in reporting rapes and a 10% drop in reporting domestic violence.<sup>38</sup> Given these problems and complications, it is no surprise that only sixteen states currently participate in the current Priority Enforcement Program, which was intended to reform the flaws in the Secure Communities Program.<sup>39</sup> But the Trump administration took a bad program and doubled-down on its problems.<sup>40</sup>

Sanctuary Cities—a broad, undefined term that generally means cities or states that expressly opt-out of these programs—have been vilified, and unfairly so. The preliminary problem is that there is no definition of this term. Despite the executive order’s promise to withhold funds from “sanctuary jurisdictions” that “willfully refuse to comply” with the statute that governs what information is shared with the federal government, no one in the government defending this order

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<sup>35</sup> See Kevin R. Johnson, *supra* note 13, at 1029–37; Carrie Rosenbaum, *What (and Whom) State Marijuana Reformers Forgot: Crimmigration Law and Noncitizens*, 9 DEPAUL J. FOR SOC. JUST. 1 (2016).

<sup>36</sup> See Julia Preston, *Despite Opposition, Immigration Agency to Expand Fingerprint Program*, N.Y. TIMES (May 11, 2012), <http://www.nytimes.com/2012/05/12/us/ice-to-expand-secure-communities-program-in-mass-and-ny.html>.

<sup>37</sup> John R. Ellement, *Police “Need to Build Trust” with Immigrant Community, Evans Says*, BOS. GLOBE (Jan. 31, 2017), <https://www.bostonglobe.com/metro/2017/01/31/evans-says-boston-police-won-enforce-federal-warrants-some-undocumented-immigrants/1vN8Sncjm683kiXISYVfuJ/story.html>.

<sup>38</sup> Melissa Jeltsen, *Rape Victims Aren’t Seeking Help for Fear of Deportation, Police Say*, HUFFINGTON POST, [http://www.huffingtonpost.com/entry/fewer-latinos-are-reporting-rapes-abuse-amid-growing-fears-of-deportation\\_us\\_58d28ef9e4b02d33b7477ce5?eobwj6yq93j2rcnmi&](http://www.huffingtonpost.com/entry/fewer-latinos-are-reporting-rapes-abuse-amid-growing-fears-of-deportation_us_58d28ef9e4b02d33b7477ce5?eobwj6yq93j2rcnmi&) (last updated Mar. 24, 2017).

<sup>39</sup> Kelly, *Enforcement of Immigration Laws*, *supra* note 1, at 3.

<sup>40</sup> Maria Sacchetti & Ed O’Keefe, *ICE Data Shows Half of Immigrants in Raids Had Traffic Convictions or No Record*, WASH. POST (Apr. 28, 2017), [https://www.washingtonpost.com/local/social-issues/ice-data-shows-half-of-immigrants-arrested-in-raids-had-traffic-convictions-or-no-record/2017/04/28/81ff7284-2c59-11e7-b605-33413c691853\\_story.html?utm\\_term=.98eee6887311](https://www.washingtonpost.com/local/social-issues/ice-data-shows-half-of-immigrants-arrested-in-raids-had-traffic-convictions-or-no-record/2017/04/28/81ff7284-2c59-11e7-b605-33413c691853_story.html?utm_term=.98eee6887311).

could actually define what sanctuary jurisdictions in fact were.<sup>41</sup> The district court enjoining the order's enforcement noted that Secretary John Kelly who is responsible for enforcing the order publically said that he "do[esn't] have a clue" on how to define "sanctuary city."<sup>42</sup>

A second problem is that ICE's request for state and local governments to detain non-citizens for immigration violations is not always legal. For years, the U.S. government always supported a civil detainer—which is the request by ICE to detain a non-citizen for up to 48 hours so that ICE can investigate whether he or she is deportable—with probable cause.<sup>43</sup> Probable cause is a term of art that means that the government has enough facts about a specific person that would lead a reasonable prosecutor or police officer to believe "an offense has been or is being committed."<sup>44</sup> Immigration detainees, however, often do not meet this standard.<sup>45</sup> To the contrary, a request to detain a person to simply check on immigration status is contrary to the Fourth Amendment's requirement that a government officer have individualized facts that someone is deportable based on a qualifying crime, which is a standard that is not always met.<sup>46</sup> When ordering the release of a non-citizen detained under an ICE detainer, the Massachusetts Supreme Judicial Court held that it is also contrary to

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<sup>41</sup> *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at \*25 (N.D. Cal. Apr. 25, 2017).

<sup>42</sup> *Id.* (quoting declaration filed with the district court).

<sup>43</sup> *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("[W]e pause to note the reason why there were likely no cases in 2009 directly addressing immigration detainees. The government had conceded for years that a detainer must be supported by probable cause.").

<sup>44</sup> *Brown v. Gilmore*, 278 F.3d 362, 367 (4th Cir. 2002).

<sup>45</sup> *Arizona v. United States*, 567 U.S. 387, 408–09 (2012) ("[I]t is not a crime for a removable alien to remain present in the United States."); *Morales*, 793 F.3d at 219–20 (an ICE officer's issuance of a civil detainer—against someone who was a naturalized citizen—only by looking at databases that said she was born outside of the country violated the Fourth Amendment).

<sup>46</sup> *See Morales v. Chadbourne*, No. 12-301-M-LDA, 2017 WL 354292, at \*1 (D.R.I. Jan. 24, 2017) ("This twenty-four hour illegal detention revealed dysfunction of a constitutional proportion at both the state and federal levels and a unilateral refusal to take responsibility for the fact that a United States citizen lost her liberty due to a baseless immigration detainer through no fault of her own."); *Orellana v. Nobles Cty.*, No. 15-3852 ADM/SER, 2017 WL 72397, at \*8 (D. Minn. Jan. 6, 2017) ("Thus, in this case, because no warrant was issued for Orellana's arrest, Orellana's arrest and continued detention is lawful only if officers acted within their statutory authority for affecting a warrantless arrest. . . . Orellana's admission regarding his immigration status provided probable cause for the first half of what § 1357(a)(2) demands. There is, however, no evidence that ICE or any other immigration officer had probable cause to believe that Orellana was 'likely to escape before a warrant can be obtained for his arrest,' the second half of what is needed before a warrantless arrest under § 1357(a)(2) is lawful."); *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at \*11 (D. Or. Apr. 11, 2014) ("There is no genuine dispute of material fact that the County maintains a custom or practice in violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention."); *Cf. Mendoza v. U.S. Immigration & Customs Enf't*, 849 F.3d 408, 418 (8th Cir. 2017) (under the facts of that case, the officer "had arguable probable cause to issue the ICE detainer and was entitled to qualified immunity").

state law “for police officers to arrest generally for civil matters, let alone authority to arrest specifically for Federal civil immigration matters.”<sup>47</sup>

A third problem lies in a mistaken belief that the cities or states are either extending some sort of amnesty or interfering with federal efforts to apprehend non-citizens.<sup>48</sup> They are doing neither: “[D]espite the choice of the term ‘sanctuary,’ these early municipal laws assisting migrants in finding refuge were never designed to provide a sanctuary for those immigrants charged with criminal conduct. To the contrary, sanctuary policies included explicit exceptions for those with criminal records.”<sup>49</sup>

Rather, the cities are not volunteering to do the work of the federal government’s immigration enforcement efforts, just as they are not asking to do the work of the federal government’s apprehension of tax evaders, those who commit crimes on Indian reservations, interstate gamblers, and other individuals who commit federal crimes. The federal government is always at liberty to hire its own agents and pay for the detention or punishment of those who violate federal law. The difference is that it would be absurd for the federal government to command local governments to do the work of the federal government, without reimbursement. This means that for the local governments that set aside money for pot holes, that money is now spent on federal enforcement matters the federal government is unwilling to pay for. Just as few taxpayers would prefer to see their pot hole money pay for federal government matters; once informed of what sanctuary cities mean, those opposed to them would likely opt for the filling of pot holes instead of federal immigration enforcement.

A fourth problem is that even Trump’s own lawyers recognize that the executive order’s punitive measures are without legal authority. Congress, not the President, is the branch of government that provides and withholds funds to the states. When Congress is authorized to withhold funding, it must be with advance notice and based on a nexus that the funding relates the conduct. The executive order threatens cities and states that do not assist in identifying deportable non-citizens by withholding and taking back all federal funding that goes to schools, hospitals, police departments, Medicare, and transportation.<sup>50</sup> San

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<sup>47</sup> *Lunn v. Commonwealth*, 477 Mass. 517, 531 (Mass. 2017).

<sup>48</sup> See Darla Cameron, *How Sanctuary Cities Work, and How Trump’s Stalled Executive Order Might Affect Them*, WASH. POST, <https://www.washingtonpost.com/graphics/national/sanctuary-cities> (last updated Apr. 26, 2017).

<sup>49</sup> Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 300–01 (2016).

<sup>50</sup> Vikram David Amar & Michael Schaps, *How Strong Is San Francisco’s “Sanctuary City” Lawsuit Against the Trump Administration*, JUSTIA (Feb. 10, 2017), <https://verdict.justia.com/2017/02/10/strong-san-franciscos-sanctuary-city-lawsuit-trump-administration>.

Francisco initiated a lawsuit against the Trump administration because the federal funding compromises 13% of its total revenue that goes to these essential services.<sup>51</sup>

In April 2017, a federal district judge enjoined enforcement of the threats to withhold federal funding to San Francisco because the executive order violated the Constitution's Spending Clause, Separation of Powers doctrine, Tenth Amendment, Fifth Amendment's clause (protecting against vagueness for lack of defining sanctuary jurisdiction), and the Due Process clause (for threatening to withhold funds after their disbursement).<sup>52</sup> In disputing the order, the federal government lawyers did not contend that the judge made a legal mistake in assessing the injury or relevant legal authorities. Rather, their argument was that because the executive order was seeking powers it did not have, it could never be enforced, and thus the district court erred in enjoining an executive order that in essence amounted to legal nonsense.<sup>53</sup> The district court rejected this argument, pointing out how the threat of enforcement serves as a weapon in and of itself.<sup>54</sup>

### C. *Millions of Non-Citizens in Private Detention Centers*

Under the new Trump enforcement measures, all of those arrested as the new priority deportees will be detained.<sup>55</sup> Before Trump, approximately \$2 billion of our tax dollars were spent each year to detain an average of 40,000 non-citizens on any given day at a rate of 400,000 detainees each year.<sup>56</sup>

Why this money is spent should be questioned: of the detainees who receive a hearing, more than half will ultimately be found to have a

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<sup>51</sup> *Id.*

<sup>52</sup> *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at \*21 (N.D. Cal. Apr. 25, 2017).

<sup>53</sup> *Id.* at \*26 (“The Government's only defense of the Order's lack of process is to claim that Section 9's provision that it be implemented ‘consistent with law’ reads in all necessary procedural requirements. Again, the Government's attempt to resolve all of the Order's constitutional infirmities with a ‘consistent with law;’ bandage is not convincing.”).

<sup>54</sup> *Id.* at \*27.

<sup>55</sup> Kelly, *Implementing the President's Border Security*, *supra* note 1, at 1, 8–9.

<sup>56</sup> Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 27–28 (2014) [hereinafter Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*] (“In FY2012, 400,000 people were subject to civil immigration incarceration, at a cost of \$2 billion.”); *Immigration Detention Map & Statistics*, CIVIC, <http://www.endisolation.org/resources/immigration-detention> (last visited June 22, 2017) (“The United States maintains the largest immigration detention infrastructure in the world, detaining approximately 380,000 to 442,000 persons per year.”); Hanna Kozłowska, *The American Private Prison Industry Has Scored Another Big Win with the US Government*, QUARTZ (Dec. 1, 2016), <https://qz.com/850810/the-department-of-homeland-security-wants-to-keep-using-private-prisons-for-immigration-detention>.

legal reason to stay in this country.<sup>57</sup>

In the meantime, private corporations are profiting: 90% of immigration detention facilities are run by non-governmental entities.<sup>58</sup> Last fall, the Department of Justice stopped using private prisons for criminal inmates because a study showed that they were less safe, less capable, and more expensive than government facilities.<sup>59</sup> To meet the immediate and growing demand of newly-detained immigrants, the Trump administration reversed the desistance of private prisons. Private prison stock prices have increased 100% since November 2016.<sup>60</sup>

In Trump's 2018 budget, he proposed appropriations for 51,379 detention beds and \$1.5 billion more to pay for new immigration detention facilities.<sup>61</sup> The money will be given to for-profit facilities, which enriches private prisons and their shareholders, at the expense of taxpayers and the diversion of funds from other programs, such as the proposed \$667 million cut from the Federal Emergency Management Agency (FEMA) and \$80 million from the Transportation Security Administration (TSA).<sup>62</sup>

A detention policy is not only costly, but truly unnecessary. No one is being detained for a criminal sentence—it is only to detain undocumented and lawful permanent residents who may have violated immigration law. Less-costly and equally effective alternatives exist. The existing Intensive Supervision Appearance Program (ISAP) uses “electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants.”<sup>63</sup> In representations made to a federal court in pending litigation, the Associate Director of ICE Enforcement and Removal Operations stated that ICE has a variety of release mechanisms at its disposal such as “bond, release on own

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<sup>57</sup> Esther Yu Hsi Lee, *Immigrants Are Winning Half of All Deportation Cases So Far This Year*, THINKPROGRESS (Feb. 18, 2014, 8:51 PM), <https://thinkprogress.org/immigrants-are-winning-half-of-all-deportation-cases-so-far-this-year-fe5a58dbd78e#.qapv4ggom>.

<sup>58</sup> Kozłowska, *supra* note 56 (reporting October 2016 statistics).

<sup>59</sup> Matt Zaptosky & Chico Harlan, *Justice Department Says It Will End Use of Private Prisons*, WASH. POST (Aug. 18, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/08/18/justice-department-says-it-will-end-use-of-private-prisons>.

<sup>60</sup> Heather Long, *Private Prison Stocks Up 100% Since Trump's Win*, CNN MONEY (Feb. 24, 2017, 2:07 PM), <http://money.cnn.com/2017/02/24/investing/private-prison-stocks-soar-trump>.

<sup>61</sup> *Trump Administration Budget Aims to Undermine Due Process and Implement Mass Deportation Plans*, AILA Doc. 17052361, AM. IMMIGR. LAW. ASS'N (May 23, 2017), <http://www.aila.org/advo-media/press-releases/2017/aila-opposes-trump-fy2018-budget>; Nicholas Fandos, *Trump's Border Wall Gets Billions in Budget Proposal*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/2017/03/16/us/politics/donald-trump-border-wall-budget.html>.

<sup>62</sup> Fandos, *supra* note 61.

<sup>63</sup> Ruthie Epstein, *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, AM. CIV. LIBERTIES UNION (Oct. 27, 2014), <https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigration-detention-atd>.

recognizance, orders of supervision, or parole.”<sup>64</sup> And community support programs—which are not funded by ICE but are operated by religious organizations in cooperation with ICE—“are also effective in assisting with court appearance rates and compliance with final removal orders.”<sup>65</sup>

#### D. *Expansion of Expedited Removal*

For over one hundred years, the United States Supreme Court has recognized that even undocumented individuals, if found within U.S. borders, are entitled to due process.<sup>66</sup> Current law provides that those who are picked up by ICE are entitled to a hearing. Again, this is not a technicality. More than half who receive a hearing are determined to have a legal reason to stay—whether it be a green card, asylum, or even citizenship.<sup>67</sup>

But based on a docket of 500,000 immigrants, there is more than an average two-year wait for a hearing.<sup>68</sup> The administration could handle the backlog by hiring more judges. Instead, it plans to clear the current backlog (and what would be an unfathomable wait time arising from Trump’s plan to deport eight million people) by expanding who is not eligible for a hearing under a program called “expedited removal.”

Starting in 1996, for the first time, Congress tested the limits of due process by denying hearings to those who were picked up at a port of entry and those who had entered within the last fourteen days, who lacked proof that they had been living in the country for at least two years.<sup>69</sup> In 2004, under President Bush, the zone expanded from the actual border to 100 air miles of *any* border, including the northern border, southern border, and the oceans.<sup>70</sup> This means that 197 million people, which is 66% of the U.S. population, live in this geographic

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<sup>64</sup> See Declaration of Thomas Homan at 11, *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (No. 2:85-CV-04544-DMG), <http://www.aila.org/File/Related/141113591.pdf>.

<sup>65</sup> Brief of Amici Law Professors, Immigration Scholars, and Clinicians in Support of Defendant-Appellant’s Request for En Banc Review at 14, *United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. 2017), <http://www.law.uh.edu/news/faculty-news/spring2017/G.Hoffman6.pdf>.

<sup>66</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”); *Wing v. United States*, 163 U.S. 228, 238 (1896) (affording due process to those ordered to be deported).

<sup>67</sup> See Lee, *supra* note 57.

<sup>68</sup> Kelly, *Implementing the President’s Border Security*, *supra* note 1, at 6–7.

<sup>69</sup> See 8 U.S.C. § 1225(B)(1)(A)(i) (1996).

<sup>70</sup> See Designated Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

zone that is within the reach of expedited removal procedures.<sup>71</sup>

The concerns of potential overreach are not theoretical. As Professor Shoba Wadhia observed, the Obama administration used expedited removal and a similar program to reinstate prior removal orders with precision and verve. From 2001 to 2013, “more than half of the total population removed from the United States has bypassed a courtroom through a speed deportation program.”<sup>72</sup> Focusing just on 2013, the most recent year where numbers are available, the percentage of those deported without a hearing jumped to 82.8%.<sup>73</sup>

When arresting an alleged non-citizen in the geographical zone where expedited removal may be used, the immigration agent must first assess whether the person is a citizen or lawful permanent resident mistakenly swept up in this procedure. If no mistake was made, then the agent assesses whether the non-citizen is eligible for asylum or whether the person has been residing in the United States for longer than fourteen days.<sup>74</sup> Despite ongoing legal challenges, this expedited process, which requires only a record of the determinations and no hearing or review of them, has stood up as a limited substitute for a hearing for those without ties to this country.<sup>75</sup>

Under the new enforcement policy, Secretary Kelly explains that ICE may be “depart[ing]” from the prior limitations placed on expedited removal now and even more in future decisions.<sup>76</sup> Indeed, the memo expands those who potentially could be deported without hearings to anyone without status.<sup>77</sup> This includes legal residents who are stopped

<sup>71</sup> See Todd Miller, *66 Percent of Americans Now Live in a Constitution-Free Zone*, NATION (July 15, 2014), <https://www.thenation.com/article/66-percent-americans-now-live-constitution-free-zone> (describing the population of 197.4 million people or 66% of the country’s population living within the 100-mile zone of the 2014 expansion notice); see also Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 194–203 (2017).

<sup>72</sup> Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 3 (2015).

<sup>73</sup> *Id.*

<sup>74</sup> Immigration and Nationality Act of 1952, 8 U.S.C. § 1225(b)(1)(A) (2012); see Designated Aliens for Expedited Removal, 69 Fed. Reg. 48,877.

<sup>75</sup> See *United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. 2017) (upholding lack of counsel provided to expedited removal proceedings). *But see id.* at 1142–43 (Pregerson, J., dissenting) (“Hundreds of thousands of people are expeditiously removed from this country each year. In 2013, the Department of Homeland Security removed approximately 438,000 noncitizens from the U.S. Expedited removals comprised 44% of all removals. An additional 39% of removals were conducted through Reinstatement of Removal, another fast track procedure established by IIRIRA with similarly nonexistent procedural safeguards. That means that 363,540 people—a staggering 83% of the people removed from the U.S. in 2013—were removed without a hearing, without a judge, without legal representation, and without the opportunity to apply for most forms of relief from removal. It is apparent that the expedited removal system is flawed in many ways. The chance to consult with a lawyer, which is the subject of this appeal, is just one way to make the process fair. I would find that such a due process right is mandated under the Constitution.”).

<sup>76</sup> Kelly, *Implementing the President’s Border Security*, supra note 1, at 7.

<sup>77</sup> *Id.* at 6.

without their paperwork and all eleven million of the undocumented individuals.

Realizing that the denial of due process to lawful permanent residents and others would be unlawful and unconstitutional, the implementing memorandum claims that, among this potential larger group, a single ICE officer will take someone off of the expedited track and give them a hearing if they “claim” to be a citizen, green card holder, asylum recipient, asylum eligible, or have proof of two years’ residence.<sup>78</sup>

This assurance should be met with much skepticism. How can an otherwise capable ICE officer be aware of critical legal technicalities and evolving rules when deciding whose claims to status are true? In the past, ICE has issued similar directives to its officers to immediately release from detention anyone who claims to be a U.S. citizen. But in practice, those policies were not followed. I had one client who was detained for just under two years claiming he was a citizen. Only after I presented research of two different state family law codes did the Board of Immigration Appeals, the national appellate court for all immigration courts, agree he was a citizen, and only then was he released from detention.<sup>79</sup>

But also, I have another client who has been fighting his citizenship claim for ten years. The case has twice gone to the federal circuit courts and two separate Supreme Court decisions have changed legal rules regarding whether he is a citizen, green card holder, or neither.<sup>80</sup> He was later released by bond. ICE did not deem his

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<sup>78</sup> *Id.* at 5–6.

<sup>79</sup> Matter of C.R., (BIA 2013) [on file with author].

<sup>80</sup> In 2006, my client was a lawful permanent resident and was convicted of one count of violating California’s burglary statute, CAL. PENAL CODE § 459 (West 2014). He will be deemed to continue to be a lawful permanent resident if his conviction does not have immigration consequences. In 2009, ICE charged this conviction as being an aggravated felony, as a burglary offense in violation of INA § 101(a)(43)(F). In 2011, the Ninth Circuit decided *United States v. Aguila-Montes de Oca*, which held that the burglary conviction § 459 was divisible. *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2010) (per curiam). While my client’s case was pending before the Ninth Circuit, the Supreme Court decided *Descamps v. United States*, which in relevant part overturned *Aguila-Montes* and clarified that § 459 is overbroad and indivisible as a burglary offense. *Descamps v. United States*, 133 S. Ct. 2276 (2013). *Descamps* overturned the Ninth Circuit precedent that the Board of Immigration Appeals (BIA) had wrongfully relied upon when upholding the aggravated felony charge in my client’s case. The government attorney agreed to remand the case to the BIA. Back at the agency, the DHS re-charged the conviction as being an aggravated felony as crime of violence in violation of INA § 101(a)(43)(F). In 2015, the Ninth Circuit decided *Dimaya v. Lynch*, which held that § 459 is not a crime of violence because that term is impermissibly vague. *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). On September 29, 2016, the Supreme Court granted the petition for certiorari but on July 19, 2017, the Court set the case for re-argument during the next term on October 2, 2017. See *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *appeal docketed sub nom.* Sessions v. Dimaya, No. 15-1498 (2016), <https://www.supremecourt.gov/docket/docketfiles/html/public/15-1498.html>. In addition, because the client’s mother was a citizen before he was eighteen years old, he may be

citizenship claim adequate to release him from custody.<sup>81</sup>

My anecdotal experiences have been substantiated by multiple sources of documented errors. A 2016 study conducted by the U.S. Commission on International Religious Freedom observed 400 interviews conducted at ports of entry. The report concluded that the border officers did not properly advise non-citizens of their rights, did not fully conduct the credible fear interview, and recorded erroneous information on the forms.<sup>82</sup>

A 2014 ACLU report details seven specific individuals who were U.S. citizens but whom the border agents illegally deported on the mistaken finding that they were not citizens because the individuals did not speak English, were not born in a hospital, or their mental impairments prevented them from presenting the relevant information.<sup>83</sup>

In a 2010 Ninth Circuit case, the ICE officer who conducted interviews with native Spanish speakers explained that she was neither fluent nor proficient in the language. When she was asked to repeat the advisals she gave in Spanish, the court-appointed interpreter could not understand her.<sup>84</sup>

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found to have a derivative citizenship claim pursuant to INA § 321. There is a circuit split over the legal meaning of the phrase “begins to reside permanently,” which will determine whether a person in that situation is or is not a citizen. *Compare* *Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013) (phrase means objective manifestation of permanent residence), *with* *Thomas v. Lynch*, 828 F.3d 11 (1st Cir. 2016) (phrase means lawful admission for permanent residence), *and* *United States v. Forey-Quintero*, 626 F.3d 1323 (11th Cir. 2010) (same meaning as *Thomas v. Lynch*). It is unreasonable to expect a border patrol agent to keep abreast of these legal doctrines, developments, and circuit splits on legal issues that have dispositive outcomes on whether someone is a lawful permanent resident or citizen.

<sup>81</sup> M.C. v. Sessions, pending before the Ninth Circuit Court of Appeals [on file with author].

<sup>82</sup> ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 17 (Aug. 2, 2016), <https://uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf> (“In more than half of the interviews . . . [U.S. Customs and Border Protection Officer of Field Operations] officers failed to read the required information advising the non-citizen to ask for protection without delay if s/he feared return. . . . [I]n 86.5 percent of the cases where a fear question was not asked, the record inaccurately indicated that it had been asked, and answered. And in 72 percent of the cases, asylum seekers were not allowed to review and correct the form before signing, as required.”).

<sup>83</sup> AM. CIVIL LIBERTIES UNION, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 47–50 (Dec. 2014).

<sup>84</sup> *See* *United States v. Ramos*, 623 F.3d 672, 678 (9th Cir. 2010). This case involved an ICE officer who explained that she conducted interviews with non-citizens about their status and rights in Spanish. *Id.* “Olson, however, is not fluent in Spanish, and her Spanish language education was limited to ‘several classes’ during her training with DHS’s Bureau of Immigration and Customs Enforcement (“ICE”).” *Id.* When the officer testified in court and recited the advisals she provides to non-citizens, the Spanish language court interpreter “had difficulty comprehending,” what the officer was saying, explaining that the alleged advisal was “nonsensical in part.” *Id.* This case was not arising from expedited removal but on a stipulated removal case. It nonetheless illustrates why judicial review is important to ensure that before people are deported there is an opportunity to correct any mistakes that may have occurred in the adjudication process.

Moreover, ICE has a history of errors and overzealous apprehension efforts.<sup>85</sup> Between 2008 and 2012, before Trump took office, ICE had mistakenly detained 834 citizens with the intent to deport them.<sup>86</sup> Within the first month after President Trump assumed office, ICE officers detained a French Holocaust historian scheduled to speak at a conference because they mistakenly did not know the exception regarding when someone can work on a tourist visa<sup>87</sup>; and stopped the citizen son of Mohammed Ali, allegedly asking him whether he is Muslim, which occurred while there was a national stay on the travel ban.<sup>88</sup> In addition, the police chief of Santa Cruz announced that his department will no longer cooperate with ICE after they had misled him about the scope and purpose of a joint operation that was executed in February 2017.<sup>89</sup> The wrongful arrests of citizens have continued, without ICE apologizing or offering systemic reform.<sup>90</sup>

These same agents have now been given new authority to deprive hearings to those claiming to be citizens, lawful permanent residents, and asylum seekers without a means to review whether those decisions were accurate or not.<sup>91</sup> Whether it be from lack of training, reasonable errors, or an overzealous culture, the likelihood of ICE agents making accurate determinations—without the benefit of legal advocates or judicial review—is slim at best.

### E. *Building a Multi-Billion Dollar Wall*

After devising an internal scheme to fast-track the deportation

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<sup>85</sup> See Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, *supra* note 56; Sandra Hernandez, *What Happens when the “Bad Hombres” Are ICE Agents? The Finer Points of Immigration Law Get Ignored*, L.A. TIMES (Feb. 26, 2017, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-hernandez-ice-agents-have-a-history-of-overreach-20170226-story.html>.

<sup>86</sup> Betsy Woodruff, *American Citizen Trapped in ICE Jail*, DAILY BEAST (Mar. 31, 2017, 1:05 AM), <http://www.thedailybeast.com/american-citizen-trapped-in-ice-jail>.

<sup>87</sup> Erin McCann, *French Historian Says He Was Threatened with Deportation at Houston Airport*, N.Y. TIMES (Feb. 26, 2017), [https://www.nytimes.com/2017/02/26/us/french-historian-detained-immigration-henry-rousso.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&\\_r=0](https://www.nytimes.com/2017/02/26/us/french-historian-detained-immigration-henry-rousso.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=0).

<sup>88</sup> Bruce Schreiner, *Border Agents Ask Muhammad Ali’s Son: “Are You Muslim?”*, APNEWS (Feb. 25, 2017), <https://apnews.com/e8df59573ae547458869418be052efdb/muhammad-alis-son-detained-airport-are-you-muslim>.

<sup>89</sup> Michael Todd, *Santa Cruz Police: Homeland Security Misled City with “Gang” Raids that Were Immigration Related*, MERCURY NEWS, <http://www.mercurynews.com/2017/02/23/santa-cruz-police-homeland-security-raids-immigration-status-not-gang-related> (last updated Feb. 24, 2017).

<sup>90</sup> John Cádiz Klemack, *U.S. Citizen Sues ICE for Wrongful Detention*, NBC SAN DIEGO (June 7, 2017), <http://www.nbcsandiego.com/news/california/US-Citizen-Sues-ICE-for-Wrongful-Detention-427103173.html> (reporting on wrongful arrest that occurred on May 29, 2017).

<sup>91</sup> See, e.g., Hernandez, *supra* note 85.

process, the administration has proposed securing the border by building even more wall along the southern border.<sup>92</sup> Current estimates place construction of the wall at a starting cost of \$21.6 billion that American taxpayers will cover.<sup>93</sup> But the likelihood of this occurring is slim. Congress has to appropriate the funding, which is not an easy sell.<sup>94</sup> California legislators and cities are exploring legal ways to no longer work with companies that help build the border wall.<sup>95</sup>

In addition, the southern border is just under 2,000 miles long and over 700 miles already have physical barriers.<sup>96</sup> The plan to fortify existing structures and add more wall to empty areas overlooks the fact that the remaining 1,300 miles are empty because (i) they are in private hands, (ii) they consist of terrain that is not “hospitable or conducive to large-scale construction,” or (iii) building a wall would be disruptive to the animals and water that migrate without regard to nation states.<sup>97</sup>

Further, a physical barrier will never stop immigration. When Janet Napolitano was the governor of Arizona, she famously said: “You show me a 50-foot wall and I’ll show you a 51-foot ladder.”<sup>98</sup> Such statement has been historically demonstrated by many of our ancestors, who immigrated to this country because they faced more harmful dangers and destitution in their native countries than the legal technicalities that awaited them in America.

And even if the southern wall was built, it would not end

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<sup>92</sup> Kelly, *Implementing the President’s Border Security*, *supra* note 1, at 5.

<sup>93</sup> Julia Edwards Ainsley, *Exclusive—Trump Border “Wall” to Cost \$21.6 Billion, Take 3.5 Years to Build: Homeland Security Internal Report*, REUTERS (Feb. 9, 2017, 6:05 PM), <http://in.reuters.com/article/usa-trump-immigration-wall-idINKBN15O2ZZ>.

<sup>94</sup> See Scott Glover, *The Many Challenges Facing Trump’s Wall*, CNN POLITICS, <http://www.cnn.com/2017/01/25/politics/trump-wall-mexico-challenges> (last updated Jan. 25, 2017); Manu Raju, *Hill Republicans Revolt over Trump’s Plans to Build Border Wall*, CNN POLITICS, <http://www.cnn.com/2017/02/03/politics/border-wall-republicans> (last updated Feb. 6, 2017); Seung Min Kim & Ted Hesson, *\$15 Billion Border Bill Wouldn’t Fund a Wall*, POLITICO (Aug. 3, 2017), <http://www.politico.com/story/2017/08/03/trump-border-bill-wall-funding-241288>.

<sup>95</sup> Dakota Smith, *L.A. Councilman’s Proposal Targets Companies Seeking Work on Trump’s Planned Border Wall*, L.A. TIMES (May 11, 2017, 6:15 PM), <http://www.latimes.com/local/lanow/la-me-ln-cedillo-wall-20170511-story.html>.

<sup>96</sup> See Daniel Stone, *A Border Wall Already Exists in Some Places. We Visited It.*, NAT’L GEOGRAPHIC (Jan. 25, 2017), <http://news.nationalgeographic.com/2017/01/what-the-us-mexico-border-actually-looks-like>.

<sup>97</sup> *Id.*; Natasha Geiling, *San Diego Prepares to Fight Back Against Trump’s Environmentally Catastrophic Border Wall*, THINK PROGRESS (Aug. 3, 2017, 10:14 AM), <https://thinkprogress.org/border-communities-environmental-destruction-wall-25266cc2b216> (discussing potential legal challenges from environmental grounds and economic challenges by the City of San Diego and the State of Arizona to the border wall); Nomaan Merchant, *As Wall Looms, US Moves to Settle Border Fence Land Cases*, US NEWS (June 16, 2017, 5:11 PM), <https://www.usnews.com/news/best-states/texas/articles/2017-06-16/as-wall-looms-us-moves-to-settle-border-fence-land-cases> (discussing legal cases against 90 Texas landowners).

<sup>98</sup> Linda Greenhouse, *Legacy of a Fence*, N.Y. TIMES (Jan. 23, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9E02E5DE1331F930A15752C0A9679D8B63>.

undocumented individuals from residing in our country. More than two times as many foreigners enter the United States from Canada rather than Mexico.<sup>99</sup> And of the population of undocumented immigrants that arrive with a visa (or if entering from certain countries in Europe do not even need a visa), are inspected, and never leave the U.S. outnumber those who cross the border without permission.<sup>100</sup> It is pure delusion to think that spending the estimated \$20 billion dollars on a wall will either be money well spent or be effective in stopping the flow of immigration.

## II. WHAT AMERICANS LOSE WHEN PURSUING ENFORCEMENT POLICIES PREMISED ON FALSEHOODS AND INFLAMED BY NATIVISM

The Trump administration's new immigration practices and policies have significant flaws. Most provisions outlined above will require congressional funding—an appropriation process that is saddled with practical and political obstacles.<sup>101</sup> The streamlined expedited removal proceedings will likely be challenged in judicial actions for not providing individuals with the process that is due.<sup>102</sup> But the two fundamental flaws with these heightened immigration policies and practices are that they are premised on the falsehood that immigration hurts the United States, and enforcement alone is a rational and effective policy.

### A. *IIRIRA Was Birthed from Political, Rather than Policy, Considerations*

The Trump administration's relentless and unyielding dedication to enforcement should be subject to scrutiny and criticism. But President Trump is neither the source nor cause of his immigration enforcement policies. In 1996, President Bill Clinton signed IIRIRA, which ended

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<sup>99</sup> Jeffrey S. Passel & D'Vera Cohn, *Homeland Security Produces First Estimate of Foreign Visitors to U.S. Who Overstay Deadline to Leave*, PEW RESEARCH CENTER (Feb. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/02/03/homeland-security-produces-first-estimate-of-foreign-visitors-to-u-s-who-overstay-deadline-to-leave>.

<sup>100</sup> Alfonso Chardy, *Foreigners Who Overstay Their Visas Outnumber Those Who Cross the Border Illegally*, MIAMI HERALD (Mar. 10, 2017, 2:47 PM), <http://www.miamiherald.com/news/local/immigration/article137722458.html>.

<sup>101</sup> Kelsey Snell, *Senate Democrats Prepare for Spring Battle over Trump's Border Wall*, WASH. POST (Mar. 13, 2017), [https://www.washingtonpost.com/news/powerpost/wp/2017/03/13/senate-democrats-prepare-for-spring-battle-over-rumps-border-wall/?utm\\_term=.cd250ccb9992](https://www.washingtonpost.com/news/powerpost/wp/2017/03/13/senate-democrats-prepare-for-spring-battle-over-rumps-border-wall/?utm_term=.cd250ccb9992).

<sup>102</sup> Erik Larson & Kartikay Mehrotra, *Trump's Immigration Crackdown Is Likely to Bring a Flood of Lawsuits*, BLOOMBERG POLITICS (Feb. 22, 2017), <https://www.bloomberg.com/politics/articles/2017-02-22/trump-s-immigration-crackdown-likely-to-bring-lawsuit-flood>.

numerous means for millions of people to legalize their status and significantly increased those who could be deported. For instance, those who overstay a visa are permitted to gain status if they marry a citizen or are hired by a U.S. company; but those who cross the border without permission are barred from doing so. Under the old law, the border crossers simply paid a \$1,000 fine, which permitted them to obtain status for which they became eligible.<sup>103</sup>

Before IIRIRA, a non-citizen also could earn a green card if she lived in the country for seven years, paid taxes, made contributions to those around them, and could establish that either she or her family members would suffer if she were deported.<sup>104</sup> This remedy allowed parents of citizen children who were top students, promising athletes, or were making contributions, such as starting anti-gang programs in their communities, to earn a means to stay and continue to contribute. IIRIRA constricted this remedy to only individuals who had been in the country for ten years without interruption, and, as a practical matter, whose citizen children had serious medical conditions. The procedural restrictions were irrational, and have served to break up functioning and healthy families that have citizen children or spouses.

In a published decision, the Ninth Circuit upheld the denial of relief to a father and son who were not able to meet the ten-year requirement because they took a trip to Mexico, in which they were helping the father's elderly parents recover from unexpected injuries, which extended past ninety days.<sup>105</sup> The court noted the immigration judge's findings in which the father, his wife, and their children:

[I]mprove[d] their community through volunteer work, helping neighbors, and tutoring those learning English. Moreover, [the son] entered the country as an infant and has spent his entire life here, with the exception of the five-month trip that now renders him deportable. Nothing in the record explains why so many of our government's limited resources have been used to pursue the deportation proceedings, to overturn the [immigration court]'s decision before the [Board of Immigration Appeals], and to defend the [agency's reversal] in this court.<sup>106</sup>

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<sup>103</sup> Immigration and Nationality Act, 8 U.S.C. §§ 1255(a), § 1255(i) (2012) (8 U.S.C. § 1153(a) waiver for inadmissibility available to those who meet all requirements before Dec. 21, 2000).

<sup>104</sup> *Jaghooori v. Holder*, 772 F.3d 764, 766 (4th Cir. 2014) (“The prospect of discretionary relief from removal has long been a fixture of immigration jurisprudence. Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), potential avenues for relief included a waiver of deportation pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994) (repealed 1996), and suspension of deportation pursuant to 8 U.S.C. § 1254(a)(1) (1994) (repealed 1996).”).

<sup>105</sup> *Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 941–42 (9th Cir. 2004).

<sup>106</sup> *Id.* at 941.

Before IIRIRA, both lawful permanent residents and undocumented individuals were not categorically barred from relief if they had committed a crime. Instead, an immigration judge would oversee a hearing in which the person's reasons for staying were balanced against the seriousness of the crime and the character of the offender.<sup>107</sup> Those whose mistakes were outweighed by their contributions and proof of rehabilitation were permitted to remain. Those whose depravity or dangerous conduct outweighed their positive qualities were deported.

By contrast, IIRIRA not only will deport people based on a criminal conviction alone—without regard to whether the criminal court found the conviction to be minor or insubstantial, or whether the criminal courts, or even a governor's pardon, found the offender to be rehabilitated.<sup>108</sup> IIRIRA also makes those consequences retroactive, which means this law targets people for previously committed crimes. People who have been in the country for decades without problems are suddenly deportable based on convictions that occurred years ago. One client, who was a lawful permanent resident for twenty-seven years, was charged with being deportable at the age of fifty-three for a crime she committed in her twenties. To add insult to injury, at the time she committed that crime, it had no immigration consequences. But after IIRIRA, it was deemed an aggravated felony.<sup>109</sup>

It is no exaggeration to attribute the 11 million undocumented individuals stuck in the shadows of the law to the operation of IIRIRA. Sixty percent of that population have been in the United States for at least a decade, prevented from being able to qualify for status.<sup>110</sup> This is a reality that hits home on a personal level. Before law school, I worked as a paralegal for an immigration attorney two years before and after IIRIRA passed. I remember vividly the days, weeks, and months after IIRIRA was enacted. Prospective clients who were people we could have helped secure status before IIRIRA, we were now forced to turn away. A lawful permanent resident who had been in the United States since age two and served in the military was now barred from relief because of his minor drug

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<sup>107</sup> See *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 296 n.5 (2001) (permitting Section 212(c) to remain available for certain individuals). For lawful permanent residents, Congress permitted Section 212(c) as a remedy for those whose equities outweighed the debts. Section 212(c) cases were granted at a national rate of at least 51.5%.

<sup>108</sup> Sarah Maslin Nir, *To Stave Off a Deportation, Cuomo Pardons a 9/11 Volunteer*, N.Y. TIMES (June 21, 2017), [https://www.nytimes.com/2017/06/21/nyregion/cuomo-pardon-deportation-carlos-cardona.html?\\_r=0](https://www.nytimes.com/2017/06/21/nyregion/cuomo-pardon-deportation-carlos-cardona.html?_r=0) (“The decision does not automatically nullify the deportation order for Mr. Cardona, said Mr. Barua, who must now petition ICE to drop the order.”).

<sup>109</sup> *Tyson v. Holder*, 670 F.3d 1015, 1016–17 (9th Cir. 2012).

<sup>110</sup> Vivian Yee, Kenan Davis & Jugal K. Patel, *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), [https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html?\\_r=0](https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html?_r=0).

conviction from his twenties, which was no longer considered a “minor offense” under IIRIRA. A gay man from Iran who trembled with fear in the office because he had been arrested and tortured by the Iranian government, showed up past the filing deadline to timely seek asylum. A citizen with HIV virus could not legalize his partner’s (who was his ten-year companion and sole caretaker) status. Electrical engineers who now worked for minimum wage and had citizen children (who were A students and soccer protégés) could no longer show that their children’s success was relevant to keeping them here.

This newly-restrictive immigration policy was a marked break from the old immigration law that rewarded people who contributed to their families, communities, and employers. Instead, IIRIRA found ways to deny, take away, and prevent those who had made contributions to continue to do so.

The experiment in ratcheting up immigration enforcement was not a thoughtful, considered proposal to an existing problem.<sup>111</sup> Instead, IIRIRA was at best a political calculation by each party to woo voters who were concerned with the optics of being tough on immigration, along with being tough on crime, welfare fraud, and gay marriages. IIRIRA was part of legislation authored by a Republican Congress and signed by President Bill Clinton in a now-infamous two-month period that was weeks before his reelection. On August 22, 1996, President Clinton ended welfare by signing the Personal Responsibility and Work Opportunity Act,<sup>112</sup> and earlier in September 1996, he signed the Defense of Marriage Act, a law, found constitutional at the time, to defend heterosexual marriages from the threat of same-sex marriages.<sup>113</sup> In that very same month, on September 30, 1996, in an election year,

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<sup>111</sup> For a thoughtful viewpoint that disagrees, contending that the criminalization of immigrants and migration was borne of a deliberate desire to harm vulnerable populations, see García Hernández, *supra* note 6, at 1492 (“Rather than viewing migrants as deserving individuals in need of safe harbor in the United States or as morally upright people coming to the United States to work and perhaps reunite with family, migrants are frequently portrayed as criminals. And as criminals, they are thought to be enemies of the law-abiding public. Once migrants were framed this way, it became logical for legislators to turn to strong-armed restrictive policies intended to curtail this threat.”).

<sup>112</sup> Margaret O’Mara, *Welfare as We Knew It: The 1996 Personal Responsibility and Work Opportunity Act*, BLACKPAST.ORG, <http://www.blackpast.org/perspectives/welfare-we-knew-it-1996-personal-responsibility-and-work-opportunity-act> (This article discusses the political calculations that went into the formulation and enactment of the bill: “By 1996, Clinton was running for reelection and comprehensive welfare reform legislation was moving through in Congress. Named the ‘Personal Responsibility and Work Opportunity Act,’ the bill truly ended welfare as we knew it. Although Gingrich’s orphanages were nowhere to be seen, the legislation ended the welfare entitlement, a heretofore sixty-year federal guarantee that all poor people who qualified would receive the benefit.”).

<sup>113</sup> Steve Kornacki, *Why Bill Clinton Really Signed DOMA*, MSNBC (Oct. 27, 2015), <http://www.msnbc.com/msnbc/why-bill-clinton-really-signed-doma> (“A profile in courage moment? Hardly. But a coldly rational judgment from a politician who had gotten too far ahead of the public on gay rights and paid dearly for it?”).

President Clinton also signed IIRIRA.<sup>114</sup> Those close to the process freely admit that IIRIRA was enacted with a full awareness of its flawed policies, but the politicians embraced it to avoid looking soft on crime and immigration.<sup>115</sup>

### B. *Enforcement-Only Measures Are Inadequate Policies*

It is telling that IIRIRA was enacted alongside Tough on Crime measures that we now have abandoned. The facts of mass incarceration, also appropriately labeled over-incarceration, are not in dispute. In 1973, there were ninety-eight prisoners per every 100,000 people in the United States. Today, there are now 753 prisoners for every 100,000 people—an increase of 400% from 1973.<sup>116</sup> Of those prisoners, 60% are serving sentences for non-violent crimes. The end result is that the United States has 5% of the world's population and over 20% of its prisoners.<sup>117</sup>

There are numerous reasons for the astronomical rise of incarceration. The war on drugs, mandatory minimums, three-strikes laws, racism, punishing juveniles as adults, all contributed to what is now known as Tough on Crime policies.<sup>118</sup>

Remarkably, a bipartisan coalition has developed to end this. This is true despite Attorney General Sessions call to revive this misguided policy.<sup>119</sup> Both Republicans and Democrats realize Tough on Crime policies, which have resulted with an annual price tag of \$80 billion

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<sup>114</sup> Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today's Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM), <http://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>.

<sup>115</sup> *Id.*; Carrie Johnson, *20 Years Later, Parts of Major Crime Bill Viewed as Terrible Mistake*, NPR (Sept. 12, 2014, 3:32 AM), <http://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake>.

<sup>116</sup> JONATHAN WROBLEWSKI, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE SENTENCING AND CORRECTIONS REFORM: WHERE WE ARE AND WHERE WE'RE HEADED 5 (2016) (on file with author). This current mass incarceration has not been the norm. To the contrary, in 1972, there were 196,092 prisoners in federal and state prisons. By 2014, the numbers had risen over 400%, to a population of 1,508,636. The 753 number is from 2009 data. See JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CTR. FOR ECON. AND POLICY RESEARCH, HIGH BUDGETARY COST OF INCARCERATION (June 2010).

<sup>117</sup> *The Prison Crisis*, AM. CIV. LIBERTIES UNION (Jan. 20, 2011), <https://www.aclu.org/prison-crisis>.

<sup>118</sup> Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration in America*, WASH. POST (Apr. 30, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/?utm\\_term=.dac8971bf21a](https://www.washingtonpost.com/news/wonk/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/?utm_term=.dac8971bf21a).

<sup>119</sup> David Cole & Marc Mauer, *Jeff Sessions Wants a New War on Drugs. It Won't Work*, WASH. POST (June 22, 2017), [https://www.washingtonpost.com/opinions/the-new-war-on-drugs-wont-be-any-more-effective-than-the-old-one/2017/06/22/669260ee-56c3-11e7-a204-ad706461fa4f\\_story.html?utm\\_term=.cdc095f7608a](https://www.washingtonpost.com/opinions/the-new-war-on-drugs-wont-be-any-more-effective-than-the-old-one/2017/06/22/669260ee-56c3-11e7-a204-ad706461fa4f_story.html?utm_term=.cdc095f7608a).

results in a 75% recidivism rate.<sup>120</sup> Moreover, the response of incarceration has not healed our communities, not given closure to the crime victims, and not helped the offender integrate back into society. By contrast, the federal and state governments developed, and now follow, Smart on Crime initiatives—often initiated by prosecutors—which focus on alternative programs to prison sentences and successful means to permit offenders to reenter society.<sup>121</sup>

### C. *Falsehoods Justify Heightened Enforcement Measures*

For the same reason that overzealous criminal laws caused more harm than good, it is time to end these trumped-up immigration enforcement policies—which are based both on an unprecedented dedication to keeping people out of the U.S. and on factually incorrect premises that immigrants are dangerous or not contributing to the welfare of the country.

The facts are that crime rates are at a twenty-year low and non-citizens commit fewer crimes than citizens.<sup>122</sup> Such facts must be remembered because, the Trump administration is creating a new registry to track and publicize crimes committed by non-citizens.<sup>123</sup> Called VOICE—Victims of Immigrant Crime Engagement office—government funding will be directed to produce and release a report “studying the effects of the victimization of criminal aliens present in the United States” four times each year.<sup>124</sup> This initiative defies reality because, as a whole, immigrants are committing fewer crimes than citizens and, for everyone who actually hurts someone, there are millions who are helping, contributing, and growing this country. But in a page from *Animal Farm*, demonizing immigrants as takers, as violent, as dangerous, as “illegal”,<sup>125</sup> creates a common enemy to rally around.

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<sup>120</sup> See Alana Semuels, *What Incarceration Costs American Families*, THE ATLANTIC (Sept. 15, 2015), <https://www.theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412>.

<sup>121</sup> See *Reentry Services: Offender Reentry*, IDAHO DEP’T OF CORRECTION, [https://www.idoc.idaho.gov/content/probation\\_and\\_parole/reentry\\_services](https://www.idoc.idaho.gov/content/probation_and_parole/reentry_services); *The Attorney General’s Smart on Crime Initiative*, THE U.S. DEP’T OF JUSTICE ARCHIVES, <https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative> (last updated Mar. 9, 2017).

<sup>122</sup> Julia Dahl, *How Big a Problem Is Crime Committed by Immigrants?*, CBS NEWS (Jan. 27, 2017, 3:08 PM), <http://www.cbsnews.com/news/illegal-immigrants-and-crime-how-big-a-problem-is-crime-committed-by-immigrants>.

<sup>123</sup> Tal Kopan, *What Is VOICE? Trump Highlights Crimes by Undocumented Immigrants*, CNN (Mar. 1, 2017), <http://www.cnn.com/2017/02/28/politics/donald-trump-voice-victim-reporting>.

<sup>124</sup> *Id.*

<sup>125</sup> See Kari Hong, *The Ten Parts of “Illegal” in “Illegal Immigration” that I Do Not Understand*, 50 UC DAVIS L. REV. ONLINE 43, 50–56 (2017).

The immigrants then either can be blamed for pretextual problems—such as hordes of immigrants crossing the border to inflict violence on citizens—or serve as the distraction from the systemic solutions to economic inequality that would in fact alleviate the falling wages, economic disparities, and loss of industry in rural areas.

#### D. *Immigrants Contribute to Our Economy and Social Services*

To counter the perpetuation of falsehoods, it is critical to acknowledge the myriad contributions immigrants make. Two-thirds of all legal immigration is based on family ties: most people want to remain in the country because they have a husband, wife, or child who is a citizen.<sup>126</sup> As noted by Jason Cade, mass deportation would exact substantial financial costs on the collateral consequences that leave citizen spouses and children without a parent to support them.<sup>127</sup> Non-citizens have, and currently do, serve in the military, and Trump has even deported veterans who fought in combat on behalf of the United States.<sup>128</sup>

According to data from the Social Security Administration, undocumented immigrants alone pay \$12 billion a year in taxes.<sup>129</sup> In addition, it is hard to see that immigrants are a burden when 83% of America's top high school science students are the children of immigrants.<sup>130</sup> In studies examining the impact that legalization of young undocumented individuals through the Deferred Action for Childhood Arrivals (DACA) program has had, the research shows that not only are young persons benefitting from increased salaries and educational degrees, but society as a whole is benefitting from increased

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<sup>126</sup> Jie Zong & Jeanne Batalova, *Green-Card Holders and Legal Immigration to the United States*, MIGRATION POLICY INST. (Oct. 1, 2015), <http://www.migrationpolicy.org/article/green-card-holders-and-legal-immigration-united-states> (reporting that in 2013, 66% of green card holders received status based on a family relationship).

<sup>127</sup> In an email on file with the author, Jason Cade stated that there are financial costs of removal decisions, including the long-term effects on children left behind, loss of workforce, and increased family reliance on public support.

<sup>128</sup> Roxana Popescu, *They Served in the U.S. Military and Hoped for Citizenship. They Got Deported*, CHI. TRIBUNE (June 4, 2017, 5:04 PM), <http://www.chicagotribune.com/news/nationworld/ct-deported-vets-20170604-story.html>.

<sup>129</sup> SOC. SEC. ADMIN., EFFECTS OF UNAUTHORIZED IMMIGRATION ON THE ACTUARIAL STATUS OF THE SOCIAL SECURITY TRUST FUNDS (2013), [https://www.ssa.gov/oact/NOTES/pdf\\_notes/note151.pdf](https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf); Alexia Fernández Campbell, *The Truth About Undocumented Immigrants and Taxes*, THE ATLANTIC (Sept. 12, 2016), <https://www.theatlantic.com/business/archive/2016/09/undocumented-immigrants-and-taxes/499604>; Eric Pianin, *Study Finds Illegal Immigrants Pay \$11.8B in Taxes*, THE FISCAL TIMES (Apr. 16, 2015), <http://www.thefiscaltimes.com/2015/04/16/Study-Finds-Illegal-Immigrants-Pay-118B-Taxes>.

<sup>130</sup> Stuart Anderson, *83% of America's Top High School Science Students Are the Children of Immigrants*, FORBES (Mar. 11, 2017, 12:11 AM), <https://www.forbes.com/sites/stuartanderson/2017/03/11/83-of-americas-top-high-school-science-students-are-the-children-of-immigrants/#7858cfa2200f>.

tax revenues and collateral benefits that arise from more persons contributing to the economy through purchasing cars, buying first homes, and starting businesses.<sup>131</sup>

Economists further contend that our economy will not thrive or expand without immigrants.<sup>132</sup> Immigrants are twice as likely as citizens to start small businesses, accounting for 30% growth in that sector from 1990 to 2010.<sup>133</sup> As we are already seeing in California and New York, based on the fear of what the Trump administration might do, agricultural fields are not being harvested, restaurants are without needed workers, and labor shortages are threatening to increase food prices.<sup>134</sup> In states such as Iowa, that have full employment, companies cannot expand without a workforce that is provided through immigration.<sup>135</sup> As European countries with aging populations are realizing too late, we will only be able to care for our aging population with the continued existence of immigrants, who will act as a means of

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<sup>131</sup> Tom K. Wong et al., *New Study of DACA Beneficiaries Shows Positive Economic and Educational Outcomes*, CTR. FOR AM. PROGRESS (Oct. 18, 2016, 12:00 PM), <https://www.americanprogress.org/issues/immigration/news/2016/10/18/146290/new-study-of-daca-beneficiaries-shows-positive-economic-and-educational-outcomes>. This study found that after four years of DACA's program, both the beneficiaries of the program and the larger society has benefitted. *Id.*

The data illustrate that DACA recipients are making significant contributions to the economy by buying cars and first homes, which translate into more revenue for states and localities in the form of sales and property taxes. Some are even using their entrepreneurial talents to help create new jobs and further spur economic growth by starting their own businesses.

*Id.*

<sup>132</sup> Heather Long, *Over 200 Economists Say Trump Is Wrong on Immigration*, CNN MONEY (Mar. 6, 2017, 7:58 AM), <http://money.cnn.com/2017/03/06/news/economy/donald-trump-immigration/index.html>.

<sup>133</sup> *Immigrants and Small Business*, N.Y. TIMES (June 30, 2012), <http://www.nytimes.com/2012/07/01/opinion/sunday/immigrants-and-small-business.html>.

<sup>134</sup> Caitlin Dickerson & Jennifer Medina, *California Farmers Backed Trump, but Now Fear Losing Field Workers*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/california-farmers-backed-trump-but-now-fear-losing-field-workers.html>; *see also* Michael Frank, *Can America's Farms Survive the Threat of Deportations?*, THE ATLANTIC (June 6, 2017), <https://www.theatlantic.com/business/archive/2017/06/can-americas-farms-survive-the-threat-of-deportations/529008>; Tamar Haspel, *Illegal Immigrants Help Fuel U.S. Farms. Does Affordable Produce Depend on Them?*, WASH. POST (Mar. 17, 2017), [https://www.washingtonpost.com/lifestyle/food/in-an-immigration-crackdown-who-will-pick-our-produce/2017/03/17/cc1c6df4-0a5d-11e7-93dc-00f9bdd74ed1\\_story.html?utm\\_term=.ecbe6a85828a](https://www.washingtonpost.com/lifestyle/food/in-an-immigration-crackdown-who-will-pick-our-produce/2017/03/17/cc1c6df4-0a5d-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.ecbe6a85828a); Chris Morris, *California Crops Rot as Immigration Crackdown Creates Farmworker Shortage*, FORTUNE (Aug. 8, 2017), <http://fortune.com/2017/08/08/immigration-worker-shortage-rotting-crops>.

<sup>135</sup> Patricia Cohen, *In Iowa, Jobs Are Plentiful but Workers Are Not*, N.Y. TIMES (Jan. 28, 2016), <https://www.nytimes.com/2016/01/29/business/economy/in-iowa-jobs-are-plentiful-but-workers-are-not.html> (“[T]he Kemin chief executive [stated] that the acute labor shortage was nudging some skeptics in the business community to be more welcoming. ‘The only thing that’s going to relieve us is getting immigrants into the state,’ he said. ‘Having babies is still a 20-year process.’”).

economic growth and, as a practical matter, the young immigrant workers will pay into the social security system.<sup>136</sup>

### E. *Immigrants Define the American Identity*

Those who favor deportations, detentions, and the wall are quick to point out that our country cannot afford newcomers. Our cities are crowded, our schools overburdened, and workers cannot compete with foreigners. The full embrace of nativism by President Trump in targeting immigrants for deportation and exclusion must be met with factual and emotional reasons for why we—as Americans—will be much worse off if that were to occur.

For starters, it is not empty rhetoric to say we are a nation of immigrants. One out of every four Americans is an immigrant or the child of an immigrant.<sup>137</sup> With the exception of Native Americans, the rest of us need not go too far back to find how our relatives got here.

Mieke Strand observed that, when a British friend asked about her background, she responded with: “I’m a quarter Norwegian, a quarter Dutch, a quarter Polish, and a quarter French-German-Irish.”<sup>138</sup> The friend laughed, explaining that such an answer is one only an American would give because in England, everyone is English, no matter from where their families came. Unique to America,

If we, ourselves, did not come here from other places, then, overwhelmingly, our parents, grandparents, or great-grandparents did. Our ancestors made the courageous and difficult decision to leave their homelands with the fervent hope that America would offer a better future. This is a point of pride for most of us, and it is part and parcel of the American ethos.<sup>139</sup>

But at the same time, Americans with immigrant roots (which includes all except those who are Native American) reconcile their own current anti-immigrant sentiment with the myth that their ancestors were different—they were desired, their talents recognized, and their

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<sup>136</sup> The Editorial Board, *The Immigration Facts Donald Trump Doesn't Like*, N.Y. TIMES (Feb. 25, 2017), [https://www.nytimes.com/2017/02/25/opinion/the-costs-of-mr-trumps-dragnet.html?\\_r=0](https://www.nytimes.com/2017/02/25/opinion/the-costs-of-mr-trumps-dragnet.html?_r=0); Liz Alderman, *Danish Companies Seek to Hire, but Everyone's Already Working*, N.Y. TIMES (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/business/economy/denmark-jobs-full-employment.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news>.

<sup>137</sup> Matt Rocheleau, *I in 4 Americans Are Immigrants or Children of Immigrants*, BOS. GLOBE (Jan. 30, 2017), <https://www.bostonglobe.com/metro/2017/01/30/americans-are-either-children-immigrants-themselves/veKA9SM9H9onyBS6TiCUwI/story.html>.

<sup>138</sup> Mieke Strand, *On Being American*, MEDIUM.COM (Jan. 31, 2017), <https://medium.com/@miekestrand/on-being-american-90206be47e16#.qmqrkogq4>.

<sup>139</sup> *Id.*

contributions embraced. Such beliefs ignore that in 1924, Congress restricted Italian immigrants from entering the U.S. by 90% based on a 1911 government report that concluded “[c]ertain kinds of criminality are inherent in the Italian race. In the popular mind, crimes of personal violence, robbery, blackmail and extortion are peculiar to the people of Italy.”<sup>140</sup> In the 1750s, Benjamin Franklin wanted to stop the entry of German immigrants because they were “too stupid” and “swarthy” to ever learn the English language or assimilate to our values.<sup>141</sup> We are a nation of immigrants, but we also have been a nation quick to forget our own immigration stories and close the door to others.

On a personal note, I have always identified as an American, a fascinating decision given that like many, my family history is a blend of established ties and newly-arrived immigrants. On the one hand, the closeness of my own immigration was near: I have a grandmother who was born in Norway and a father who had been a refugee from Latvia. But I never needed to reconcile whether my identity was informed by this nearness. As a child, I asked my grandmother what her nationality was. I was gently but firmly corrected that not only was she American but my grandfather’s family had arrived from Germany generations ago, an explanation that rebutted any doubt that I had a right to be in this country and claim citizenship to it. Indeed, I took my cues from the newly-arrived family members who proudly and unequivocally claimed an American identity, without modification. Although this identity had underlying tensions, I never needed to face it. Before becoming an immigration advocate, I—like many Americans—forgot that my family members arrived when the laws were more welcoming.

Professor Hiroshi Motomura eloquently discussed how immigration law—and society—used to deem certain immigrants as “Americans in Waiting,” a presumption that recognized the enormous value immigrants have provided our country, communities, and families.<sup>142</sup> Although the term was used selectively, it needs to be revived as an alternative term to describe immigrants. The greatest harm in using the term “illegal immigrant” is that it recasts immigrants not as those who will contribute, but as indelible foreigners—unwelcomed, dangerous, and not being valuable to the United States.<sup>143</sup> The past twenty years of

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<sup>140</sup> Helene Stapinski, *When America Barred Italians*, N.Y. TIMES (June 2, 2017), <https://www.nytimes.com/2017/06/02/opinion/illegal-immigration-italian-americans.html?mwrsm=Facebook> (quoting the United States Immigration Commission’s 1911 Dillignham report).

<sup>141</sup> *Ben Franklin on “Stupid, Swarthy Germans,”* DIALOG INT’L (Feb. 5, 2008), [http://www.dialoginternational.com/dialog\\_international/2008/02/ben-franklin-on.html](http://www.dialoginternational.com/dialog_international/2008/02/ben-franklin-on.html).

<sup>142</sup> HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 10 (Oxford 2006).

<sup>143</sup> See also HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 19–55 (Oxford 2014); Hong, *supra* note 125 (discussing ten reasons why the term “illegal” is misleading when used in

immigration enforcement has justified spending billions of dollars to remove and keep away individuals who are vital to our economic growth. But more important, the Trump enforcement measures are exacting greater losses.

Abu Romman, a Jordanian citizen and son of a man who graduated from the University of Illinois, no longer wishes to return to the United States. He grew up, being told by his father that “America is the land of justice, land of opportunities, of generosity. That there are very kind people.”<sup>144</sup> But after being erroneously turned away under the Trump administration’s Travel Ban, Mr. Romman observed that his father’s America is in the past, stating, “I think things have changed.”<sup>145</sup>

Although one story, it is neither a coincidence nor an isolated event. Trump administration’s enforcement policies may or may not ultimately withstand court challenges. But that is not their only goal or measure of success. One of their primary architects, Kris Kobach, had authored the infamous Hazelton ordinance that permitted landlords not to rent to immigrants and Arizona’s SB70, which authorized police to arrest people for suspected immigration violations. Those anti-immigration measures were unsuccessful in terms of being implemented and legal. But they were effective in putting “immigrants in the center of a raging populist debate at every level of state and local government,” and as a result, “life got ugly for them.”<sup>146</sup>

The long-game of an “America First” policy is to deport existing immigrants and stop new immigrants from coming to the U.S. through physical and psychological barriers. Within days of Trump’s inauguration, tourism was “swiftly down” by 17%,<sup>147</sup> within weeks, the numbers of international students seeking admission to U.S. universities were down by 40%,<sup>148</sup> and refugee and asylum seekers who were in the U.S. opted to seek protections in Canada.<sup>149</sup> In June 2017, an award-

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the immigration context).

<sup>144</sup> Jane Arraf, *Deported with a Valid U.S. Visa, Jordanian Says Message Is “You’re Not Welcome,”* NPR (Feb. 24, 2017, 6:28 PM), <http://www.npr.org/sections/parallels/2017/02/24/517023337/deported-with-a-valid-u-s-visa-jordanian-says-message-is-youre-not-welcome>.

<sup>145</sup> *Id.*

<sup>146</sup> Jonathan Blitzer, *Trump’s Ideas Man for Hard-Line Immigration Policy*, THE NEW YORKER (Nov. 22, 2016), <http://www.newyorker.com/news/news-desk/trumps-ideas-man-for-hard-line-immigration-policy>.

<sup>147</sup> Christopher Muther, *You Could Call US Tourism a Victim of Trump’s Travel Ban*, BOS. GLOBE TRAVEL (Feb. 14, 2017), <https://www.bostonglobe.com/lifestyle/travel/2017/02/14/trump-ban-causes-tourism-drop-and-industry-fears-lasting-effect/yzMAVzeLvqywP8gEekoFsL/story.html>.

<sup>148</sup> Ron Allen, *Survey Finds Foreign Students Aren’t Applying to American Colleges*, NBC NEWS (Mar. 25, 2017, 11:06 PM), <http://www.nbcnews.com/nightly-news/survey-finds-foreign-students-aren-t-applying-american-colleges-n738411>.

<sup>149</sup> Catherine Porter, Dan Levin & Ian Austen, *Losing Hope in U.S., Migrants Make Icy Crossing to Canada*, N.Y. TIMES CAN. (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/world/canada/trump-migrants-canada.html>.

winning Syrian doctor, who had vaccinated 1.4 million children and was studying at Brown University, relocated to Canada in response to the “uncertainty” in securing a student visa under Trump’s Travel Ban.<sup>150</sup>

In this respect, the loss of immigrants and the decline of immigration threatens the core of our national identity. Being American is a verb. Immigrants reaffirm and renew our best values. Among my clients, a Pakistani Christian who had been granted asylum showed up a year later wearing a purple pantsuit and proudly speaking of how his daughter’s best friend at school was African-American. A Yemeni man married a woman who had been raised Catholic and converted to Islam. At the start of a routine meeting, my client burst with excitement, telling me that they went to the weekend’s gay pride parade and lamented not seeing me in the crowds. (This anecdote is consistent with a recent study showing that American Muslims are less homophobic than white Evangelical Christians.<sup>151</sup>) A Mexican client and his wife who were working at low-paying jobs, took in and raised the citizen child of an acquaintance who left the child in their care for two weeks, which turned into twelve years. The man had been a professional runner, and seeing the athletic talent in the abandoned child who became his own, developed the child’s talents so that he could earn a college scholarship. This past summer, that child ran in the U.S. Olympic Trials. Another client who had been an electrical engineer in Mexico, and had worked at a car wash for twenty years here, showed up with twenty years’ worth of federal income tax returns. A Salvadoran teenager, who fled from gangs and was granted asylum, called me asking how he can enlist in the U.S. military.

The list can go on, but what working with immigrants taught me is that those who want to come to this country do so with a desire to live out the best of our values—hard work, generosity, tolerance, and a desire to give back. It is not an overstatement to say that I first became patriotic when I saw my own country through their eyes. And because being American is a verb, it makes no economic or social sense to be deporting those who do contribute now and whose loss will harm our economic growth and our ability for renewal.

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<sup>150</sup> Jennifer McDermott, *Syrian Doctor Caught in Travel Ban Gives Up, Moves to Canada*, BOS. GLOBE (June 28, 2017), <https://www.bostonglobe.com/news/politics/2017/06/28/syrian-doctor-caught-travel-ban-gives-moves-canada/QqkVo4RNsAdjyhQspNcpL/story.html>.

<sup>151</sup> Ashley DeJean, *A New Poll Shows American Muslims Are Less Homophobic than White Evangelical Christians*, MOTHER JONES (Aug. 8, 2017, 6:00 AM), <http://www.motherjones.com/politics/2017/08/a-new-poll-shows-american-muslims-are-less-homophobic-than-white-evangelical-christians>.

F. *What Immigration Law Could Look Like*

It is a fallacy to think that the only option we have is the heightened enforcement measures or open borders. Before IIRIRA, we had a more nuanced system that rewarded those who contributed to our country and served as a check on those who caused more harm than good.

It is critical to return to this common-sense scheme that will welcome and reward those who can earn a right to remain. Under existing immigration policy, our country rewards those who have family ties (approximately 67% of the legal immigrants), provide valuable employment (approximately 20%), or are fleeing persecution (approximately 10%). I would endorse these categories along with a fourth, what was known as suspension of deportation, which permitted those who contributed to those around them to earn a green card after seven years.

To build upon what IIRIRA did, along with contemporary technology and concerns, I would recommend the following thought experiment regarding what immigration law could look like. I would recommend imposing a ten-day period for anyone entering the United States to register with the government. To borrow from the vision of immigration attorney Stephen Manning, the U.S. government could set up kiosks in public spaces that function like ATMs. A visitor—regardless of whether she was inspected or crossed the border—must register her name, address, birth date, and provide fingerprints and photograph to the machine. In exchange, the machine would provide a Social Security card and requirement that the person work, pay taxes, and not accept public benefits. In thirty days, if the person has either a job or significant familial relationship to a U.S. citizen, the person can stay, if she does not, she must leave. If the person is eligible for asylum, there would be a separate means for the person to apply and be evaluated for that claim.

I would allow renewal for six months, requiring a person to check-in, comply with all laws, pay all taxes, and prove the qualifying familial or work relationship. Under IIRIRA, at seven years, the person could apply for a green card and receive it if the equities outweighed any problems. I would return to this system and let those who are contributing to remain. If someone committed a crime that Congress designated as having immigration consequences, the immigration court would evaluate the seriousness of the crime, the rehabilitation of the offender, and give the person a maximum of one chance to commit a disqualifying offense.

This is not particularly visionary or radical. With the exception of kiosks and routine check-ins, it is simply returning to what immigration law used to be. The advantages are many. For those concerned over security, getting people out of the shadows, and, instead, getting them addresses, fingerprints, and locations makes a country safer. For those concerned about costs, the United States Citizenship and Immigration

Services is one of the few federal agencies that runs on the fees it generates, meaning immigrants cover the majority of costs to legalize their status.<sup>152</sup> For those concerned about the economy, legalization lets people continue to work and pay taxes. For those concerned with keeping the social security system solvent for their retirement, immigration provides the future young, productive workforce that keeps social security afloat.

#### CONCLUSION

The Trump administration is pursuing enforcement policies that will cost billions of dollars each year and are not rationally targeted to ease existing administrative problems. The heightened measures are costly, ineffective, and cruel. Just as important, the reasons for pursuing the increased crackdown on immigrants are premised on specious and fallacious assertions. Despite President Trump's rhetoric that immigrants are rapists and murderers, or cheap labor taking away jobs, the statistics establish that our society has the lowest violent crime rate in twenty years, non-citizens commit fewer crimes than citizens, and immigrant labor produces more jobs for citizens.

It is easy to criticize the Trump administration because these practices are materially different from those pursued by the Obama administration, in that they target as many immigrants as possible for deportation without regard to the human cost of separating families and the ruthless enforcement of laws without compassion. But before President Trump alone is condemned, it is critical to recognize that the current enforcement measures are also a continuation of the practices and policies that the previous three presidents—Obama, Bush, and Clinton—had pursued with relentless precision. For the past twenty years, all have been following a misguided immigration policy that is focused on enforcement—arrests, detention, and deportation—instead of family unification, fair adjudication of asylum applications, and legalization of those who contribute to our economy, society, and neighborhoods.

We can no longer afford to listen to nativist voices claiming immigrants are a burden when evidence contradicts these fears. For every immigrant deported, the country does not gain, but rather, our

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<sup>152</sup> WILLIAM A KANDEL & CHAD C. HADDAL, CONG. RESEARCH SERV., U.S. CITIZENSHIP AND IMMIGRATION SERVICES' IMMIGRATION FEES AND ADJUDICATION COSTS: PROPOSED ADJUSTMENTS AND HISTORICAL CONTEXTS, Summary (2010), <https://www.ilw.com/immigrationdaily/news/2011,0421-crs.pdf> ("USCIS obtains over 80% of its funding from fee revenue"); Vipul Naik, *US Immigrant Processing: Funded by User Fees Since 1882*, OPEN BORDERS (Jan. 22, 2015), <https://openborders.info/blog/us-immigrant-processing-funded-by-user-fees-since-1882>.

economy is hurt in immediate and lasting ways. But also, the renewal of our dreams and values comes through immigrants. The significant financial costs of pursuing trumped-up immigration enforcement for trumped-up reasons become damaging on numerous fronts.

We do not have to choose between a cruel crackdown and open borders. Repealing IIRIRA will return to sorting out the good from the bad, and giving those who do contribute a means and ability to stay. The old system was effective in rewarding those who contribute and deporting only the few who were of actual harm or detriment. A failure to return to common-sense proportionality, and permitting those who can contribute to do so will hurt us all.