Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System

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ABSTRACT

In this essay I defend the importance of resolute enforcement in sustaining generous immigration policy, particularly America’s singularly high lawful admission levels and relatively successful immigrant integration record. Drawing on my experiences in government service, I explore the risks to humane policy when the public perceives that migration is out of control. The public backlash to the 1980 Mariel boatlift, Congress’s enactment of harsh enforcement measures in 1996, and the Obama administration’s stern response to the child migrant crisis of 2014 illustrate the point. Though the current public reaction is relatively quiet, that situation is fragile, highly dependent on the relatively low net inflow of unauthorized migrants. I then examine specific ideas for building an effective and sustainable enforcement system. All would work better if accompanied by an expansive statutory legalization program; removing long-resident unauthorized immigrants as targets would facilitate resolute enforcement against newer violators. The specific recommended changes include: (1) mandatory E-Verify, but with added steps to address that system’s serious vulnerability to identity fraud; (2) stronger enforcement against visa overstays, which does not require that the nation build a wasteful biometric exit monitoring system; (3) revitalized and carefully designed cooperation with state and local law enforcement agencies, built upon lessons learned from Secure Communities—a fundamentally sound and efficient program that wound up losing support through mistakes in implementation, bad timing, and skillful litigation attacking immigration detainers; and (4) restoration of wider versions of discretionary relief from removal administered by immigration judges.

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This essay defends the importance of effective enforcement of the immigration laws and explores ideas for building a truly workable enforcement system. It draws from a long career doing immigration law, both as a scholar and as a government official (and, episodically, as an advocate for an individual or organizational client). It does not derive from a desire to see reductions in the immigrant population of the United States nor sharp cutbacks on the categories of persons who can come. Far from it. In fact, building an efficient enforcement system that earns and holds public confidence may be the best investment we can make toward sustaining a major American achievement: America regularly admits for lawful permanent residence far more foreigners than other countries (a million new green-card holders each year), and, despite problems, it generally greets its new populations with a welcoming and supportive attitude that helps foster integration. This country reaps considerable benefits from this stance toward migration and effective incorporation, both culturally and economically. We could profitably take in modestly higher levels, particularly if we can make sure that the permanent migration that expands our population and our talent pool comes overwhelmingly through legal channels. This is where improved enforcement plays its role.

I. Why Enforcement is Important for Supporters of Generous Immigration Policy

A. A bit of history

The nation’s historic support for high levels of annual immigration, though it builds on important parts of American tradition, cannot be taken for granted. My years in government have left me with memorable evidence of the risks from real or perceived enforcement failures and the public’s negative reaction.

As a young lawyer, knowing virtually nothing about immigration law, I became an officer in the new human rights bureau at the State Department and wound up working on what became the Refugee Act of 1980. Though the statute drew wide praise and had solid bipartisan support when it was enacted in March, 1980, the massive Mariel boatlift from Cuba, which began four weeks later, produced a public opinion turnaround. During the

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five months that the boatlift lasted, 125,000 Cubans arrived in South Florida by boat, in a chaotic rush and without advance screening. That protracted scene produced a steady barrage of angry, anguished, disgusted, concerned, or vituperative mail to the State Department. It also triggered calls for repeal of the brand new Refugee Act, even though the Act had little to do with the underlying problems that caused the boatlift and in fact provided a far better decisionmaking structure for refugee admissions than pre-existing law. The policy merits, I quickly learned, become badly obscured when passions are fired by a perception that the government has lost control of immigration.

The Refugee Act survived. But a more powerful and graphic example of damaging public reaction to high-level illegal migration came during my second period of public service in the executive branch, as General Counsel to the Immigration and Naturalization Service in the mid-1990s. During that period Congress adopted major statutory changes, in two laws enacted in 1996. Many of the provisions were poorly designed, and immigration policy is still suffering from their effects.

The background is instructive. Proposition 187 had been adopted by popular referendum in California in November 1994, winning 59% of the vote. Dubbed the “Save Our State” initiative (in the midst of an economic recession in California), the measure denied a host of state services, including education from elementary through university levels, to unauthorized migrants. It also included mandates that state agencies check immigration status in most settings before providing services. The combination was meant to encourage the undocumented to leave—or at least to deter new illegal arrivals. The proponents’ campaign drew on deep
disillusionment with what by 1994 had become the obvious failure of the enforcement measures that had been adopted with great fanfare in the 1986 Immigration Reform and Control Act ("IRCA"). IRCA's chief enforcement innovations - sanctioning employers who hire unauthorized workers, and requiring employers to follow specific procedures to screen new employees - had proved to be easily defeated with false documents, whereas its amnesty or legalization provisions successfully brought legal status to nearly three million formerly unauthorized migrants.

Most of Prop 187 was eventually ruled invalid in litigation. But its adoption by the voters amounted to a political earthquake shaking Washington, D.C., and producing two intense years of federal-level political jockeying to enact tough new federal laws. Both parties trumpeted their commitment to strengthening enforcement, though they had different programs for doing so. In this climate, Congress in 1996 accepted a broad array of ill-designed measures peddled by members who were drawing not on careful study of what might work in the field, but on oversimplified ideas of what tough enforcement should look and sound like.

In that process, Congress dismembered what had proven to be reasonably workable forms of relief from deportation, known as 212(c) relief and

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10 Not all parts of IIRIRA were ill-designed; some portions of this massive Act did represent improvements in enforcement. For example, the law makes possible swift removal of persons who reenter the country without permission after an earlier deportation under a formal removal order, through a better-designed procedure for “reinstatement” of the earlier order. Immigration and Nationality Act ("INA") § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2012). The INA was enacted in 1952 as Pub. L. No. 82-414, 66 Stat. 163, and has been heavily amended since then. Unless otherwise indicated, my references to the INA are to the current version, as it appears in the cited section of the informal codification in 8 U.S.C.
suspension\textsuperscript{11}—safety valves that provided carefully structured procedures for alleviating the worst kinds of hardship that enforcement might cause. These were forms of relief administered by neutral immigration judges rather than enforcement agencies, and on the basis of a record compiled in immigration court. We have been working ever since to restore a reasonable space for the exercise of humane case-by-case discretion, but we are now forced to use inferior or ill-fitting mechanisms like prosecutorial discretion, deferred action, and U visas.\textsuperscript{12}

Congress also greatly expanded the criminal grounds for removal, which have their primary impact on lawful permanent residents ("LPRs"), whose status is generally otherwise quite secure. The changes not only widened the net cast by the definition of "aggravated felony,"\textsuperscript{13} a category for which conviction leads to almost certain deportability and forecloses nearly all forms of relief from removal, but they also explicitly made all parts of that definition retroactive in application. This rendered removable many LPRs who had not been deportable based on the crime when it was committed. The media carried poignant stories of lawful permanent residents suddenly facing deportation, though they had been completely law-abiding after finishing whatever sentence had been imposed and had developed extensive community, business, and family ties.\textsuperscript{14}

Congress also chose to make detention during proceedings mandatory for persons removable on most criminal grounds (even well-anchored LPRs).\textsuperscript{15} And it adopted something called the three- and ten-year bars\textsuperscript{16} that in practice carry little deterrent impact but instead wind up simply imposing significant hardship at exactly the moment when unauthorized

\textsuperscript{11} Former INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996); former INA § 244, 8 U.S.C. § 1254 (1994) (amended 1996 to eliminate suspension of deportation); Vashti D. Van Wyke, 
\textsuperscript{12} See \textit{ALENIKOFF ET AL.}, supra note 8, at 421–28 (discussing U visas), 778–88 (discussing prosecutorial discretion and deferred action).
\textsuperscript{13} Section 321(a) of IIRIRA, supra note 5, greatly expanded the definition of "aggravated felony." The current version, little changed since 1996, appears in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012).
\textsuperscript{14} See, e.g., Anthony Lewis, \textit{Abroad at Home; ‘Accent the Positive,'} \textit{N.Y. TIMES} (Oct. 10, 1997), http://www.nytimes.com/1997/10/10/opinion/abroad-at-home-accent-the-positive.html (describing the situation of Jesus Collado, one of the most widely discussed cases illustrating the harshness of the retroactive expansion of removal grounds); Anthony Lewis, \textit{Abroad at Home; Punishing the Past,} \textit{N.Y. TIMES} (Mar. 30, 1998), http://www.nytimes.com/1998/03/30/opinion/abroad-at-home-punishing-the-past.html (describing similar case of Gabriella Dee).
\textsuperscript{15} INA § 236(c), 8 U.S.C. § 1226(c) (2012).
residents have acquired a basis for a green card (mainly through marriage to an American citizen or LPR, but also sometimes through qualifying employment). Pre-1996 law permitted such persons to regularize their status rather promptly, perhaps with the payment of a penalty fee or after returning briefly to their country of nationality to acquire an immigrant visa at the U.S. consulate there. After 1996, the bars made such curing of status impossible for large categories of undocumented residents. Instead of inducing timely departures before the bars kicked in, this provision essentially solidified or amplified these people's inducement to remain here in irregular status once they acquired the close family tie that in earlier years would have led to legal status—precisely because they lacked any reasonable prospect for normalization without a decade of separation.

Perhaps even more worrying, as a sign of what is at risk when the public gets panicky about high levels of illegal migration, was the threat posed to legal migration categories in the wake of Prop 187. The bandwagon started rolling to impose significant cutbacks and reduce our annual intake of lawful permanent residents. Even the blue-ribbon commission chartered in 1990 to look into immigration reform, chaired by the revered Barbara Jordan, issued reports calling for significant reductions in categories and quotas for legal permanent migration based on family relationships. The primary bills advancing through the congressional process in 1995 and 1996 included such steps, looking to reduce the annual intake of new lawful permanent residents by as much as 25%. These measures enjoyed wide support in Congress. Had the cutbacks come up for a floor vote in 1996, they probably would have been adopted. Significant reductions in legal migration were avoided only through a clever

\[17\] See T. ALEXANDER ALEINKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 503–06 (4th ed. 1998) (describing the pre-1996 possibilities for adjustment of status, after payment of a penalty, under INA § 245(i), or for fairly quick access to consular processing if adjustment was denied).

\[18\] The details of this statutory fiasco are complex; I have attempted to explain the defects in David A. Martin, Waiting for Solutions: Extending the Time for Migrants to Apply for Green Cards Doesn't Get at the Real Problem, LEGAL TIMES, May 28, 2001, at 66.

\[19\] U.S. COMMISSION ON IMMIGRATION REFORM, 1997 REPORT TO CONGRESS: BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 59–66 (1997) (suggesting that annual admissions of LPRs would decline to 550,000, not counting refugees, under the Commission's proposal for realigning the admission categories).

procedural maneuver as the Senate Judiciary Committee began its consideration.\textsuperscript{21}

B. Why that history remains relevant

These episodes illustrate how widespread and visible failures of immigration enforcement, especially when they lead to rapidly rising populations of unauthorized migrants in local communities throughout the nation, create momentum for new restrictive legislation. At the same time, they narrow the space for thoughtful deliberation over effectiveness. What we got in 1996, and frequently risk in similar panicky circumstances, is a titanic legislative overreaction. Furthermore, for all the hardship the 1996 amendments imposed, they were stunningly weak in deterring or controlling illegal migration. Ten years after their effective date, the undocumented population had grown from approximately five million to nearly twelve million.\textsuperscript{22} As long as the net inflow of unauthorized migrants remained high (before the 2008 recession), public reaction to the ongoing perception that immigration was out of control proved sufficiently negative and virulent to defeat two major efforts at balanced immigration reform in 2006 and 2007.\textsuperscript{23}

Building a reliable and efficient enforcement system, then, is not inevitably an exercise in regimentation, xenophobia, or compulsive tidiness. The assurance of a reasonably functional enforcement regime would provide a vital barrier against shifting political winds and incipient

\textsuperscript{21} Senator Spencer Abraham (R-Mich.) took the lead in resisting cutbacks in legal migration. He proposed a motion, accepted by the Judiciary Committee, to “split the bill” and place legal immigration reform in a separate measure. See Senate Committee Splits Immigration Reform Bill, House Floor Action is Next, 73 INTERPRETER RELEASES 313 (1996); Senate Judiciary Committee Begins Markup of Major Immigration Legislation, 73 INTERPRETER RELEASES 262 (1996). It was clearly understood at the time that the legal migration reforms would not be acted upon before that session of Congress expired, whereas passage of some sort of enforcement reform was seen as a political necessity for both the President and members of Congress as they approached the hotly contested 1996 elections. See Eric Schmitt, Bill to Limit Immigration Faces a Setback in Senate, N.Y. TIMES (Mar. 14, 1996), http://www.nytimes.com/1996/03/14/us/bill-to-limit-immigration-faces-a-setback-in-senate.html; Marc Lacey, Senate Panel Opts to Split Bill on Immigration, L.A. TIMES (Mar. 15, 1996), http://articles.latimes.com/1996-03-15/news/mn-47388_1_legal-immigration.


anti-foreigner demagogy, thus helping the United States sustain wise immigration policy. Naturally it would not mean that avid restrictionists will give up on their efforts to reduce immigration quotas. Nor would it persuade xenophobes to love foreigners. There will always be factions within our society that take extreme positions. The point is not to convert those people. It is to shrink their effective audience by winning and holding support from the political middle.

Some may think that my concerns here are anachronistic. Prop. 187 is now far in the past, and its cousins, Arizona-style restrictionist laws, are on the wane. Instead, the recent trend (though with some exceptions) runs in the direction of local jurisdictions and some states restricting cooperation with immigration enforcement, instead of clamoring to participate in it. Also, unlike 2007, the 2013 Senate immigration reform bill did not trigger a record outpouring of hostile phone calls to Senators’ offices (such calls played a key role in defeating the earlier year’s anticipated “Grand Bargain” reform legislation). In fact, the 2013 Senate bill, which included significant increases in legal permanent migration, passed by a vote of 68 to 32.

But this period of greater calm, although welcome, is fragile. We have enjoyed a few years of reduced passions not because the problems of the immigration system have been solved, but because other factors combined to reduce new migration and the attendant stresses. These factors include the deep recession and rise in U.S. unemployment that began in earnest in 2008; greatly expanded border deployments over the last decade, which may have hit a tipping point toward sustained effectiveness in about 2010;


26 Robert Pear, No. 2 Senate Republican Calls for Passage of Immigration Bill, N.Y. TIMES (May 24, 2007), http://www.nytimes.com/2007/05/24/washington/24immig.html?_r=0 (describing how Senators’ offices had been “flooded with telephone calls” opposing legalization).

and significant economic and demographic changes in Mexico, which has been for many decades the largest source country for U.S. migration, legal and illegal.28 As a result, the population of unauthorized residents, which climbed rapidly through the 2000s, dropped noticeably in 2008 and 2009 and then stabilized at about eleven million for the succeeding three years.29 The attitudinal correlation strongly suggests that high, unauthorized flow and rapid growth of immigrant enclaves generate most of the backlash that powers overreaction. In contrast, statistics on the total stock of unauthorized migrants, especially if most are long-resident, do not carry the same impact. Given time, a critical mass of the citizenry tends to accommodate to the undocumented in their communities. Supporters of generous immigration policy would be well-advised to use our present period of relative calm to introduce measured enforcement changes that can keep the net growth low, even if other factors that attract migration revive, such as a return to high employment demand.

A wonderful series of stories in the New York Times in the summer of 2014, written by Damien Cave, neatly captured this political reality—and its fragility. Cave traveled up Interstate 35 from Laredo to Duluth, looking at the lives of immigrants and the communities where they live, including several localities, like Farmers Branch, Texas, that had once been flashpoints for local anti-immigrant agitation.30 He found that “fatigue with

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29 Jeffrey S. Passel & D’Vera Cohn, Unauthorized Immigrants: 11.1 Million in 2011, PEO HISPANIC CTR. (Dec. 6, 2012), http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011/. The years since 2012 may have brought a modest reversal of the trend, but any new net growth is quite small compared to pre-2008 levels. See Jeffrey S. Passel, D’Vera Cohn & Ana Gonzalez-Barrera, Population Decline of Unauthorized Immigrants Stalls, May Have Reversed, PEW HISPANIC CTR. (Sept. 23, 2013), http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/.

30 Farmers Branch passed an ordinance in 2008 designed to bar undocumented aliens from renting housing in the municipality. The ordinance required prospective renters to obtain a license indicating U.S. citizenship or legal immigration status. A court eventually ruled the measure invalid. Villas at Parkside Partners v. City of Farmers Branch, Tex., 726 F.3d 524, 526 (5th Cir. 2013) (en banc), cert. denied, 134 S. Ct. 1491 (2014); Dianne Solis, Supreme Court Refuses Farmers Branch Immigration Ordinance, DALLAS MORNING NEWS (Mar. 3, 2014), http://www.dallasnews.com/news/community-
the issue and years of interaction with immigrants seem to be softening the once-hardened opposition and outrage about immigration’s impact.”

31 This attitude, he concluded, amounts to a “begrudging pragmatism,” but it has its limits:

Many conversations also led to expressions of deep-seated frustration with the federal government’s inability to get a better handle on both legal and illegal immigration, suggesting that frustration could boil over again. . . . [A county official] in Denison, Iowa . . . told me, “We’re learning how to deal with it here,” but Washington has a responsibility “to keep us from dealing with more of it.”

C. The Obama Administration’s recent actions support this diagnosis

The actions of President Obama and his Administration through the spring and summer of 2014 graphically illustrate their understanding of that responsibility and – though they never put it quite this way publicly – of the importance of resolute, even severe enforcement in order to hold public support for key elements of generous immigration policy. The White House’s apparent overarching immigration objective during that period was either winning congressional approval of reform legislation that would include a broad legalization program, or else, should legislation fail, laying the groundwork for unilateral executive actions.34 As is well known, the House never took up the immigration reform bill, and the President’s unilateral executive initiatives were finalized and formally announced on November 20, 2014. They prominently included deferred action (a

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32 Id.


protection against deportation) and work authorization for up to five million unauthorized immigrants.\(^{35}\)

But a major complication toward winning acceptance, either of legislation or of executive action, became apparent in late spring, turning into a raging public issue by July. Record numbers of child migrants began arriving from Central America – sometimes alone and sometimes accompanied by family members.\(^{36}\) Up until that point, a major selling point for some form of legalization of long-resident undocumented populations (whether done through legislation or by executive action) had been the public perception that the border was under increasingly effective control. The arrival of children in such large numbers vividly undermined that perception, because this was a flow that seemed unlikely to yield to the tools previously used to beef up the border, such as frontier fencing or massive new deployments of the Border Patrol. The children and their family members were not trying to evade *la migra*. They were actually seeking officers out, in order to turn themselves in. They apparently perceived that this would lead to haven in the United States, perhaps through political asylum or through other special measures for children enacted without careful consideration in 2008.\(^{37}\)

Members of Congress clamored for a solution, and many localities resisted the opening within their boundaries of shelter care for the children.\(^{38}\) Public support for key parts of immigration reform eroded

\(^{35}\) President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), available at http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration. Twenty-six states challenged the President’s actions and won a preliminary injunction against implementation of that portion that would provide deferred action to an estimated four million persons with children who are U.S. citizens or lawful permanent residents. Texas v. United States, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015). The court of appeals denied the government’s request to stay or narrow the preliminary injunction, 2015 WL 3386436 (5th Cir. May 26, 2015); that court will hear full argument on the merits of the injunction in July 2015.


\(^{38}\) Manuel Roig-Franzia, Wesley Lowery & Niraj Chokshi, Border Crisis Creates Discomfort for State, Local Politicians over Housing Children, WASH. POST (July 23, 2014),
quickly. Until then, immigration controversy had been steadily declining over previous years. Polls showed that only 3% listed immigration as the top public issue in January 2014, down from 10% in 2006.\textsuperscript{39} By July, however, 17% of the public listed immigration as the number one public problem, more than any other issue.\textsuperscript{40} Beginning in 2012, polls had shown that a majority of the public supported a policy emphasis on legalization of the undocumented (54% in February 2014), as opposed to an emphasis on deportation (supported by 41% in that February poll). The proportions virtually flipped by July 2014, clearly spurred by the apparently uncontrolled rise in the flow from Central America.\textsuperscript{41}

The White House saw the risks and started to mobilize, in ways that otherwise seem to clash sharply with more familiar administration initiatives of the last few years — whose main theme had been curbing and focusing deportation, in part to avoid splitting families. In an effort to deter new arrivals from Central America, the Administration began insisting on detention for the arriving families, opening large new centers that could house women and children.\textsuperscript{42} It even deployed surprisingly severe and novel legal arguments in an effort to prevent judges from ordering release


Immigration court cases were held speedily, and the planes removing families with children who had received deportation orders received substantial publicity – in the United States and in the country of nationality when the plane landed. It has also enhanced cooperation with the source countries and transit countries in the region (especially Mexico) in efforts to thwart or discourage further migration. These measures appear to have succeeded in reducing the flow considerably, though whether the effect is durable remains to be seen. The administration has persisted in these strict and determined efforts in the face of judicial resistance and sharp criticism from its normal allies, and despite the fact that these severe measures focus on what would otherwise seem to be a highly sympathetic population: children fleeing countries with high levels of violence.

43 The Justice Department argued that removal actions against recently arrived entrants without inspection are not covered by the Constitution’s procedural due process guarantees (nor related habeas corpus protections), under doctrine announced in United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542–44 (1950). See M.S.P.C. v. U.S. Customs and Border Protection, No. CIV 14-769 JCH/CG, 2014 WL 6476125, at *20, *24–30 (D.N.M. Oct. 16 2014) (describing and accepting the government’s due process argument). The Knauff case involved a noncitizen excluded at a port of entry; before the most recent border crisis, the government had not generally argued that this restrictive doctrine would apply to persons who had effected an entry, even if a brief one.


47 The actions inside the United States have been heavily criticized by immigrant advocacy organizations, and several lawsuits have been filed. See, e.g., Diaz Rodriguez v. U.S. Customs & Border Prot., No. 6:14-CV-2716, 2014 WL 4675182 (W.D. La. Sept. 18, 2014) (rejecting effort to subject expedited removal order to judicial review); RILR v. Johnson, AM. CIVIL LIBERTIES UNION (Dec. 16, 2014), https://www.aclu.org/immigrants-rights/rilr-v-johnson (describing the ACLU’s suit challenging the Administration’s policy calling for systematic detention of women and minors from Central America). The ACLU won a preliminary injunction barring the United States from using detention of current family members seeking asylum in order to deter others. R.I.L.-R v. Johnson, No. CV 15-11 (JEB), 2015 WL 737117 (D.D.C. 2015). See also Hylton, supra note 42 (describing the litigation and its impact).
To me, this uncharacteristically severe reaction by the Obama Administration is explainable largely as a White House recognition that its long-term goals for dealing with the resident undocumented population can succeed only if that population exhibits no significant or visible net growth. The President’s national address on November 20, 2014, announcing his broad new deferred action program was revealing in this respect. Highlighting border security in his opening paragraphs, the President acknowledged “a brief spike in unaccompanied children” over the summer, but then essentially bragged that the number of such migrants was by November the lowest it had been in two years.48

Secretary Jeh Johnson, the head of the Department of Homeland Security (“DHS”), was far more direct in his remarks at the opening of a large new detention center for women and children near the Texas border in December 2014. He strongly defended the President’s broad programs for deferred action for the long-resident undocumented—the humanitarian type of executive initiative for which the Obama Administration is far better known. But he went on to emphasize that these steps have been paired with other enforcement initiatives. As reported in the New York Times, Johnson stated that the administration was making “a sharp distinction between past and future,” with all migrants who came illegally after Jan. 1, 2014, becoming top priorities for deportation. “Frankly,” Mr. Johnson said, “we want to send a message that our border is not open to illegal migration.”49 These remarks recognize that, on a broader canvas, resolute enforcement is crucial to the nation’s capacity to adopt or sustain reasonably generous immigration policy toward selected categories.

D. Expanding the horizon: the critical need for a judicious strategy to rebuild interior enforcement

This Article is premised on a similar recognition, but with one variation. The quoted remarks from the President and the Secretary suggest that the

48 Remarks by the President in Address to the Nation on Immigration, supra note 35.
49 Preston, supra note 42. The key date for differentiating past from future will apparently be January 1, 2014. Secretary Johnson issued a series of memos to implement President Obama’s November 20 announcement, including a new statement of enforcement priorities. Persons with specified criminal convictions occupy the highest priority, generally without regard to date of entry or offense. But the next priorities include aliens issued a final order of removal on or after January 1, 2014, and those who entered or reentered unlawfully after that date. See Memorandum from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014) [hereinafter Priorities Memorandum], available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.
Adminsitration believes it can achieve its “sharp distinction between past and future” primarily through border policing, including swift removal proceedings and stronger detention requirements for very recent arrivals—as exemplified in its response to the surge in juvenile migrants. Undeniably, border security is important to resolute enforcement, and there is no doubt that the massive growth in border resources over the last twenty years has provided a key building block. But border security alone is insufficient. Successful immigration enforcement necessarily rests on complementary action both at the border and in the interior. Visa overstayers, who constitute an estimated 25% to 40% of the unauthorized population, provide the most obvious illustration of this point. Border policing does nothing to address that sort of violation. Moreover, no matter how many more Border Patrol agents we hire, the temptation to try to find a way past those officers will remain high as long as just one successful trip means ready access to the full U.S. job market.

The weakest part of our current immigration system is interior enforcement. The current extensive border deployments will doubtless continue, for they enjoy wide congressional support. But further massive growth in the Border Patrol, as called for in the 2013 Senate immigration reform bill, is neither needed nor appropriate. Those funds could be spent


53 Martin, supra note 51, at 543-45.

54 Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. tit. III (2013). Very late in the Senate’s consideration of this bill, the Congressional Budget Office gave an unexpectedly rosy report on the bill’s effect on the federal deficit, projecting deficit reduction of $200 billion over ten years. Senators Corker and Hoeven then crafted a border security amendment that added $30 billion in spending, mainly to double the Border Patrol and build another 700 miles of fencing. Senator Corker admitted that these new resources were “almost overkill,” and others wondered whether the Department of Homeland Security (“DHS”) could even successfully hire so many new agents on the time frame proposed. Nonetheless, it passed overwhelmingly, because it provided political cover against a charge that bill supporters were insufficiently vigilant about enforcement. See Ed O’Keefe, Senators Reach Deal on Border Security Proposals, WASH. POST (June
far more effectively on interior enforcement initiatives. Curing the deep
and chronic sickness of the interior enforcement system is an indispensable
backstop to border enforcement.\

Furthermore, as Secretary Johnson’s remarks suggest, such cures are
much more likely to be effective if they largely focus on relatively recent
arrivals – on the future rather than the past. Local resistance is at its height
when enforcement is brought to bear on long-resident noncitizens who
have solid roots in the community. Federal judges are also far more likely
to adopt questionable doctrine that greatly complicates enforcement when
faced with this kind of sympathetic respondent. The old canard that hard
cases make bad law applies fully here. If we want to rebuild interior
enforcement to make it effective, we are much more likely to find success
if new or refined measures and strategies are directed primarily at more
recent arrivals.

The best way to create such an environment would be through a
legislated legalization program, perhaps along the lines included in the bill
the Senate passed in June 2013. That would have offered a form of secure
legal status, with work authorization, to all who entered before December
31, 2011, with certain exceptions for persons with criminal records. Such
a program would amount, in essence, to a sweeping legislative exercise of
prosecutorial discretion. Such an action has roots in humanitarian
impulses, but it should also be seen as an important enforcement-
empowering measure, facilitating wider public support for the resolute
actions thereafter to be taken against mere immigration violators.

In the absence of comprehensive immigration reform legislation of this
type, broad executive exercises of prosecutorial discretion may serve as a
less desirable fallback measure that nonetheless will focus enforcement
fixes on recent arrivals. This appears to be the intent behind the
Administration’s November 2014 executive initiatives, which may provide
deferred action for roughly half of the long-term undocumented

20, 2013), http://www.washingtonpost.com/blogs/post-politics/wp/2013/06/20/senators-reach-deal-on-
border-security-proposals/.

55 I have argued elsewhere that vast improvements in key governmental systems and databases
since September 11, 2001, also provide a solid basis, unavailable during earlier interior enforcement
campaigns, for far higher effectiveness now, if properly deployed in service of better-designed
substantive policies. David A. Martin, What Would an Unbroken Immigration System Look Like?

56 Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th
Cong. § 2101 (2013).

57 See Martin, supra note 55, at 2–3.

59 Priorities Memorandum, supra note 49.


using the familiar I-9 form and an employer review of specified documents such as a driver’s license and Social Security card, was easily defeated with false documents.\textsuperscript{63}

This failure is widely recognized, contributing to broad acceptance that immigration reform today must include an electronic verification system made mandatory (in phases) for virtually all U.S. hiring. It would build on the voluntary system now known as E-Verify, which has been in place, under evolving nomenclature, since 1997.\textsuperscript{64} Much of the earlier resistance to E-Verify has dissipated, as employers have found the internet-based system to be quite user-friendly.\textsuperscript{65} Over half a million employers are now participating, covering 1.4 million hiring sites and an estimated 40% of new hires; on average 1400 newly participating employers join the system each week.\textsuperscript{66} Though there are challenges in applying E-Verify in agriculture and in certain small-business settings, most participating employers find the system easy to use. False negatives (in which authorized workers – both U.S. citizens and authorized aliens – do not receive prompt verification) were once a major issue, producing loud resistance from some quarters. But the agency that manages the system, U.S. Citizenship and Immigration Services (“USCIS”) has made significant improvements in accuracy, muting though not altogether silencing those complaints.\textsuperscript{67}

\textsuperscript{63} ALEINIKOFF ET AL., supra note 8, at 952–54; INDEP. TASK FORCE ON IMMIGRATION & AMERICA’S FUTURE, supra note 60, at 46.


\textsuperscript{66} What is E-Verify?, supra note 65. The 40% estimate is my rough extrapolation from figures provided in MARC R. ROSENBLUM, MIGRATION POLICY INST., E-VERIFY: STRENGTHS, WEAKNESSES AND PROPOSALS FOR REFORM 2 (2011), available at http://www.migrationpolicy.org/research/e-verify-strengths-weaknesses-and-proposals-reform. Rosenblum reported that as of October 2010, 216,000 employers were participating. Though this number represented just 4% of U.S. employers, 20% of new hires within the United States were then being screened through the E-Verify system, which clearly means that a significant percentage of large-scale employers have registered for E-Verify. The number of employers has grown by roughly 150% since Rosenblum wrote, but the extrapolation recognizes that participation may now include a higher proportion of lower-volume employers. Id.

B. Troubling complacency about E-Verify’s vulnerability to identity fraud

E-Verify marks a highly significant advance over the employer-operated paper-based verification system adopted in IRCA, and it holds considerable promise. Nonetheless, the current consensus supporting mandatory E-Verify is much too complacent. It masks a serious issue: E-Verify remains significantly vulnerable to identity fraud. If this vulnerability is not addressed in a systematic fashion, mandatory E-Verify may prove as deeply disappointing, a few years down the road, as IRCA’s I-9 system.

It is important to understand the exact contours of this vulnerability. E-Verify can quickly and accurately detect whether the name and Social Security number (or other identifier) presented by a new employee match government records of someone actually authorized to work in the United States. It can thus defeat the simple forms of fraud that rendered the 1986 law’s employer verification system ineffective. Under IRCA an employer basically has to accept an identity document or work authorization card that “reasonably appears on its face to be genuine.” It can certainly appear genuine even with a made-up name or ID number. With E-Verify, however, the employer does a simple Internet check that can readily expose, for example, a mismatched name and number. But what E-Verify cannot reliably do, across the full range of checked documents, is to reveal whether the person presenting the information is actually the person whose name appears on the card. Fake-ID entrepreneurs are adapting. They are acquiring actual Social Security numbers along with the associated name, either through theft or through borrowing or buying from willing citizens. Monitoring reports have spoken of this vulnerability for some time, but it has not sparked nearly enough attention or corrective action to date.

The most reliable way to verify identity, of course, would be through biometrics. Senators Charles Schumer and Lindsey Graham, who since 2009 have played key roles in the Senate effort to accomplish immigration reform, strongly championed for a couple of years a system that would equip each authorized worker, citizen or foreigner, with a government-issued swipe card bearing that person’s coded fingerprint data. Each

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employer would have access to a device that could quickly capture a fingerprint image from the worker there in the hiring office and compare it against the coded data shown through the card swipe. A no-match result would mean no job.  

Schumer and Graham quietly backed off this proposal early in the 2013 reform debate—perhaps because of its high cost. Building such a system and distributing fingerprint readers to millions of employers is doable, but it would cost several billion dollars and would present significant logistical difficulties, especially to implement a reliable upfront registration system as people acquire their swipe cards. A biometric system is only as good as its initial registration procedures; scrupulously careful and potentially labor-intensive validation of identity during enrollment is crucial before a biometrically encoded ID document is issued. Rushing the enrollment process would degrade the quality and reliability of the whole system. Also, although the Schumer-Graham plan was carefully designed to avoid creation of a centralized fingerprint database, it would doubtless encounter major political resistance. At the present time, it is therefore more fruitful for E-Verify to address identity fraud through other means, although biometric identifier systems should be kept under consideration for possible adoption as technology improves in the future.

C. Adding driver’s license photos to E-Verify’s photo tool

The most promising medium-term path is to build on a capability that already exists. E-Verify has a “photo tool” that can immediately show on the employer’s computer screen the exact photographic image that should appear on the ID document being presented by a new employee. Impostors are thus exposed. The problem is that E-Verify now has access to database photos only for a limited range of documents: U.S. passports, U.S. permanent resident cards (green cards) and DHS-issued employment authorization documents. The majority of new employees undergoing immigration screening, however, present state-issued driver’s licenses to the employer to establish identity.

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71 Charles E. Schumer & Lindsey O. Graham, The Right Way to Mend Immigration, WASH. POST (Mar. 19, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031703115.html. In order to avoid creation of a national fingerprint database, the digitized fingerprint data were to be recorded only on the swipe card. The Senators also contemplated an appeals system for those who wished to contest an initially negative result from the card-sweep process.

Giving the E-Verify system access to digital versions of state driver’s license photos, in order to display them to employers through the photo tool, thus would provide a major new barrier to identity fraud. (The system of course requires careful privacy protections limiting the use of the database photos to the stated purposes, but models for such controls are available.) Though it is not widely appreciated, state identity card systems have greatly improved over the past dozen years. Initial improvements were driven by state officials’ chagrin over the 9/11 hijackers’ easy access to driver’s licenses that they used to facilitate their travel. The federal REAL ID Act of 2005 also mandated extensive further improvements to state driver’s license systems and better sharing of information to defeat fraud. Although several states have resisted full certification of compliance with REAL ID (because they see the Act as unwarranted federal intrusion), and though DHS has extended the Act’s deadlines, in fact many of the mandated improvements have taken place, even in resisting states. Driver’s license systems now provide a solid foundation for secure identification and enhanced detection of fraud.

To date, however, despite DHS requests and efforts to resolve issues, no state has agreed to share drivers’ license photos digitally with USCIS for use in E-Verify. Congress could change that situation by providing serious financial incentives for states that share photo access, or more

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73 Matthew L. Wald & David D. Kirkpatrick, Congress May Require Closer Scrutiny to Get a Driver’s License, N.Y. TIMES (May 3, 2005), http://www.nytimes.com/2005/05/03/politics/03licenses.html?pagewanted=print&position=&r=0.
76 ANDORRA BRUNO, CONG. RESEARCH SERV., R40446, ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION (2013), available at http://www.fas.org/sgp/crs/misc/R40446.pdf. Some limited progress has been made in cooperative sharing of driver’s license data, but the sharing does not include photos, and at present it involves only five states: Mississippi, Florida, Idaho, Iowa, and Nebraska. See Driver’s License Verification, U.S. CITIZENSHIP & IMMIGRATION SERVS. (July 10, 2014), http://www.uscis.gov/e-verify/employers/drivers-license-verification. The RIDE initiative (Records and Information from Department of Motor Vehicles for E-Verify) allows E-Verify to check certain entries (such as driver’s license numbers or dates of birth) that appear on the document presented by the individual against the Motor Vehicle Association’s data. See Privacy Impact Assessment Update for E-Verify RIDE, DEPT' OF HOMELAND SEC. (May 6, 2011), available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_evriderupdate.pdf.
powerfully, by conditioning related grant programs (such as federal highway funding) on agreement by recipient states to share state ID photos for these purposes.\footnote{The 2013 Senate bill encouraged greater state sharing through a grant program, but it was too stingy. It allocated only $2.50 million, which obviously works out to a mere $5 million average per state, and did not otherwise use the leverage that could come from conditioning related federal grants on a state's agreement to provide driver's license photos to E-Verify. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3101(d)(8)(F)(iii) (2013).}

III. DIRECT ENFORCEMENT

A. Getting serious about overstay violations

Starting our consideration of direct enforcement with the situation of visa overstayers is useful for three reasons. Many commentators have noted critically that the overwhelming majority of immigration enforcement appears to focus on those who enter without inspection,\footnote{See, e.g., SELECT COMM’N ON IMMIGRATION & REFUGEE POLICY, supra note 61, at 53.} even though it is commonly estimated that 25 to 40% of the unauthorized population entered on a nonimmigrant admission and then overstayed.\footnote{See Jeffrey S. Passel, supra note 52, at 16.} Because the two kinds of immigration violations would seem to be comparable in effect and culpability, this wide disparity in enforcement efforts fosters cynicism about the class-based nature of enforcement priorities. Second, a successful campaign to introduce more rigorous enforcement against overstayers is likely to have an early feedback effect that should enhance deterrence. Envision a campaign that shows, over a period of a year or two, that recent visa overstayers are quickly identified, put into removal proceedings, and sent home. Thereafter, voluntary adherence to the agreed time limits on a temporary admission should become more common among nonimmigrants, helping to build among that population a culture of compliance rather than dismissiveness about immigration law's requirements. Third, this sort of progress would help boost the morale of immigration agencies and officers (more on this below), while encouraging a wider segment of the public to accept that well-crafted and properly supported immigration enforcement actually can work. Success should be self-reinforcing.

1. End the fixation on biometric exit systems

To reach this objective, we should first dispel a widely shared but pernicious and disabling misunderstanding: that we cannot get serious
about enforcement against overstayers until we build a comprehensive biometric exit monitoring system. The 9/11 Commission recommended such a system in its final report, and various statutes have set deadlines for the creation of such a system, with particular emphasis on airports and seaports. The deadlines have not been met, owing to insufficient congressional funding, travel industry resistance, and DHS objections, which are based on a wholly justified judgment that the system's vast cost cannot be justified by the limited benefits to enforcement. But we do not have to—and should not—wait until this kind of expensive and logistically complicated exit system is created.

The premise of this fixation on biometric exit control is that we will finally obtain the most reliable possible information about who is actually leaving, through capturing fingerprints of all departing foreigners as they get on the plane or boat. And here is the key step—we then use that information to work back and see who did not leave on time. It sounds intuitively appealing and high-tech. But there are two big problems. Not everyone leaves through an airport or seaport, even if they arrived in that fashion. Unless we capture biometrics on all who leave, including the millions who depart by land, every name on that residual list of presumed overstays is suspect.

But there is a more basic problem. Suppose we get that detailed biometric information from all exit points, and by a process of elimination work up a list of who failed to leave on time. Then what? The list tells us

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82 The legislative provisions are summarized in Entry-Exit System: Progress, Challenges, and Outlook, BIPARTISAN POLICY CTR. 3–4 (May 2014), available at http://bipartisanpolicy.org/library/immigration-entry-exit-system/.

83 See id. at v, 34–37.

84 A thorough recent study by the Bipartisan Policy Center made similar findings. Id. at v, 34–37. The report stated: “[O]verall, the value-added calculus shows that while biometric exit is certainly worth pursuing, biographic exit can achieve most of the goals of an entry-exit system.” Id. at 35.
absolutely nothing about where any identified overstayer can be found. The latter information must be developed by DHS agents sent out to do the time-consuming legwork needed to locate the overstayer, file charges, pursue a removal case, and then enforce departure. Most proposals that look to fork over billions of dollars to the contractor who wins the bidding for deploying fancy biometric exit devices do not take seriously the need to fund those follow-on DHS resources. But the former is worthless (at least as a measure meant to punish or deter overstays) without the latter.85

The widely shared tunnel vision on biometric exit ignores key capabilities that already exist. DHS now possesses sufficient detailed information — biographic, not biometric — about departing noncitizens to develop a highly effective and timely list of who has overstayed.86 (Biographic capabilities are based on names and related information like date of birth, rather than capture of facial geometry, fingerprints, or retinal images.) The pertinent information emerged as a byproduct of far better systems, developed after the 9/11 attacks and with a focus on security risks rather than general enforcement, that track who enters and who leaves, through real-time submission by carriers of passenger manifests, and through other related steps.87 DHS now uses that information to trigger overstay enforcement — but very selectively, because it has meager resources directed toward the apprehension of overstayers, which has never been a priority for U.S. immigration agencies. Whenever this country decides it is serious about removing overstayers, DHS already has more

85 The Bipartisan Policy Center's report on entry-exit systems observed: "[A]lthough [biometric] exit records would indicate that individuals had not left the country, they would not help law enforcement locate the individual, nor would they ensure the substantial increase in enforcement resources that such a strategy would require." Id. at v.


than enough solid, biographically-based information to send its agents out on the hunt. For this reason, it sometimes appears that the fixation on biometric exit tracking is just one more excuse to stall a few more years before doing something truly effective about overstays.

2. Committing to action using current capabilities

Without waiting for new technical breakthroughs or new system deployments, therefore, Congress or the executive branch could direct additional resources to overstay enforcement. Tracking down overstayers can be time-consuming and challenging, but in general an officer will have more to work with than would be the case with entrants without inspection, based on the information derived from available passenger data, the visa application, the admission process, and any other applications for extension or change of status, plus other standard law-enforcement techniques.

As suggested above, deterrence advantages would come from ramping up such resources quickly and with well-designed publicity. This particular population of noncitizens – nonimmigrants who properly entered the United States – would appear to be an audience highly likely to change behavior in response to a visible enforcement campaign. Unlike entrants without inspection (“EWIs”), these are people initially present in the United States legally. They face an identifiable choice as they near the end of their authorized stay, and they generally have an easily available option that permits them to remain within the law. Making it clear that violations regularly trigger swift investigation to find, charge, and deport should shift each individual’s cost-benefit analysis in the direction of leaving as originally promised.

An overstay removal campaign would also carry significant benefits for the morale of enforcement personnel at Immigration and Customs Enforcement (“ICE”). The last few years have been difficult ones for such officers (exacerbated by union leadership that has been remarkably acerbic and confrontational with agency leadership as ICE has tried to innovate).
From the officer’s perspective, the Department’s emphasis over the last several years on systematic exercise of prosecutorial discretion is mainly about what they are not supposed to do, from among actions for which they have been trained and which would be clearly consistent with the statute. In this climate, a largely new and visible enforcement program, encouraging officer initiative and innovation to locate and remove overstay violators whose names appear on a list generated shortly after the violation occurs, would come as a welcome change, one that would pay officers the compliment of drawing upon their professional skills.

3. Streamlined removal procedures for certain overstay categories

Success in this endeavor would be greatly aided by other changes—including the indispensable augmentation of the immigration judge (“IJ”) corps, now saddled with debilitating backlogs owing to many years of inexcusable funding neglect. Congress should also consider new streamlined procedures for at least some kinds of carefully defined overstay cases, permitting adjudication of removal charges and issuance of removal orders by immigration officers rather than IJs.

The law already uses streamlined procedures in several discrete and specific cases where they are appropriate. For example, the law subjects people who come in as short-term visitors under the visa waiver program to a streamlined removal procedure. Specially trained immigration agents consider the case, make the necessary findings, and issue the orders, subject to specialized forms of review. This procedure saves time and also allows the overburdened immigration court system to focus on cases that present complicated issues. Streamlined procedures also improve the odds that violators will be removed quickly, before developing the work and social ties that often fuel community resistance to belated enforcement.


\[\text{INA § 217(b), 8 U.S.C. § 1187(b) (2012); 8 C.F.R. § 217.4 (2014).}\]

\[\text{Other significant uses of streamlined procedures include expedited removal at the border, for persons lacking proper documents or seeking admission through fraud, INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (2012); administrative removal of non-LPRs convicted of aggravated felonies, INA § 238(b), 8 U.S.C. § 1228(b) (2012); and reinstatement of earlier removal orders when a person previously deported reenters without permission, INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2012). See ALENIKOFF ET AL., supra note 8, at 569–79, 1209–16.}\]
I emphasize that streamlined removal procedures bring advantages only in specific circumstances. They are effective—and also fair—when the underlying violations are simple and straightforward to identify. The majority of overstay violations match that description. For the most heavily used nonimmigrant categories, especially B-1 and B-2 visitors, identifying the violation requires only a check of the calendar and the end-date for the admission that is stamped on the person’s documents and recorded in DHS databases. It is also vital that any new streamlined procedures retain carefully designed safeguards, based on existing models, that lead to full proceedings before an immigration judge, when the case is more complicated or sensitive—such as for asylum applicants who pass threshold screening. Also, to reduce objections and provide for a clean transition, it may be advisable for Congress to make the streamlined procedure applicable only to persons who enter in the specified nonimmigrant categories after the date of enactment.

I am well aware of the objections to streamlined procedures that most immigration advocates and many lawyers would voice. But due process doctrine recognizes that fairness does not always require a courtroom-type hearing, and this proposed change would carefully divert the matter to immigration court if there is a threshold showing that the case presents more complicated issues.

94 A preliminary analysis by the Government Accountability Office found that 44% of the apparent overstays identified through existing ICE procedures had entered on B visas. IMMIGRATION ENFORCEMENT: PRELIMINARY OBSERVATIONS, supra note 86, at 6.
97 Martin, supra note 93, at 687–94.
B. Cooperation with state and local law enforcement, including the Secure Communities saga

Carefully structured cooperation between federal immigration authorities and state or local law enforcement agencies ("LEAs") should be an integral part of effective interior enforcement. Such cooperation has been uneven in the past and has taken many forms. Until recently, the primary framework has been a jail-focused program called Secure Communities ("SC"). Although SC, in my view, holds considerable promise as a key element in an effective immigration enforcement system, bad timing for SC's launch, combined with mistakes in implementation, eventually generated substantial opposition. Some influential opponents called for complete abolition of SC, while some disaffected LEAs responded with more general resistance to ICE cooperation (especially to ICE detainers). Clearly some change of course became necessary, and DHS began that process through reforms announced in November 2014, which are still being amplified and refined as they are put into practice. It is important that those reforms retain the core innovations introduced as part of Secure Communities, so that under more auspicious conditions in the future, cooperative procedures can again be used in a robust form. The most important element toward making conditions more favorable would be a broad legalization program, so that SC-type cooperation could then focus on recent immigration violators rather than long-term unauthorized residents.

I offer here a brief sketch of the context and history surrounding Secure Communities, recounting the key developments that led to the current situation. I then provide an early evaluation of the November 2014 reforms, with some longer-term recommendations.

1. The context: threading the needle

Federal cooperation with LEAs regarding immigration enforcement must thread the needle between two kinds of potential dysfunction.

Sometimes local action is over-eager. A LEA might treat authorized cooperation with DHS as a green light to follow its own preferences on

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immigration enforcement. Its officers then may arrest immigration violators who are low priorities for DHS, burdening scarce detention space and immigration court capacity.\textsuperscript{100} Far more problematic have been episodes where a LEA possessing such authorization has engaged in broad sweeps, charging persons based on local officers’ uninformed suspicions about immigration violations – a practice that at its extreme may reflect racial profiling – and in the process arresting numerous legal residents and U.S. citizens. Bad experiences along these lines, including an exceptionally damaging episode in Chandler, Arizona, in 1997,\textsuperscript{101} led INS to reduce joint operations and to divert LEA activity, when possible, into much more focused channels.

One of the main alternatives consisted of traditional INS jail programs, which confine the LEA role to actions affecting people its officers have already arrested for ordinary criminal offenses that fall within the direct jurisdiction and expertise of the local agency. Such programs involve no grant of authority to the LEA to arrest for immigration violations. They typically have included arrangements for the LEA to provide space within the facility for regular visits by skilled federal immigration officers, to interview selected detainees, perform database checks, and then initiate the removal process when appropriate in light of federal capacities and priorities.\textsuperscript{102} Jail programs of this type constituted an important and useful innovation when introduced two decades ago, but they were labor-

\textsuperscript{100} This risk of overburdening formed one of the U.S. government’s main objections to Arizona’s immigration enforcement legislation known as S.B. 1070, key parts of which were struck down by the Supreme Court in \textit{Arizona v. United States}, 132 S. Ct. 2492 (2012).


intensive for INS, and therefore could be run systematically only with a relatively few large-scale arrest and detention facilities in high-population areas.

Now consider the opposite side of the needle. The federal role must be accomplished in a way that minimizes disruption of or interference with LEAs’ primary law enforcement responsibilities, thus keeping them on board as willing cooperators. INS jail programs were not generally disruptive to local operations, but they did sometimes pose a problem of a different sort. In many localities (dependent to a significant extent on the local political climate at the time), police may not want to be visibly associated with immigration enforcement, for fear that such a linkage will hinder the willingness of the population to cooperate in their primary mission of fighting ordinary crime. This reaction is especially likely in cities with large immigrant communities (usually with a substantial proportion of unauthorized residents living in the midst of a larger co-ethnic population consisting of citizens and legal residents). In recent years, as immigrant advocates and some law enforcement leaders have raised more pointedly the argument that DHS cooperation interferes with community policing, a growing number of jurisdictions moved to separate themselves from visible cooperation with DHS.103

2. The road to Secure Communities, and to controversy

Secure Communities (SC) provided a way to address the first cluster of concerns (i.e., over-eagerness), while showing sensitivity to the second (i.e., worries about complicating or undercutting the LEAs’ primary missions). It promised to help DHS steer local enforcement enthusiasm into less easily misused channels, because SC essentially constitutes a more comprehensive and efficient variant of the older jail programs – but one that, within a few years of launch, would become available to all LEAs. It also promised to be even less disruptive than traditional INS jail programs, because its up-front processes would fit invisibly into already well-established booking routines. SC imposes no requirements to train local staff on new procedures and no need for them to choose specific

103 See LYNN TRAMONTE, IMMIGRATION POLICY CTR., DEBUNKING THE MYTH OF “SANCTUARY CITIES”: COMMUNITY POLICING POLICIES PROTECT AMERICAN COMMUNITIES (April 2011). DHS chartered a task force (on which I served) to look into the impact of the Secure Communities program on community policing. Its conclusions and recommendations supported continuation of SC with modifications. TASK FORCE ON SECURE COMMUNITIES, HOMELAND SEC. ADVISORY COUNCIL (HSAC), FINDINGS AND RECOMMENDATIONS (2011).
arrestees believed to be noncitizens for referral to immigration screening, nor for the jail to acquire new equipment or to arrange for regular interviews of detainees by resident or visiting immigration officers. This enhanced logistical simplicity, combined with the elimination or significant reduction in the presence of DHS officers at LEA facilities, was thought likely to ease the LEA's burden and also perhaps to minimize perceptions of close links between local policing and immigration enforcement.

In essence, Secure Communities works simply by adding digital transactions, entirely internal to the federal role, within the standard practice that police already employ for checking the fingerprints of arrested persons. For decades local authorities have routinely shared such prints with the Federal Bureau of Investigation ("FBI") so that they can receive information from the FBI's databases on the person's criminal history—which of course is highly pertinent to the LEA's core mission. Initiating Secure Communities for a particular jurisdiction basically meant that the FBI added a further step to its own processing. It immediately transmitted the digitized prints it received to DHS for a check against the latter's fingerprint database known as IDENT (using computer capabilities vastly improved and expanded since 9/11). All prints sent to the FBI, no matter how certain the arresting officer might be that the subject is a U.S. citizen, were checked against IDENT. If an IDENT "hit" occurred, DHS then

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104 Secure Communities: Overview, supra note 98.
105 Much of the description in this paragraph and at other points throughout this section draws upon briefings provided in late 2008 to the Obama Administration's DHS Transition Team. I was a member of that team, with principal responsibilities relating to the Department's immigration functions.
106 IDENT now contains the fingerprints of virtually any noncitizen who since the mid-2000s has applied for a visa or for admission to the United States at an air or sea port of entry, plus many who have applied at a land port of entry. It also captures the fingerprints of noncitizens picked up by the Border Patrol or who have some other enforcement encounter. And it contains fingerprints of those who have applied for an immigration benefit, including naturalization, with the United States Citizenship and Immigration Services ("USCIS"). Privacy Impact Assessment for the Automated Biometric Identification System (IDENT), DEP'T OF HOMELAND SEC. 2–7 (Dec. 7, 2012), http://www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy_pia_usvisit_ident appendixj_jan2013.pdf.
107 Because the preceding jail programs often involved arrangements whereby local jail personnel selected the detainees to be referred to immigration officers for a check of status, concerns were sometimes raised that referrals were discriminatory or based on racial profiling. Federal planners initially hoped and expected that SC's design, incorporating universal fingerprint checking, would eliminate both the chances for and the perception of bias. Secure Communities: Get the Facts, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure-communities/get-the-facts (last visited Apr. 5, 2015). As it happened, however, concerns about racial profiling persisted, but with a focus instead on the initial arrest stage. See Barbara E. Armacost, The Enforcement Pathologies of Immigration Policing, forthcoming 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584713.
determined whether the person was potentially subject to removal for immigration violations and, if so, applied its own priorities to decide whether it wanted to follow up with enforcement action.\textsuperscript{108} When enforcement was chosen, the local ICE office typically sent a detainer to the LEA, a formal request that ICE be notified before the person is released and also that detention be prolonged by up to 48 hours to enable federal officers to make the pickup.\textsuperscript{109} In principle – at least up until the time when the person would otherwise be set free from pretrial or post-conviction confinement – SC required of local arresting and booking officers no changes in routine, virtually no extra effort, and certainly no guesses about a person’s citizenship or immigration status.

Contrary to a widely held misperception, SC was specifically designed to minimize any discouragement of witnesses and victims from reporting

Critics charged that local officers who know that SC has been activated would arrest suspected foreigners based on thin evidence or even on pretextual grounds – not expecting to pursue a prosecution but instead expecting ICE to take early custody and pursue removal. See, e.g., \textit{A Fact Sheet, Immigration Policy Ctr.} (Nov. 29, 2011), http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet (noting objections to Secure Communities based on its impact on community policing and also the risk of increased profiling and pretextual arrests); Aarti Kohli, Peter L. Markowitz & Lisa Chavez, \textit{The Chief Justice Earl Warren Inst. on Law & Soc. Policy, Secure Communities by the Numbers: An Analysis of Demographics and Due Process} (2011), http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf. The methodology and conclusions of the Kohli report have drawn sharp criticism. W.D. Reasoner & Jessica Vaughan, \textit{Secure Communities by the Numbers, Revisited (Part 2 of 3): Analyzing the Analysis, Ctr. for Immigration Studies} (Mar. 2012), http://cis.org/SC-by-the-numbers-critique-part2.

In my view, though there is a risk of such misuse by LEA officers, the charge of racial profiling has been leveled far too widely, often based on slim evidence and without attention to the many programs developed within the LEA community to guard against such profiling. Secure Communities does need to assure prompt investigation of complaints about biased policing, but this is not a reason to jettison the program. See \textit{Task Force on Secure Communities, supra} note 103, at 25–27. DHS has worked to develop such procedures through its Office of Civil Rights and Civil Liberties, and Secretary Johnson directed further steps along these lines to accompany the major changes he ordered to the Secure Communities program in November 2014 (renaming the revised program the Priority Enforcement Program (PEP)). Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement et al., Secure Communities (Nov. 20, 2014) [hereinafter PEP Memorandum], available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

\textsuperscript{108} There is no automatic connection between an IDENT hit and enforcement interest. The person might well be a naturalized citizen – immune to immigration enforcement, but with fingerprints in the system taken as part of earlier applications for immigration benefits – or in a lawful status (though ICE might have interest in the latter if conviction on the criminal charge could effectively make the person deportable). Even if the person appears removable, ICE may choose not to proceed, in accordance with its enforcement priorities. See note 122 infra and accompanying text.

\textsuperscript{109} The detainer in use during Secure Communities’ early period was the Form I-247 (Rev 4-1-97). It has been revised three times since early 2010 in response to political controversies and litigation. See Kate M. Manuel, Cong. Research Serv., R42690, \textit{Immigration Detainers: Legal Issues} 12–13 (2014).
crimes to police. SC designers wanted to avoid any notion that all persons coming into contact with local police would somehow have their immigration status checked. Only those who are fingerprinted—which happens upon arrest, not upon simple contact with the police or the report of a crime—would be checked against IDENT.

It bears remembering that SC was planned and initially launched during a period in 2007 and 2008, when the undocumented population still showed substantial annual growth, and when a great many state and local governments were clamoring for a role in tougher immigration enforcement. The main pressures on DHS were for more cooperation, more sharing of information, and more vigor in removing immigration violators who had been arrested by local authorities. In that environment, key federal officials viewed SC as presenting fewer risks of inappropriate LEA behavior than, for example, Section 287(g) task force agreements, because local officers have no occasion to make immigration status decisions as part of the SC process; they were expected simply to continue making arrests for crimes within their own clear jurisdiction.111

3. The benefits of this sort of program

In my judgment, Secure Communities is a well-conceived program of potentially high value. Under the right conditions and with some adjustments in its procedures, this sort of program should be a core long-term component in any resolute and balanced U.S. immigration enforcement system. It advantageously serves two distinct and equally legitimate federal purposes:

1. It provides greater assurance of enforcement action against dangerous noncitizens actually convicted of crime, because it efficiently covers all jurisdictions, not just a few urban areas with labor-intensive DHS jail programs. This advantage, focused on assuring removal of "criminal aliens," was Congress's primary motivation when it funded and mandated what became Secure

110 INA § 287(g), 8 U.S.C. § 1357(g) (2012), enacted in 1996, authorizes DHS to enter into agreements with LEAs permitting specially trained state and local officers to undertake specific tasks relating to the investigation, apprehension, or detention of aliens, under federal supervision. See CRISTINA RODRIGUEZ ET AL., MIGRATION POLICY INST., A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(g) (2010), available at http://www.migrationpolicy.org/research/program-flux-new-priorities-and-implementation-challenges-287g.

111 Secure Communities still poses some risk of distorting arrest practices. See Secure Communities: A Fact Sheet, note 107 supra.
Communities, through interoperability with the FBI fingerprint system.\textsuperscript{112}

2. SC also affords a superior way to find and charge ordinary immigration violators, as compared to the primary alternatives, such as area control operations, fugitive operations teams, or worksite enforcement, which can be highly disruptive to neighborhoods and businesses.\textsuperscript{113} Subjects identified through Secure Communities, in contrast, have already been apprehended by someone else and are being detained on an independent basis, affording time for a full check of immigration status and a well-considered charging decision based on ICE priorities. Jails and booking stations are probably the least problematic places to look intensively for ordinary violators who have traveled away from the border.

4. The controversy escalates

Nonetheless, SC became controversial because of missteps in its early implementation and in the explanations and defenses offered by DHS, and – perhaps most importantly – because its primary deployments came at a time when a solid majority of the unauthorized population had lived in the United States for a decade or more and thus enjoyed substantial community ties. Initiating removal of undocumented arrestees charged with minor offenses or whose criminal charges were dropped before conviction – even if fully justified under the immigration laws – therefore


\textsuperscript{113} See ALENIKOFF ET AL., supra note 8, at 941–44 (describing the alternative enforcement methods); EDWIN HARWOOD, IN LIBERTY’S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 96–124 (1986) (describing alternative enforcement methods but covering an earlier period). Although fugitive operations teams are intended to apprehend and remove those persons who have not complied with final removal orders, they drew criticism during some periods when officers were given undue credit for finding any unauthorized alien during the course of their search for particular absconders. See MARGOT MENDELS, SHAYNA STROM & MICHAEL WISHNIE, MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE’S FUGITIVE OPERATIONS PROGRAM 11–13 (2009), http://www.migrationpolicy.org/research/ice-fugitive-operations-program. ICE refocused the enforcement priorities of the Fugitive Operations Program in December 2009, to emphasize the original purposes. Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enforcement, to Field Office Dir. & Fugitive Operation Team Members, National Fugitive Operations Program: Priorities, Goals, and Expectations (Dec. 8, 2009), http://www.ice.gov/doclib/detention-reform/pdf/nfop_priorities_goals_expectations.pdf.
clashed with expectations held by a growing portion of the politically active U.S. population for the legalization of much of the long-resident undocumented population.

Again, the timing is important in understanding how the controversy unfolded. The enforcement fervor of 2007 through 2009—the climate in which certain key design decisions about the program were made—had abated considerably by 2011 through 2013, the period when Secure Communities was activated in most jurisdictions. As noted in Part I.D. above, the fervor cooled largely because recession and border deployments had actually ended the net growth of the unauthorized population. In response, many communities were increasingly coming to terms with the migrants already in their midst.

Immigrant advocates adapted skillfully to the changed public climate, while also widely publicizing DHS’s mistakes and course changes. In essence they took advantage number two enumerated above—SC’s efficiency at bringing ordinary immigration violators within reach of removal proceedings (whether or not the criminal charges resulted in conviction)—and turned it into a program liability. The advocacy campaign succeeded in selling, at least to certain key constituencies, a perception that such enforcement was improper unless the individual had also been convicted of some other serious criminal offense. To do so, they placed hard emphasis on Congress’s language in the appropriations process that funded SC, which focused heavily on the first purpose enumerated above—removal of serious criminals.

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144 This notion, that unauthorized migrants (at least those with any significant period of residence) should not be removed unless they have been convicted of a criminal offense, of course is not at all congruent with the multi-factored removability grounds Congress has enacted, INA §§ 212(a), 237(a), 8 U.S.C. §§ 1182(a), 1227(a) (2012)—not with any workable design for a law-governed migration management system. In the long run, constructing a stable, sustainable enforcement system depends on the government’s strong defense of the principle that immigration violations themselves justify enforcement, without the need for proof of other crimes.


The wave of state-law changes to motor vehicle laws in 2007 through 2009 also magnified the impact of Secure Communities that advocates found so objectionable, because it resulted in more arrests of undocumented persons (triggering the SC database checks), rather than simple citations for minor traffic violations. By late 2009, all but three states had passed laws denying any form of driving permit to unauthorized aliens.  

For other reasons, wholly separate from immigration policy, police officers commonly do arrest an individual driving without a license, even if the underlying offense that triggered the traffic stop was minor. This reflects more than a judgment to treat driving without a license with more gravity than simple speeding. A police officer who has in hand a driver’s license to establish a subject’s identity can do a quick name-based criminal history check from the squad car through the National Crime Information Center. With no license, however, positively establishing identity requires booking and fingerprinting, which cannot be accomplished during a roadside stop. Because police do not want to risk letting a serious criminal go, undocumented persons with no other law violations could, because they lack a valid driver’s license, find themselves arrested and then placed in removal proceedings through SC, based on what began as a traffic stop for minor speeding or an improper turn.

News accounts of a few sympathetic individuals charged or deported in circumstances like this helped stimulate a wave of effective publicity against SC. They also helped galvanize concerns among some sheriffs

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116 Between 2007 and 2009, many states enacted legislation requiring proof of legal immigration status in order to obtain a driver’s license. See Nina Bernstein, *Spitzer Grants Illegal Immigrants Easier Access to Driver’s Licenses*, N.Y. TIMES (Sept. 22, 2007), http://www.nytimes.com/2007/09/22/nyregion/22licenses.html?pagewanted=all (describing how New York Governor Spitzer’s proposal, which was ultimately abandoned, defied the national trend of denying driver’s licenses to undocumented immigrants). In 2013, however, a legislative counterwave set in, as nine states passed laws reopening the possibility of obtaining driver’s licenses without an immigration status check. Vock, supra note 75 (noting that before 2013, only three states allowed unauthorized immigrants to drive); see also Gilberto Mendoza, *States Offering Driver’s Licenses to Immigrants*, NAT’L CONF. OF STATE LEGISLATURES (Nov. 5, 2014), http://www.ncsl.org/research/immigration/states-offering-driver’s-licenses-to-immigrants.aspx.


and police chiefs that the SC connection to the booking process, suddenly and somewhat unexpectedly receiving heavy publicity because of effective public opposition, would stamp the local police as immigration enforcers. As noted earlier, these officials feared that such a perception would hamper community policing by discouraging people from reporting ordinary crime. ICE protested that SC was carefully designed to produce information only on people actually arrested—not witnesses or informants. But this nuance, although an important and deliberate design feature, proved insufficient to stem the criticism.

The news accounts of sympathetic individuals deported after identification through Secure Communities often painted the outcome as a person deported because of a broken taillight. This was a distortion, of course. The individuals were deported because of violations of the underlying immigration laws (usually uncontested in immigration court)—overstaying a nonimmigrant admission or being present without inspection. The law enforcement encounter was merely the event that brought the violator to the attention of DHS. Though a few voices defended SC in part because it meant greater action on deporting this kind of garden-variety offender, many LEAs faced far stronger pressure from local activists opposing deportation absent a criminal conviction. Particularly after Barack Obama's reelection in 2012, polls were showing growing support for legalization, and legislative action seemed imminent. Sudden removal ostensibly based on a mere traffic stop could thus be portrayed as especially disproportionate.

ICE was refining its priorities during this period—which would generally have meant that a long-time resident with only a minor traffic violation, though identified through SC, should not be the subject of


enforcement action. That is, the ICE officer should not send a detainer — a hold request — to the LEA. But uneven field implementation of the priorities meant that several “poster-child” cases were already available to the activists. ICE eventually developed better mechanisms to help assure more consistent field implementation, but much damage to the image of the program had already been done.

Beyond these problems, ICE’s statements often responded to criticism by a blunderbuss defense that portrayed SC as a system designed to remove “the worst of the worst.” That ICE assertion is true as far as it goes. Congress did want SC to serve as a systematic way to identify all deportable aliens with serious crimes — and it admirably serves that objective. But that was not all that SC could or would accomplish, and it proved counterproductive for ICE to downplay these other roles. ICE’s 2010 through 2014 enforcement priorities memos did place convicted criminals at the top of the list, but the priorities were by no means confined to felons. Other categories within the priorities memos unmistakably applied to misdemeanants and to others with no criminal background. The latter included recent violators of the immigration laws, as well as egregious or repeat immigration violators, including those who had failed to honor a final removal order. For that reason, ICE’s defensive emphasis on serious criminals only wound up providing ammunition to SC

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123 See, e.g., Preston, supra note 118.


125 Civil Enforcement Memorandum, supra note 122. Moreover, to state that ICE’s top priority is deporting serious criminals, or to say that the agency would focus on or target such persons, is not a statement that it would only enforce against such persons. By its nature, “priority” does not imply exclusivity. Agency critics persistently bulldozed this nuance. Meanwhile, ICE’s publicity, clinging to the rhetorical emphasis on serious criminals, even when the data clearly showed that others were — properly — brought within the enforcement ambit, wound up strengthening the critics’ attacks on removal of anyone without a criminal record.

126 Id. at 2–3.
opponents whenever they could point to someone with no criminal conviction placed in removal proceedings. Activists made much of their findings, for example, that only 14% of ICE detainers issued in FY 2012 and the early part of FY 2013 involved serious criminals, and only 47% involved persons with criminal violations at all. More careful studies of ICE removals, however, show that they have been overwhelmingly consistent with ICE’s actual published priority categories; the right noncriminals were included in removals. But advocates were often able to frame the debate in such a way that deportation of noncriminals was viewed as a departure from policy; after all, such people were clearly not “the worst of the worst.”

5. Resistance in local jurisdictions, ICE’s change of course, and the eventual attack on ICE detainers

Faced with mounting opposition, some jurisdictions, starting in 2010, began telling ICE that they did not want to participate in Secure Communities. ICE’s initial manner of handling local relations in communities where it was planning to activate SC had led localities to believe that they had a choice in whether or not to participate, because participation in the early stages commenced only with a Memorandum of Agreement (“MOA”) worked out with the local authorities. The exact reason for ICE’s initial reliance on jointly signed MOAs appears obscure, but it was in any event legally erroneous. Secure Communities was fundamentally an arrangement between two federal agencies to share information voluntarily supplied to one of them. A locality could opt out of the data-sharing with ICE only by declining to provide the fingerprint images to the FBI—a wholly unlikely outcome, because obtaining the

127 Few ICE Detainers Target Serious Criminals, TRAC IMMIGRATION (Sept. 17, 2013), http://trac.syr.edu/immigration/reports/330/; see also KOHLI ET AL., supra note 107; ACLU Statement on Secure Communities, AM. CIVIL LIBERTIES UNION (Nov. 10, 2010), https://www.aclu.org/immigrants-rights/aclu-statement-secure-communities (reporting that only 21% of those removed through Secure Communities during the studied period “were charged with or convicted of a serious felony”).


130 Id.; James Verini, Obama’s Immigration Two-Step, WASH. MONTHLY BLOG (June 27, 2012), http://www.washingtonmonthly.com/ten-miles-square/2012/06/obamas_deportation_two_step038212.php (describing differences of view among former Bush Administration officials on the possibility of opt-outs by LEA’s).
criminal history information from the FBI remains highly important to all LEAs. As ICE encountered this kind of local resistance, it dropped the use of MOAs and announced that opting out was not possible.131 This sharp change of signals, though legally correct, further angered some state and local officials and many activists. Pressure at the local level then shifted, as SC opponents worked to cultivate different forms of LEA opt-outs. If the fingerprints were going to reach ICE in any event, the main avenue for disaffected LEAs was to decline to cooperate in transfers requested by ICE – that is, to refuse to honor ICE detainers. This step is potentially much more damaging to immigration enforcement, at least in blanket form, for it greatly complicates ICE’s process for taking custody, even of deportable noncitizens with serious criminal records – whether ICE learned of their local detention through SC or through any other source.132 Some jurisdictions adopted blanket noncompliance.133 Most resisting jurisdictions took a more measured step, however, announcing that they would not honor detainers in the absence of a serious criminal charge – or, for some, in the absence of an actual conviction for a serious crime.134


132 For general background on ICE detainer practice, see Christopher N. Lasch, Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers, 35 WM. MITCHELL L. REV. 164, 166–82 (2008).


Covered crimes varied widely. California’s adoption of the TRUST Act in October 2013, which limited cooperation to cases where the person has been convicted of a serious or violent felony or certain other designated crimes, or has been arrested for such an offense and a magistrate has found that the arrest is supported by probable cause, proved influential in leading to wider adoption of similar policies by other state and local legislatures and enforcement agencies.

But the detainer-resistance snowball truly gained momentum with the issuance of several court decisions, beginning in 2013, which held out the prospect that municipalities could face significant damages liability for prolonging an individual’s period of detention or tightening custody conditions based only on the issuance of an ICE detainer. The core problem was that ICE detainers at that time did not necessarily represent a finding that probable cause existed to justify detention for an immigration violation, because issuing officers often checked only that box on the detainer form stating that ICE had “initiated an investigation to determine” whether the person is removable. Courts held this insufficient to meet Fourth Amendment requirements. (Several rulings came in suits for damages filed because ICE had erroneously issued a detainer against an American citizen.) These decisions, though many of them ruled merely on

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preliminary issues, tipped dozens of new jurisdictions toward limiting or rejecting cooperation with ICE detainers.

As public objections and LEA defections from at least some forms of ICE cooperation mounted, advocates proposed major changes to Secure Communities. The proposals ranged from termination of the program altogether to more focused operational changes, such as postponing checks against the DHS fingerprint database until a criminal conviction (or for some advocates, a felony conviction) was final. Termination was not a realistic outcome, given SC’s strong congressional support, manifested in generous appropriations statutes. Checking fingerprints only after conviction was equally unrealistic. Such a requirement would add expensive logistical complexity, necessitating either a cumbersome second taking and transmitting of prints by the LEA or the deployment of a brand new system that would notify ICE upon conviction and somehow pull up just the newly-convicted person’s long-stored fingerprints for checking against IDENT. It would also disable one of the cardinal efficiencies of SC, because the early check helped assure ICE action against high-priority violators even if the criminal process terminated abruptly.

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138 See, e.g., Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014); Ortega v. U.S. Immigration & Customs Enforcement, 737 F.3d 435, 439 (6th Cir. 2013), cert. denied, 135 S. Ct. 48 (2014) (dismissing damage claims on qualified immunity grounds, but clarifying for future cases that transfer of prisoner from home confinement to prison based on an ICE detainer carries a sufficiently severe liberty impact to implicate due process and thus potential liability for the detaining agency).


141 See Nat’l Immigration Forum Staff, Secure Communities, NAT’L IMMIGRATION FORUM (Oct. 17, 2014), https://immigrationforum.org/blog/secure-communities-2/ (discussing proposals for operational changes and suggesting that ICE documents released under a FOIA request show that sharing data only after conviction is technologically possible). This idea was also presented to and discussed by the HSAC Task Force, on which I served, but the task force recommended that fingerprints continue to be transmitted promptly from the FBI to ICE for the IDENT check. TASK FORCE ON SECURE COMMUNITIES, supra note 103, at 23.

6. The Administration responds

By late 2014, it was apparent that DHS would probably need significant changes to regain the willing trust and cooperation of LEAs—and to ameliorate their litigation exposure deriving from DHS's former detainer practices. The challenge, however, was to figure out how to make prudent cutbacks while still preserving the core immigration enforcement advantages possible from efficient IDENT checks of fingerprints sent to the FBI—and to do so in a way that might foster gradual restoration of wider cooperation, if the background conditions someday become more favorable (particularly in a post-legalization world).

Secretary Johnson issued a memorandum on Secure Communities on November 20, 2014, directing significant modifications. As usual, much will depend on the details of implementation. But the reforms, in my view, are reasonably well-designed to meet the objectives just mentioned.

Johnson's memo begins by announcing that "[t]he Secure Communities program, as we know it, will be discontinued." Stating that the overarching goal of Secure Communities remains valid, the Secretary directed that "a fresh start and a new program are necessary," the latter to be known as the Priority Enforcement Program (PEP). Importantly, the new program will "continue to rely on fingerprint-based biometric data submitted during bookings" by LEAs, to be immediately checked against IDENT. The key operational change comes at the next step in the process. Johnson directed that ICE henceforth will seek the transfer of a noncitizen from the LEA after an IDENT hit only when the person fits a limited subset of the new and narrower enforcement priorities also promulgated the same day in another memo from the Secretary. In essence, the applicable priorities require conviction of a specifically described set of crimes, which excludes

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143 PEP Memorandum, supra note 107.
144 Id. at 1.
145 Id. at 3.
146 Id. at 2.
147 Id., referring to Priorities Memorandum, supra note 49. PEP will not ordinarily be used for the following categories listed in the Priorities Memorandum, even though such persons remain subject to DHS enforcement if located in some other fashion:

- 1(b) - "aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States";
- 2(c) - "aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States . . . after January 1, 2014";
- 2(d) - "aliens who . . . have significantly abused the visa or visa waiver programs";
- 3 - "those who have been issued a final order of removal on or after January 1, 2014."

Id. at 3-4.
misdemeanors not deemed "significant" according to a definition spelled out in the priorities memo.\textsuperscript{148} PEP, for the time being at least, therefore will principally focus on the first goal articulated for Secure Communities above – removing criminal aliens, those with actual convictions above the level of lesser misdemeanors.

Of perhaps greater long-term importance, Secretary Johnson's PEP Memorandum also entrenches significant changes to the ICE detainer practices that had been primarily responsible for most of the damages litigation directed at LEAs. Johnson directed that ICE replace requests for detention with simple requests for timely notification of when the LEA would release an individual falling within the PEP priorities.\textsuperscript{149} ICE then bears the responsibility to assure that it arrives in time to take custody; it cannot rely on or expect a 48-hour extension of detention, as had been the customary request in the previous versions of ICE detainers. Presumably no detainee will be subjected to a lengthened period of detention based on the ICE request for information – thus apparently avoiding one of the main triggers for Fourth Amendment litigation.\textsuperscript{150}

The PEP Memorandum also countenances the use of a stronger ICE action, an actual request for detention leading to transfer, "in special circumstances," which will apparently be defined in later guidance.\textsuperscript{151} The Memo directs that any such request must state that the person is subject to a final order of removal or else specify other reasons why "there is . . . sufficient probable cause to find that the person is a removable alien, thereby addressing the Fourth Amendment concerns raised in recent federal court decisions."\textsuperscript{152}

7. Where should we go from here?

DHS's retreat to requests for notification (rather than for detention and transfer) makes sense only as an interim measure. By reducing the chance that a DHS request will in any manner work to prolong detention, it visibly

\textsuperscript{148}Id. at 4. The PEP-applicable priorities categories do encompass authority to seek transfer even without a conviction in tightly limited circumstances, involving national security threats or persons over 15 years old intentionally participating in criminal gang activity. Id. at 3 (priorities 1(a) and (c)).

\textsuperscript{149}PEP Memorandum, supra note 107, at 2–4.

\textsuperscript{150}There could still be some risk of constitutional litigation, if the LEA subjects the person to significantly more restrictive terms of custody because of the request for notification, at least in the absence of a reliable indicator of probable cause justifying such a step. See note 138 supra and accompanying text (discussing Ortega v. U.S. Immigration & Customs Enforcement).

\textsuperscript{151}PEP Memorandum, supra note 107, at 2.

\textsuperscript{152}Id.
addresses one of the most prominent litigation concerns for LEAs. Maybe this kind of prominent retreat was necessary in order to help slow or reverse the cascade of jurisdictions announcing broader cutbacks in cooperation with DHS. As part of a short-term stop-the-bleeding approach, it can be defended.

But it is no model for the future. Instead, another change cryptically sketched in the PEP Memorandum from Secretary Johnson would address those litigation concerns in a much more focused and productive way. The “special circumstances” paragraph described above insists that any requests for actual transfer affirmatively specify how they rest on a determination of probable cause that the person is validly subject to immigration enforcement and thus to restrictions on his or her liberty.\footnote{Id. The memorandum specifies that the request will be accompanied by a final order of removal or some other (as yet unspecified) means of assuring that probable cause exists.} Inattention to probable cause – or at least to documenting in detainer procedures that probable cause exists – was a central source of the adverse court decisions. Neither the public nor the courts generally deem objectionable the common practice for one law enforcement agency to hold an arrested person for a short period while it waits to hand him or her over to a criminal justice agency from another jurisdiction. Such cooperation routinely happens on a voluntary basis and also occurs in a structured way pursuant to the Interstate Agreement on Detainers Act.\footnote{Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397 (Dec. 9, 1970) (codified as amended at 18 U.S.C. app. 2 § 2 (2012)); see Christopher N. Lasch, \textit{Rendition Resistance}, 92 N.C. L. Rev. 149, 192–200 (2013) (discussing the background to the IADA). That Act does not cover immigration detainers.} The presence of a properly documented or validated determination of probable cause is what makes such cooperation legally acceptable and effective.\footnote{See Miranda-Olivares v. Clackamas Cnty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (“Absent probable cause, that detention [on the basis of an ICE detainer] was unlawful.”); People v. Xirum, 45 Misc. 3d 785, 791, 993 N.Y.S.2d 627, 631 (Sup. Ct. 2014) (probable cause exists, justifying detention in response to an ICE detainer, when the detainer indicates that the person is subject to a final order of removal).}

DHS should use the Secretary’s PEP Memorandum as the occasion to rework quickly its forms and its internal quality-control processes so as to assure that probable cause exists before \textit{any} detention-related request to a LEA – whether for notification of release (as will probably be the primary vehicle during the early implementation of PEP) or for transfer. DHS should then go further and think creatively about more extensive and formal administrative reforms that can provide a sufficiently independent validation of probable cause – something beyond the initial finding by an
investigating officer. Some sort of functional independence for the ultimate decisionmaker on the detainer’s validity is needed in order to gain the confidence of both federal courts and LEAs, ultimately permitting a more disciplined detainer practice to become routine. These kinds of changes would have to be implemented through regulations – or even better, through a statute that not only lays out careful procedures for internal review of immigration warrants and detainers before issuance, but also finally provides clear and explicit statutory authority for detainers themselves.\footnote{Current law expressly authorizes DHS detainers only in connection with persons arrested for controlled substance offenses. INA § 287(d), 8 U.S.C. § 1357(d) (2012). This limited explicit mention does not necessarily mean that detainer practice, particularly in the form of requests rather than mandates, is legally questionable. INA § 103, 8 U.S.C. § 1103 (2012), gives broad authorities to the Secretary of Homeland Security to administer and enforce all immigration laws. See MANUEL, supra note 109, at 10–11. Nonetheless, now that intense controversy has arisen, explicit statutory authority, clarifying underlying procedures and questions of liability for mistakes or misuse, would be highly useful.} The statute should also provide (within that reformed context) that LEA officials or municipalities who rely on such a detainer or request shall not be liable\footnote{Any liability for errors or deficiencies that rise to the level of constitutional torts should fall on the agency responsible for assuring that probable cause exists: DHS.} for honoring it.\footnote{If reformed practices one day build a more generally supportive political climate, Congress might also choose to make mandatory the honoring of a DHS request for information in advance of release. Such a step could provoke objection under the anti-commandeering doctrine derived from New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 898 (1997). Mandating that the state actually detain and transfer probably would violate that doctrine. But dictum in Printz suggests that there may be room for imposing a federal statutory requirement that the state or local agency provide information. Printz, 521 U.S. at 918 (indicating that the Court is not addressing statutes “which require only the provision of information to the Federal Government”); id. at 936 (O’Connor, J., concurring) (“[T]he Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities . . . are similarly invalid”). If even a mandatory notification statute proves politically or legally unachievable, Congress’s simple enactment of clear statutory authority for DHS to issue requests for transfer – that is, detainers – combined with well-crafted immunity against damages for any LEA honoring such a request, would probably suffice to sustain an efficient level of state-federal cooperation.} Unless the file already contains an appropriate formal determination of probable cause (as the PEP Memorandum indicates, a preexisting final order of removal would of course serve that purpose), a different form of formalized procedure is needed. Perhaps a cadre of senior immigration officers, insulated from involvement in immediate investigative duties, could be given the task to pass upon the adequacy of the foundation for a warrant or detainer before it issues.\footnote{This would amount to a more formal and disciplined version of the role now taken by immigration officers in reviewing the validity of warrantless arrests made by other officers under 8 C.F.R. § 287.3 (2014), or in issuing immigration arrest warrants. 8 C.F.R. § 287.5(c) (2014). Those}
review procedure would engage the Department of Justice, authorizing immigration judges to issue or approve such warrants or requests. (This sort of change should be considered only if Congress considerably enlarges the ranks of the IJs; they are woefully understaffed for even the current removal caseload at present.) Any statutory amendment process could of course consider a wider range of options, even including a possible role for federal magistrates in determining or certifying probable cause.  

Another paragraph of the PEP Memorandum quietly leaves the door open for broader forms of cooperation with LEAs after the IDENT check. It states that the memo does not prevent ICE from seeking transfer of any noncitizen who fits any of the categories on the full 2014 list of DHS enforcement priorities, from a LEA that is willing to cooperate in this fashion. This option introduces a useful element of flexibility for a somewhat wider use of fingerprint data to initiate enforcement against immigration violators, such as recent overstays or recent entrants without inspection, even though they have not been convicted of a criminal offense. But one should not expect significant use of this option until the controversy over Secure Communities has cooled and more rigorous probable-cause controls are shown to be effective. Such an evolution may prove possible only in connection with a broad statute-based legalization program, which would definitively focus DHS enforcement on more recent violators.

Regulations should be made considerably more rigorous, both procedurally and substantively (for example, explicitly requiring a finding of probable cause).

Some critics of ICE detainer practice assert that a LEA should be allowed to detain or transfer an individual only on the basis of a judicial warrant. See, e.g., Christopher Lasch, The Faulty Legal Arguments Behind Immigration Detainers, 8 PERSP. ON IMMIGR. 1, 8 (Immigration Policy Center, Dec. 18, 2013), available at http://www.immigrationpolicy.org/perspectives/faulty-legal-arguments-behind-immigration-detainers. This would be, to say the least, a curious outcome in a system wherein actual removal orders, implicating a far more significant intrusion on liberty than a detainer, have historically been issued by executive officers. Over 100 years of Supreme Court precedent, tracing to Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893), supports the constitutionality of that practice. Being constitutional is not the same as being optimal, of course; Congress may wish to require non-DHS officials, be they judicial magistrates, immigration judges, or someone else, to issue or approve warrants and detainers (thus providing greater assurance of a neutral determination of probable cause).

In other words, this process could be used for persons falling within the otherwise PEP-omitted priorities. See supra note 147. Mostly such charges would have to be based on immigration violations committed after January 1, 2014 – thus keeping with Secretary Johnson’s “sharp distinction” between past and future violators. Preston, supra note 42.

I view this potential for evolution toward a more sustainable enforcement effort against ordinary violators, particularly in a post-legalization world, as a distinct advantage. But the evolution will of course encounter stout resistance. Some immigrant advocates are already voicing suspicions about PEP, calling it an insufficient cure for the ills of Secure Communities, because it may still permit some
In the long run, restoring this kind of carefully structured federal-state cooperation, not wholly dependent on conviction for a separate crime, is central to building a healthy interior enforcement system. Resolute enforcement ultimately depends on broad societal acceptance that persons who violate the immigration laws (with some structured room for humanitarian exceptions) are justly subjected to the removal sanction based on that fact alone, without having also to commit some separate criminal offense.\footnote{See supra note 114.}

C. Reduce the harshness that gives enforcement a bad name

My final cluster of suggestions looks in a different direction. Resolute enforcement is important, but it must also be prudent. Most immigration violations are not regarded by a majority of the public as \emph{mala in se}. They are \emph{mala prohibita}. There is a good case to be made for the law’s imposition of measured prohibitions on free migration, in the nation-state-dominated world order we inhabit.\footnote{Such justification is a complex and elusive subject. For an excellent introduction to such argumentation, see MICHAEL WALZER, SPHERES OF JUSTICE 31–63 (1983).} But because ordinary immigration violations – entries without inspection and overstaying of temporary admissions – are not regarded as inherently evil, particularly when the press focuses on individually sympathetic cases, the system needs a carefully designed statutory capacity to soften the harshest edges of enforcement. That capacity helps over time to build or sustain public faith in the overall justice and proportionality of the system.\footnote{Dan Kanstroom has insightfully observed: “Discretion might be described as the flexible shock absorber of the administrative state. It is a venerable and essential component of the rule of law that recognizes the inevitable complexities of enforcement of laws by government agencies.” DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 215 (2012). For further thoughtful analysis of the levels, stages, and significance of enforcement discretion, see HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 129–30 (2014).} Such a pool of support can help bolster the polity’s commitment to acting swiftly and firmly against most violations, as necessary.

As indicated, a broad statute-based legalization program, giving enforcement a fresh start that can clearly focus on recent violators, would...
provide the greatest help along these lines. Taking the cases of noncitizens with long community ties out of the enforcement target zone will facilitate significant new initiatives like E-Verify and an overstay enforcement campaign. Nonetheless, compelling post-legalization cases will arise.

1. Case-by-case consideration: restoring wider scope for relief from removal administered by immigration judges

Before 1996, the law assigned much of this edge-softening role to immigration judges as part of a removal proceeding, by enabling applications for discretionary relief from deportation.\footnote{In earlier generations, private bills enacted by Congress served this function. Finding this task burdensome, Congress enacted administrative forms of relief. See ALENIKOFF ET AL., supra note 8, at 773–74.} Lawful permanent residents, who generally find themselves in a removal proceeding only because of a criminal conviction, could apply under the former INA § 212(c)\footnote{Former INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).} and try to convince the judge that they should be allowed to stay despite their baseline deportability. The main prerequisite to being considered by the IJ for such relief was seven years of lawful permanent residence.\footnote{Id.} In reaching her discretionary decision, the judge would consider the severity of the offense and the length of time that has passed since then. She would also assess the person’s rehabilitation, family ties, contributions to the community, and other factors that might counterbalance the criminal conviction.\footnote{Matter of Marin, 16 I. & N. Dec. 581, 584–85 (BIA 1978) (listing positive and negative factors).}

The 1996 amendments greatly narrowed eligibility for this form of relief, now renamed “cancellation of removal,”\footnote{INA § 240A(a), 8 U.S.C. § 1229b(a) (2012).} primarily by rendering ineligible anyone who has been convicted of an aggravated felony, as defined in INA § 101(a)(43). In principle, such a disqualification is not necessarily misguided. There are some criminal offenses so extreme that a categorical bar from relief could be justified. The “aggravated felony” concept, as initially enacted in 1988, basically met this description, being confined to three forms of serious crime.\footnote{They were murder, drug trafficking, and firearms trafficking. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (Nov. 18, 1988).} But Congress has added enormously to the list since then, now including many offenses that are not even felonies under the applicable criminal law. For some offenses, whether they count as aggravated felonies depends on the length of
sentence imposed. But because of harsh sentence-counting rules, which include all periods of a suspended sentence, some persons who are considered by the criminal court judge to be minor offenders and so are sentenced to spend no time in prison (but who receive a suspended sentence of one year) must be treated as aggravated felons—and are therefore barred from cancellation.

Another pre-1996 avenue for discretionary relief, known as suspension of deportation, was potentially available to non-LPRs. It too was administered by IJs. To meet the threshold qualification, the individual had to have lived in the country for seven years, possess good moral character (basically meaning no criminal convictions), and show that deportation would result in extreme hardship. Congress tightened these prerequisites in 1996 as well, now requiring ten years continuous presence and a higher showing of hardship (while also renaming this form of non-LPR relief “cancellation of removal”). Moreover, hardship to the noncitizen respondent no longer counts; only hardship to a close family member who is a citizen or LPR is considered. And Congress imposed a logistically irrational annual numerical limit on this form of relief as well. (The resulting problems are well-documented in Margaret Taylor’s contribution to this symposium.)

When the restrictive 1996 Act narrowed the criteria for cancellation relief, the change generated such harsh and unpopular results in many members’ home districts that twenty-eight members of Congress, including some leading supporters of the Act, wrote the Attorney General and the INS Commissioner in 1999, urging them to alleviate this kind of harsh outcome. They explicitly pressed INS to adopt prosecutorial discretion guidelines that would avoid enforcement in these circumstances, thus saving them from their own restrictionist handiwork—an extraordinary turnaround.

176 INA § 240A(b), 8 U.S.C. § 1229(b) (2012). The hardship standard is now “exceptional and extremely unusual hardship.” Id.
INS launched a process to authorize and encourage the use of prosecutorial discretion for these purposes, and it eventually served to soften some of the harsh edges of the 1996 amendments. But relying on charging officers to exercise this discretion is far inferior to the old forms of relief from removal granted by an IJ. An IJ’s grant of relief is durable, leading to (or retaining) LPR status, whereas a prosecutor’s declination can be reversed by a later Administration. Equally important, professional ethics and ingrained patterns of behavior make it inappropriate for anyone to try to bring outside pressure to bear on an immigration judge in reaching a decision, even on discretionary matters. Hence an IJ’s decision on relief is based only on the record, and the IJ must give reasons for the decision, which is subject to formal and transparent administrative appeal. But no such mores shield the immigration enforcement agencies from telephone calls or other pressure, whether to argue for severity or leniency, originating from members of Congress or other interested outsiders, regarding the exercise of prosecutorial discretion.

The reach of the current cancellation provisions is insufficient. Experience has shown that they must be supplemented by additional steps to alleviate the harshness of the law as written – and prosecutorial discretion is now virtually the only game in town. Congress should instead amend the statute to restore something like the old forms of relief. (Because these benefits would remain uncertain and discretionary, while retaining relatively demanding threshold eligibility requirements, they are unlikely to serve as significant ex ante inducements to break the law in the hopes of being granted such relief.)

The best way to reopen such possibilities for LPRs would be for Congress to trim substantially the list of aggravated felonies. If that change


180 Congress has largely barred judicial review of this sort of discretionary decision. INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (2012). I have argued that such a restriction could be justified in the interest of timely finality — provided that administrative appellate review before the Board of Immigration Appeals remains available, as at present — but that such restrictions on judicial review would make far more sense if accompanied by a restoration of the wider scope for discretionary relief known before 1996. See David A. Martin, Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen, 16 GEO. IMMIGR. L.J. 313, 328–32 (2002).
is politically too difficult, perhaps Congress could change the formula for calculating sentence length, so as to count only time served in actual custody after conviction, not including suspended portions of the sentence. Or the most feasible alternative, if INA § 101(a)(43) cannot be significantly pared, might be to amend the bar to cancellation itself, so that it applies only to persons convicted of aggravated felonies for which the aggregate sentence exceeds five years, rather than to all aggravated felonies. For non-LPR cancellation, the most helpful changes would be to return the required residence period to seven years, restore the standard to "extreme hardship," and also allow the IJ to consider all aspects of the hardship that removal would produce, whether to the noncitizen respondent or to immediate family members, whatever their immigration status.

2. The remaining role for prosecutorial discretion

Reforming relief along these lines, especially if coupled with a broad statutory legalization program, should return us to a situation where equity-based discretion is primarily exercised by immigration judges. The IJ's decisions would become the "discretion that matters," to borrow and reapply Hiroshi Motomura's memorable phrasing. Prosecutorial discretion exercised by DHS officers would still be important for truly compelling cases that fall outside the statutory prerequisites for IJ relief. But such action would be infrequent and interstitial, as it is in most law enforcement—not the primary arena for large battles over policy and over the respective authorities of the legislative and executive branches.

3. Metering enforcement activity to assure a balanced capacity to execute removal orders

One last role for prosecutorial discretion may also be important in a post-legalization regime that is committed to effective enforcement against newer violators. Such discretion should be used as a kind of metering

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181 INA § 101(a)(48), 8 U.S.C. §1101(a)(48) (2012). Or Congress could at least make a one-day correction in several sentence-length specifications enacted in 1996, thus bringing immigration law into harmony with the usual dividing line between misdemeanors and felonies. The INA often uses a severity threshold of a sentence of one year or more. Criminal law usually treats sentences of exactly one year as a misdemeanor, requiring more than one year to consider the offense a felony. See Laura Murray-Tjan, A Tale of Two Typos (Boston College Law School, Research Paper No. 311, 2013), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=2307743.


mechanism, to make sure that initial charging decisions stay in reasonable balance with the capacity of the system to effectuate removal once a final order is issued. For decades, far more energy and officer time have been devoted to finding and charging immigration violators than to enforcing final orders of removal by locating absconders and making sure that they depart.

To some extent this is understandable. The process of writing up and serving initial immigration charges has traditionally been relatively straightforward and speedy, whereas locating an absconder is labor-intensive. Moreover, removal proceedings generally take many months and often last for years, enabling a non-detained respondent to deepen his or her community ties in the meantime (another important reason for greatly enhancing the resources given to the immigration court system). Therefore, apprehending someone at the brink of removal tends to generate the sharpest and most sustained resistance to the officer’s action, from the individual’s employer, pastor, family, and other members of the community.

The general ineffectiveness of removal enforcement has helped breed a culture wherein final orders are widely ignored. But as a corollary, a few years’ demonstration of real and thoughtful commitment to finding absconders could help change that culture and induce more people to show up for deportation as commanded. A sustained track record of actual removals thus affords another prime opportunity for enhancing deterrence and someday thereby reducing the overall need for direct enforcement.

For all these reasons, it makes little sense to invest public resources in charging a violator, unless the system is recalibrated so that, whenever the government secures a final removal order, the normal outcome is actual removal. The proportion of officers assigned to securing removal (as

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184 Systematic data on the percentage of removal orders that result in actual removals are not available, but intermittent monitoring reports, usually based on sampling, provide snapshots, all indicating a compliance rate below 20% for aliens who are not detained (non-detained aliens form a substantial majority of persons in removal proceedings, even with major expansion in detention space over the last decade). See Office of the Inspector Gen., Dep’t. of Justice, Inspection Report No. 1-96-03, Immigration and Naturalization Service: Deportation of Aliens After Final Orders Have Been Issued (1996), available at http://www.justice.gov/oig/reports/INS/e9603/#EXECUTIVE%20DIGEST (finding that only 11% of nondetained aliens are removed following issuance of a final order of removal, versus over 90% for persons detained throughout the proceedings); Office of the Inspector Gen., Dep’t. of Justice, Report Number 1-2003-004, The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders 11-13 (2003), available at http://www.justice.gov/oig/reports/INS/e0304/index.htm (finding that the rate of removal of nondetained aliens had only risen to 13%).
opposed to filing charges or handling other early stages of the process) needs to be increased. DHS supervisors need to monitor the volume and character of charging decisions so as to counteract the long-demonstrated tendency of the system to suck too many resources into the charging and trial process, to the detriment of effectuating the results. Prosecutorial discretion at the charging stage, in short, plays a quantitative as well as a qualitative role.

IV. CONCLUSION

Effective enforcement is not impossible, and it need not be draconian. This Article sketches out a few ideas about how to nurture such a system. Properly designed and managed, resolute enforcement can serve as a central component in preserving America's historic openness to high-volume managed migration – and in avoiding the worst extremes of polarization and overreaction. Supporters of generous immigration need to recognize their stake in creating thoughtful and truly workable mechanisms that will foster compliance.