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## Abolish ICE . . . and Then What?

*Peter L. Markowitz*

**ABSTRACT.** In recent years, activists and then politicians began calling for the abolition of the United States’s interior immigration-enforcement agency: U.S. Immigration and Customs Enforcement (ICE). Many people have misinterpreted the call to “Abolish ICE” as merely a spontaneous rhetorical device used to express outrage at the current Administration’s brutal immigration policies. In fact, abolishing ICE is the natural extension of years of thoughtful organizing by a loose coalition of grassroots immigrant-rights groups. These organizations are serious, not only about their literal goal to eliminate the agency, but also about not replacing it with another dedicated agency of immigration police. Accordingly, the proposal to eliminate ICE necessarily raises the question of how, in a post-ICE world, the United States would enforce its immigration laws. Missing from the public discourse, however, is an affirmative vision for the mechanics of a just and humane immigration-enforcement system that could follow the abolition of ICE. Drawing on lessons from our own and other nations’ past immigration-enforcement schemes, enforcement mechanisms employed by other federal agencies, and interviews with leaders of the “Abolish ICE” movement, I seek to begin to fill this void. This Essay suggests a paradigm shift in immigration enforcement toward the creation of an enforcement scheme that does not rely on detention, mass deportation, or any dedicated agency of immigration police but is nevertheless realistic and effective at increasing compliance with immigration law. The new immigration enforcement principles set forth herein are intended as a starting point for the immigrant-rights movement and for policymakers to use, critique, and improve upon.

### INTRODUCTION

The movement to abolish the U.S. Immigration and Customs Enforcement agency (ICE) burst into the national consciousness in the summer of 2018.<sup>1</sup> The

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1. Molly Hensley-Clancy & Nidhi Prakash, “Abolish ICE” Was the Call of Last Summer. 2020 Democrats Have Moved On., BUZZFEED NEWS (May 15, 2019, 11:25 AM), <https://www.buzzfeednews.com/article/mollyhensleyclancy/abolish-ice-2020-democrats-immigration> [<https://perma.cc/AU9R-BJQ8>]; Julianne Hing, *What Does It Mean to Abolish ICE?: Activists and Politicians Want a Total Overhaul of Immigration Enforcement—but Do We*

idea was the natural extension of years of thoughtful organizing by a loose coalition of grassroots immigrant-rights groups.<sup>2</sup> They had become convinced that efforts to reform ICE were futile and that a more radical approach was needed. The Trump Administration’s policy of separating and detaining parents and children and the upset victory of U.S. Representative Alexandria Ocasio-Cortez, who had built her campaign in large part around a call to abolish ICE, created a tipping point for the movement.<sup>3</sup> Prominent national politicians quickly lined up behind the idea.<sup>4</sup> But that initial rush of support has waned in the past year, as many have struggled to explain how we would enforce immigration laws without ICE.

ICE’s brutality, lawlessness, and ineffectiveness have been well documented in academic literature and, more powerfully, by immigrant-community leaders, who have proposed specific and thoughtful changes to our immigration-enforcement paradigm.<sup>5</sup> These changes, however, focus almost exclusively on a negative vision of what we need to eliminate in our current enforcement scheme: detention, deportations,<sup>6</sup> and the entanglement of our criminal-justice and immigration systems, among other flaws.<sup>7</sup> Lacking in the public discourse is a clear

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*Have a Real Plan?*, NATION (July 11, 2018), <https://www.thenation.com/article/mean-abolish-ice> [<https://perma.cc/7AL2-BLZ2>].

2. See, e.g., JOMO, *Fighting Obama’s Deportation Policies Without Papers—and Without Fear*, NATION (Apr. 24, 2014) (discussing the #Not1More campaign calling for a moratorium on deportations), <https://www.thenation.com/article/fighting-obamas-deportation-policies-without-papers-and-without-fear> [<https://perma.cc/YJL8-52GG>]; #Not1More, NOT ONE MORE DEPORTATION, <http://www.notonemoredeportation.com> [<https://perma.cc/A5GU-JTGN>]; *Not One More*, N.Y. TIMES (Oct. 27, 2013), <https://www.nytimes.com/2013/10/28/opinion/not-one-more.html> [<https://perma.cc/SQE2-GBGB>].
3. See Hing, *supra* note 1.
4. See Hensley-Clancy & Prakash, *supra* note 1; Hing, *supra* note 1.
5. See, e.g., César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 292-300 (2017); Kari Hong, *10 Reasons Why Congress Should Defund ICE’s Deportation Force*, 43 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 40 (2019); *Defund the Detention and Deportation Machine Campaign*, DETENTION WATCH NETWORK (Nov. 12, 2018) [https://www.detentionwatchnetwork.org/sites/default/files/DefundHate%20Explainer\\_11.12.2018.pdf](https://www.detentionwatchnetwork.org/sites/default/files/DefundHate%20Explainer_11.12.2018.pdf) [<https://perma.cc/5VNA-GRMV>]; *Free Our Future: An Immigration Policy Platform for Beyond the Trump Era*, MIJENTE (June 20, 2018), [https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform\\_0628.pdf](https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf) [<https://perma.cc/2XWM-AF83>]; see also *infra* Part I (discussing commonly cited criticisms of ICE).
6. The Immigration and Nationality Act (INA) uses the term “removal” rather than deportation. See, e.g., 8 U.S.C. § 1229a (2018). This term tends to sanitize the state violence associated with the physical separation of individuals from their families and communities. Accordingly, I use the term “deportation.”
7. See, e.g., *Defund the Detention and Deportation Machine Campaign*, *supra* note 5; *Free Our Future*, *supra* note 5.

affirmative vision for a practical immigration-enforcement system<sup>8</sup> that is not dependent on mass detention and deportation.<sup>9</sup> This Essay seeks to offer such a vision for a new immigration-enforcement paradigm<sup>10</sup> that is humane and effective but that does not rely on the existence of ICE, or any immigration police agency.

The proposal builds on the work of others who have examined immigration-enforcement strategies within the context of the current agency system,<sup>11</sup> as well as upon the literature discussing administrative enforcement in other contexts.<sup>12</sup> In addition, a critical and primary source for this Essay is a series of interviews

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8. Some in the Abolish ICE community have rejected the idea of enforcement altogether, calling for an end to borders. See, e.g., *First We Abolish ICE: A Manifesto for Immigrant Liberation*, CAL. IMMIGRANT YOUTH JUST. ALLIANCE (July 2, 2018), <https://ciyja.org/wp-content/uploads/2018/07/AbolishICE.pdf> [<https://perma.cc/RM5K-CHYD>]. However, the majority of the movement has not seen any utility in staking out a formal position. In contrast, the movement is united and clear in its goal to literally abolish ICE and any dedicated agency of immigration police. Moreover, the leaders with whom I spoke recognize the reality that borders are likely here to stay and are interested in the practical effort of mitigating the pain that immigration enforcement visits upon their communities. I adopt this approach throughout. Assuming that rules will remain about who may enter and stay in the United States, I seek to envision the most just and humane way to enforce those rules.
  9. See Elliot Hannon, *House Democrats Preparing Legislation That Would Abolish ICE*, SLATE (July 10, 2018), <https://slate.com/news-and-politics/2018/07/house-democrats-preparing-legislation-that-would-abolish-ice.html> [<https://perma.cc/7SAB-E42D>] (discussing legislation to abolish ICE that creates a commission to recommend a new immigration-enforcement system).
  10. “Enforcement” as used throughout this Essay is not limited to systems of punishment through coercive physical state power. Rather, the term is used broadly to describe any method to address noncompliance or encourage compliance.
  11. See, e.g., Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 9-13 (2017); Hernández, *supra* note 5; Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089 (2011); David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411 (2015); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622 (2015); Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. FOR AM. PROGRESS (July 22, 2019), <https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-law-fair-humane-workable-immigration-system> [<https://perma.cc/2HW2-TTB6>].
  12. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 14-17 (1997); Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555; Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713 (1997).

conducted with immigrant-community leaders who generously shared their time and insight.<sup>13</sup>

This Essay proceeds in two Parts. Part I lays out the case for the abolition of ICE. Part II proposes four key pillars of a humane and effective immigration-enforcement system that could follow ICE’s dissolution.

## I. THE CASE AGAINST ICE

ICE was created in the aftermath of the September 11 attacks<sup>14</sup> and was fundamentally ill-conceived from its inception. It has since amassed a notorious record of abuse, illegality, waste, and ineffectiveness. Its predecessor agency, the Immigration and Naturalization Service (INS), had been housed in the Department of Justice (DOJ) and had a combined services and enforcement mission.<sup>15</sup> However, in creating ICE, Congress excised the services mission, placing those functions in another agency, U.S. Citizenship and Immigration Services (USCIS). All immigration-related agencies then came under the purview of the new Department of Homeland Security (DHS).<sup>16</sup> The message was clear: immigration policy would be a component of the nation’s counterterrorism efforts, and ICE would be singularly focused on punitive enforcement. While ICE’s civil-enforcement efforts, by its own assessment, are unrelated to DHS’s national security mission,<sup>17</sup> that mission has powerfully influenced ICE’s heavy-handed tactics.

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13. See acknowledgments *infra*. Some of these leaders are first generation immigrants themselves who speak from personal as well as professional experience. Others are leaders of membership organizations or immigrant advocacy organizations with deep connections to the immigrant communities most acutely impacted by immigration enforcement.

14. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

15. The INS had its own checkered history, and the DOJ’s criminal-justice paradigm had a strong and problematic influence on the nation’s immigration-enforcement regime long before the creation of ICE. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006). Much of what is broken about the U.S. immigration-enforcement system was firmly entrenched in INS practice prior to the creation of ICE. The creation of ICE, however, amplified and expanded those defects.

16. *Id.* at 388 n.113.

17. U.S. Immigration & Customs En’t, *Budget Overview Fiscal Year 2018: Congressional Justification*, U.S. DEP’T HOMELAND SECURITY 6 (2018), <https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf> [<https://perma.cc/PG8N-S9BC>] (conceding that ICE’s Enforcement Removal Operations (“ERO”) component, responsible for civil immigration enforcement, contributes 0% to the “Prevent Terrorism and Enhance Security” portion of DHS’s mission); cf. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1860 (2007) (arguing that ICE’s civil enforcement efforts are unrelated to DHS’s national security mission).

ICE's abusive tactics are well documented. The barbarism of separating toddlers from their parents, holding them in cages, and forcing them to defend themselves in complex legal proceedings against trained government lawyers is a daily reality.<sup>18</sup> In addition, there is an established and ongoing pattern of "egregious medical neglect in [immigration] detention facilities across the country."<sup>19</sup> Not surprisingly, ICE's mistreatment of detainees has led to a startling pattern of deaths in ICE custody.<sup>20</sup> In addition, ICE has amassed a well-earned

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18. See, e.g., Charles M. Blow, *Trump's Concentration Camps*, N.Y. TIMES (June 23, 2019), <https://www.nytimes.com/2019/06/23/opinion/trump-migrants-camps.html> [<https://perma.cc/KQ7V-WFD4>]; Vanessa Romo & Joel Rose, *Administration Cuts Education and Legal Services for Unaccompanied Minors*, NPR (June 5, 2019), <https://www.npr.org/2019/06/05/730082911/administration-cuts-education-and-legal-services-for-unaccompanied-minors> [<https://perma.cc/4CXZ-QCLT>]; Jessica Roy, *Judge Thinks 3-Year-Olds Can Defend Themselves, so Immigration Lawyers Tried It on Their Own Kids*, L.A. TIMES (Mar. 12, 2016), <https://www.latimes.com/nation/la-na-immigration-toddler-lawyers-videos-snap-html.htmlstory.html> [<https://perma.cc/R9HX-SRDU>]. To be clear, the family separation policy implemented at the border is primarily the work of ICE's sister agency, CBP. ICE, however, has also been engaged in large-scale family-separation policies for years. See Madeline Buiano, *ICE Data: Tens of Thousands of Deported Parents Have U.S. Citizen Kids*, CTR. FOR PUB. INTEGRITY (Oct. 12, 2018), <https://publicintegrity.org/immigration/ice-data-tens-of-thousands-of-deported-parents-have-u-s-citizen-kids> [<https://perma.cc/PHQ5-J9VL>]; Guillermo Cantor, *Thousands of U.S.-Citizen Children Separated from Parents, ICE Records Show*, IMMIGR. IMPACT (June 26, 2014), [<https://perma.cc/Q2Z5-FRBY>]; see also, e.g., Justine Boggs, *ICE Attempted to Arrest Three Fathers Dropping Kids Off for School in NJ*, ABC 15 (Jan. 26, 2018, 8:59 AM), <https://www.abc15.com/news/national/ice-attempted-to-arrest-3-fathers-dropping-kids-off-for-school-in-nj> [<https://perma.cc/M6W3-QPZS>].
19. *Detained and Denied: Healthcare Access in Immigration Detention*, N.Y. LAW. FOR PUB. INT. 1 (2017), [https://nylpi.org/wp-content/uploads/2017/02/HJ-Health-in-Immigration-Detention-Report\\_2017.pdf](https://nylpi.org/wp-content/uploads/2017/02/HJ-Health-in-Immigration-Detention-Report_2017.pdf) [<https://perma.cc/UR3R-B7G3>]; see also Office of the Inspector Gen., *Concerns about ICE Detainee Treatment and Care at Four Detention Facilities*, U.S. DEP'T HOME- LAND SECURITY (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf> [<https://perma.cc/2FE3-ATGS>]; *Fatal Neglect: How ICE Ignores Death in Detention*, AM. C.L. UNION ET AL. (2016), <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention> [<https://perma.cc/X27E-95KG>]; *US: Deaths in Immigration Detention*, HUM. RTS. WATCH (July 7, 2016), <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention> [<https://perma.cc/24WS-LWZX>].
20. See Ken Klippenstein, *ICE Detainee Deaths Were Preventable*, TYT (June 3, 2019), <https://tyt.com/stories/4vZLCHuQrYE4uKagyooYMA/688s1LbTKvQKNCv2E9bu7h> [<https://perma.cc/TWR7-GQR9>]; Hannah Rappleyle & Lisa Riordan Seville, *24 Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019, 7:00 AM), <https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291> [<https://perma.cc/99MC-BX87>].

reputation as a dishonest,<sup>21</sup> racist,<sup>22</sup> and rogue agency that regularly flouts legal limits.<sup>23</sup>

The one area where ICE has demonstrated startling success has been in garnering resources for itself. Its funding has risen from \$3.3 billion in 2003, the year after its creation, to \$7.5 billion in 2018—an increase of approximately 130%.<sup>24</sup> The United States now spends more on immigration enforcement than

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21. See, e.g., Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 308 (2018); Erik Larson, *Trump Administration Lied to Federal Judge to Deport Iraqis, He Rules*, BLOOMBERG (Nov. 20, 2018, 3:11 PM), <https://www.bloomberg.com/news/articles/2018-11-20/judge-orders-ice-to-free-iraqis-says-it-gave-false-information> [<https://perma.cc/Q4QD-WJXE>]; Dan Simon, *ICE Spokesman in SF Resigns and Slams Trump Administration Officials*, CNN (Mar. 13, 2018, 7:35 AM), <https://www.cnn.com/2018/03/12/politics/ice-spokesman-resigns-san-francisco/index.html> [<https://perma.cc/TG25-ATYY>].
22. See Aarti Kohli et al., *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, BERKELEY L. SCH. 2 (Oct. 2011), [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf) [<https://perma.cc/X8NC-7LAP>] (documenting how Latino immigrants are disproportionately targeted in localities participating in ICE’s Secure Communities); García Hernández, *supra* note 5, at 283-84; Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, PROPUBLICA (June 8, 2018, 5:00 AM), <https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania> [<https://perma.cc/3J2H-9TEQ>].
23. See, e.g., R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (issuing a preliminary injunction because plaintiffs were likely to prevail on their claim that ICE’s policy of detaining families to deter others from immigrating to the United States was unlawful); Alia Al-Khatib, *Putting a Hold on Ice: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 AM. U. L. REV. 109, 145-46 (2014) (explaining how, prior to 2012, DHS’s practice was to illegally issue detainers directing local authorities to arrest people solely for investigative purposes, in flagrant violation of the Fourth Amendment); Bess Chiu et al., *Constitution on ICE: A Report on Immigration Home Raid Operations*, CARDOZO IMMIGR. JUST. CLINIC (2009) [https://cardozo.yu.edu/sites/default/files/Constitution%20On%20ICE--A%20Report%20on%20Immigration%20Home%20Raid%20Operations%20-%20Cardozo%20Law%20School\\_o.pdf](https://cardozo.yu.edu/sites/default/files/Constitution%20On%20ICE--A%20Report%20on%20Immigration%20Home%20Raid%20Operations%20-%20Cardozo%20Law%20School_o.pdf) [<https://perma.cc/9LBP-CXDE>] (documenting the widespread illegal practice of ICE agents illegally entering homes without judicial warrants). See generally Fred Barbash, *Trump’s Immigration Policies Fail Time and Again When Faced with Scrutiny from the Federal Courts*, WASH. POST (Apr. 11, 2019, 7:07 PM), [https://www.washingtonpost.com/world/national-security/trumps-immigration-policies-fail-time-and-again-when-faced-with-scrutiny-from-the-federal-courts/2019/04/11/e2bfc5a-5bb3-11e9-9625-01d48d50ef75\\_story.html](https://www.washingtonpost.com/world/national-security/trumps-immigration-policies-fail-time-and-again-when-faced-with-scrutiny-from-the-federal-courts/2019/04/11/e2bfc5a-5bb3-11e9-9625-01d48d50ef75_story.html) [<https://perma.cc/HJR3-3GQD>] (explaining that federal courts have determined that ICE under the Trump Administration has violated federal law several times); Fred Barbash et al., *Federal Courts Have Ruled Against Trump Administration Policies at Least 70 Times*, WASH. POST (Apr. 26, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-overruled> [<https://perma.cc/4NZ7-6ZPQ>] (same).
24. *The Growth of the U.S. Deportation Machine: More Immigrants Are Being “Removed” from the United States Than Ever Before*, AM. IMMIGR. COUNCIL 4 (Mar. 2014), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_growth\\_of\\_the\\_us\\_deportation\\_machine.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_growth_of_the_us_deportation_machine.pdf) [<https://perma.cc/YK6W-LUU8>]; *Budget-in-Brief: Fiscal Year*

on all other federal criminal law enforcement combined.<sup>25</sup> And what has been gained from this enormous spending increase? Certainly, the number of deportations has skyrocketed.<sup>26</sup> But if the goal is to increase compliance with the law, the surge in funding has failed miserably. In 2000, just before the creation of ICE, the country's undocumented population stood at 7 million.<sup>27</sup> DHS's most recent estimate of the undocumented population is 12 million.<sup>28</sup> Thus, while ICE's resources have more than doubled, the undocumented population has grown by over 70%. Waste and mismanagement are part of the problem,<sup>29</sup> but at base, these numbers demonstrate that ICE's ever-increasing investment in detention and deportation has simply failed to increase compliance with U.S. immigration law.

Demonstrating the failure of ICE's enforcement paradigm, however, merely begs the question whether there is a better way. Documenting ICE's irredeemable defects is the beginning, not the end, of the inquiry. The Abolish ICE movement can only succeed if it can plot a path forward with an affirmative vision for a more humane enforcement scheme that is both effective and realistic.

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2020, U.S. DEP'T HOMELAND SECURITY [https://www.dhs.gov/sites/default/files/publications/19\\_0318\\_MGMT\\_FY-2020-Budget-In-Brief.pdf](https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf) [<https://perma.cc/9FBK-VW2U>].

25. See DORIS MEISSNER ET AL., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POL'Y INST. 9 (Jan. 2013), <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery> [<https://perma.cc/4DJ7-9WFB>].
26. See Office of Immigration Statistics, *2017 Yearbook of Immigration Statistics*, U.S. DEP'T HOMELAND SECURITY 193 tbl.39, [https://www.dhs.gov/sites/default/files/publications/yearbook\\_immigration\\_statistics\\_2017\\_o.pdf](https://www.dhs.gov/sites/default/files/publications/yearbook_immigration_statistics_2017_o.pdf) [<https://perma.cc/7S3U-8GTX>] [hereinafter *DHS Removals 1892 to 2017*].
27. Office of Policy and Planning, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000*, U.S. IMMIGR. NATURALIZATION SERV. 1, <https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%201990%20to%202000.pdf> [<https://perma.cc/K6AW-ADGE>].
28. Office of Immigration Statistics, *Population Estimates: Illegal Alien Population Residing In The United States: January 2015*, U.S. DEP'T HOMELAND SECURITY 2 (2018), [https://www.dhs.gov/sites/default/files/publications/18\\_1214\\_PLCY\\_pops-est-report.pdf](https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf) [<https://perma.cc/5M7S-AY2N>]. Some nongovernmental actors have estimated that the undocumented population has declined somewhat in recent years. See, e.g., Jeffrey S. Passel & D'vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RES. CTR. (Nov. 27, 2018), <https://www.pewhispanic.org/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade> [<https://perma.cc/V58U-6TRD>]. However, such decline is generally understood to be the result of changes in the push and pull factors that drive immigration and is not believed to be attributable to ICE's enforcement strategy. See Martin, *supra* note 11, at 418-19.
29. See ICE's *Fiscal Mismanagement: Deceit and Abuse*, DETENTION WATCH NETWORK <https://www.detentionwatchnetwork.org/sites/default/files/ICE%E2%80%99s%20Fiscal%20Mismanagement-%20Deceit%20and%20Abuse.pdf> [<https://perma.cc/8BWD-46HA>].



## II. PILLARS OF A HUMANE AND EFFECTIVE IMMIGRATION ENFORCEMENT SYSTEM

Any successful proposal for a post-ICE immigration-enforcement scheme must achieve two distinct goals. First, the new system must forswear and commit to cure the inhumanity and brutality that characterize immigration enforcement under ICE – most notably by eliminating immigration detention and mass deportation. Second, the new system must be more effective at promoting compliance with immigration law. Some critics of the Abolish ICE movement have suggested that the two goals are mutually inconsistent, but they need not be so.<sup>30</sup> Below, I propose four pillars of a new immigration-enforcement paradigm – one that would radically reshape immigration enforcement and create a humane system that could be both more effective at encouraging compliance with U.S. immigration laws and dramatically less expensive. The pillars are foundational elements of such a system that would need to be fleshed out in significant detail in future legislation. I offer them now in broad strokes to help policy-makers and advocates conceive of, and articulate, the basic contours of a new immigration-enforcement paradigm. In doing so, I establish a target to work toward now and to refine into winnable legislation when the political climate allows.<sup>31</sup> The proposal draws lessons from our own and other nations' past immigration-enforcement schemes, from mechanisms employed by other federal agencies, and from the expertise of the Abolish ICE movement leaders interviewed for this Essay.

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30. See, e.g., Jeh Charles Johnson, Opinion, *Abolishing ICE Is Not a Serious Policy Proposal*, WASH. POST (July 6, 2018, 6:13 PM), [https://www.washingtonpost.com/opinions/ice-needs-reform-not-abolition/2018/07/06/5d2cecoe-8133-11e8-b658-4f4d2a1aeefi\\_story.html](https://www.washingtonpost.com/opinions/ice-needs-reform-not-abolition/2018/07/06/5d2cecoe-8133-11e8-b658-4f4d2a1aeefi_story.html) [<https://perma.cc/P63Z-5FL6>].

31. The current Administration's extreme anti-immigrant rhetoric and policies, and the xenophobia it fans and feeds off, can make even the most modest proposals for productive immigration reform feel like a political impossibility. The radical restructuring of our immigration-enforcement system proposed herein will thus appear to some as a fantasy detached from the realities of modern American politics. To be sure, this proposal could not become law under the current Congress and President. But the extreme anti-immigrant policies of the day have also awoken a majority of Americans to the deep flaws in our current system and the productive role that immigrants play in our society. See Bradley Jones, *Majority of Americans Continue to Say Immigrants Strengthen the U.S.*, PEW RES. CTR. (Jan. 31, 2019), <https://www.pewresearch.org/fact-tank/2019/01/31/majority-of-americans-continue-to-say-immigrants-strengthen-the-u-s> [<https://perma.cc/6AS2-F9L6>] (showing near-record levels of Americans with positive views toward immigrants). It is critical that policy-makers and advocates work now to set forth thoughtful and realistic but also ambitious proposals for immigration reform that can earn the support of Americans, so the nation can enact such proposals when politics inevitably shift.

*A. Pillar One: Optimal Enforcement Scaling*

DHS was founded with the mission of achieving a “100% removal rate.”<sup>32</sup> Accordingly, ICE’s goal from the outset was, and remains, to deport every person potentially subject to deportation.<sup>33</sup> This approach, which has driven the extraordinary increase in ICE’s funding, is both wildly impractical<sup>34</sup> and dramatically out of step with historical norms. During the twentieth century, when the United States also had significant levels of noncompliance with immigration laws, the nation deported under 25,000 people per year on average.<sup>35</sup> Thus far in the twenty-first century, the United States has deported over 300,000 people per year on average—a startling 1,200% increase.<sup>36</sup> Accordingly, the first inquiry is to determine whether the current extraordinary levels of punitive enforcement are justified.

Any well-conceived enforcement scheme must identify its optimal scale by balancing the societal costs of punitive enforcement against the marginal compliance such enforcement can achieve and the societal benefits associated with that additional compliance. For example, extremely high levels of enforcement are justified by the Nuclear Regulatory Commission because even low levels of noncompliance risk grave societal harm. In other areas, such as the regulation of marijuana, sex work, or quality-of-life crimes, there is a growing consensus that the cost and collateral harms of high levels of enforcement, the low deterrent value of heavy-handed enforcement, and the relatively minor societal injuries associated with noncompliance, militate in favor of low enforcement levels.

In the administrative arena, the approach of the Internal Revenue Service (IRS) stands out as an example of an intentional low-level punitive enforcement strategy. Initially, the IRS was required to audit all tax returns.<sup>37</sup> Over time, this

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32. *Endgame: Office of Detention and Removal Strategic Plan 2003-2012*, U.S. IMMIGR. CUSTOMS ENFORCEMENT 2 (2003), <https://fas.org/irp/agency/dhs/endgame.pdf> [<https://perma.cc/3DVY-JBHT>].

33. *See id.*; Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017); Secure Fence Act § , Pub. L. No. 109-367, § 2(b), 120 Stat. 2638, 2638 (2006).

34. *See* Julia Preston et al., *What Would It Take for Donald Trump to Deport 11 Million and Build a Wall?*, N.Y. TIMES (May 19, 2016), <http://www.nytimes.com/2016/05/20/us/politics/donald-trump-immigration.html> [<https://perma.cc/VY9W-5DXL>].

35. *See DHS Removals 1892 to 2017*, *supra* note 26.

36. *Id.*

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

enforcement approach came to be seen as overzealous.<sup>38</sup> In response, Congress implemented reforms that caused punitive enforcement activity to decline significantly.<sup>39</sup> The IRS now employs a notably low level of punitive enforcement, annually auditing under one percent of returns and prosecuting only a couple hundred people for failure to file.<sup>40</sup> This shift away from punitive enforcement and toward compliance assistance has not undermined the IRS's enforcement of tax laws. Indeed, the United States now enjoys one of the world's highest tax-compliance rates.<sup>41</sup>

In the immigration arena, the societal costs of the current high levels of punitive enforcement are profound. The destruction of family units, deaths, mistreatment, and the traumatization of entire communities are well documented. Further, the fiscal costs are extraordinary.<sup>42</sup> On the other side of the equation, the harms associated with noncompliance are hotly contested. Immigration restrictionists point principally to three categories of alleged harm: criminality of undocumented immigrants, the cost of providing public benefits and services to undocumented immigrants, and the harms that may flow from labor competition with undocumented workers.<sup>43</sup> However, the social-science data establish that these alleged harms are either nonexistent or minor.

Study after study has concluded that undocumented immigrants pose no heightened risk of criminality.<sup>44</sup> Undocumented immigrants are also ineligible

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38. Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 972, 998 (2003).

39. *Id.* at 972, 983-1008.

40. *Internal Revenue Service Data Book, 2013*, INTERNAL REVENUE SERV. 21-24 (Mar. 2014), <https://www.irs.gov/pub/irs-soi/13databk.pdf> [<https://perma.cc/2XNL-FHT3>]; *Statistical Data—Non-filer Investigations*, INTERNAL REVENUE SERV. (May 3, 2019), <https://www.irs.gov/compliance/criminal-investigation/statistical-data-nonfiler-investigations> [<https://perma.cc/VS5Z-REJG>].

41. See Rene Chun, *Why Americans Don't Cheat on Their Taxes: The Weirdly Hopeful Story of How the U.S. Came To Be a Leader in Tax Compliance*, ATLANTIC (Apr. 2019), <https://www.theatlantic.com/magazine/archive/2019/04/why-americans-dont-cheat-on-their-taxes/583222> [<https://perma.cc/3H7S-SEH2>]; Lederman, *supra* note 38, at 974 n.17; see also *infra* Section II.B.

42. See *supra* notes 24-29 and accompanying text.

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

44. See, e.g., Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, MARSHALL PROJECT (May 13, 2019), <https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime> [<https://perma.cc/EZ7K-DRYG>]; Rubén G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-Born Men*, IMMIGR. POL'Y CTR. 1-2 (2007), <https://www.americanimmigrationcouncil.org/sites/default/files/research/Imm%20Criminality%20%28IPC%29.pdf> [<https://perma.cc/MVX8-2QVD>].

for virtually all federal benefits programs.<sup>45</sup> Indeed, many undocumented workers pay taxes and pay into Social Security and other benefits systems – notwithstanding their ineligibility to receive such benefits – leading some to argue that they are a net benefit to the public coffers.<sup>46</sup> Evidence on whether undocumented workers create increased labor competition in low-wage fields is more contested,<sup>47</sup> but the overwhelming weight of the evidence demonstrates that undocumented workers are a critical net benefit to the U.S. economy.<sup>48</sup> Indeed, much of the literature demonstrates that the greatest harms of immigration noncompliance are suffered by the undocumented population itself.<sup>49</sup> Moreover, even if we were to assume some significant level of harm from noncompliance, high levels of enforcement are only justified if they actually reduce noncompliance.

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45. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 401-420, 110 Stat. 2105, 2260-70 (codified at 42 U.S.C. § 601 (2018)).

46. See, e.g., Hong, *supra* note 5, at 52-54.

47. Compare Julia Preston, *Immigrants Aren't Taking Americans' Jobs, New Study Finds*, N.Y. TIMES (Sept. 21, 2016), <https://www.nytimes.com/2016/09/22/us/immigrants-arent-taking-americans-jobs-new-study-finds.html> [<https://perma.cc/LU6C-T7RV>], with Christoph Albert, *The Labor Market Impact of Undocumented Immigrants: Job Creation vs. Job Competition* (Universitat Pompeu Fabra, Working Paper No. 6575, 2017), [https://www.upf.edu/documents/2963149/3253728/The\\_Labor\\_Market\\_Impact\\_of\\_Undocumented\\_Immigrants\\_Christoph\\_Albert\\_April2017.pdf](https://www.upf.edu/documents/2963149/3253728/The_Labor_Market_Impact_of_Undocumented_Immigrants_Christoph_Albert_April2017.pdf) [<https://perma.cc/9RHG-4SWZ>] (arguing that immigration increases competition in the labor market).

48. See NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE ET AL., *THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION* 80 (Francine D. Blau & Christopher Mackie eds., 2017); Annie Baxter, *How an Immigration Raid Threw a Small Iowa Town into Economic Crisis*, MARKETPLACE (Aug. 3, 2017), <https://www.marketplace.org/2017/08/03/economy/postvilles-long-recovery-after-raid> [<https://perma.cc/AD2M-TSFV>]; Shikha Dalmia, *Opinion, Actually the Numbers Show That We Need More Immigration, Not Less*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/opinion/trump-immigration-myth.html> [<https://perma.cc/ZS46-GYNK>]; Heather Long, *Over 200 Economists Say Trump Is Wrong on Immigration*, CNN (Mar. 6, 2017, 7:58 AM ET), <http://money.cnn.com/2017/03/06/news/economy/donald-trump-immigration/index.html> [<https://perma.cc/KWW7-W6TC>]; Kevin Murphy, *American Farmers Need Immigration Reform*, WALL ST. J. (May 30, 2019, 7:25 PM ET), <https://www.wsj.com/articles/american-farmers-need-immigration-reform-11559258759> [<https://perma.cc/4GU9-4WY7>].

49. See, e.g., Regina Day Langhout et al., *Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities*, 62 AM. J. COMMUNITY PSYCHOL. 3 (2018), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/ajcp.12256> [<https://perma.cc/H3JN-HM8X>]; Brenda Eskenazi et al., *Association of Perceived Immigration Policy Vulnerability with Mental and Physical Health Among US-Born Latino Adolescents in California*, JAMA PEDIATRICS (June 24, 2019), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2735685> [<https://perma.cc/N4ST-Z4KX>].

The weight of the evidence, however, suggests that ICE's heavy-handed tactics are of limited value in reducing noncompliance.<sup>50</sup>

Accordingly, the first pillar requires policy-makers to scrutinize the level of punitive enforcement employed by ICE and to identify the optimal scale. In doing so, they will likely see that the current high level of punitive immigration enforcement is of limited utility in increasing compliance and carries significant fiscal and human costs, which outweigh the relatively minor societal harms associated with the deterrable noncompliance. A humane and effective immigration-enforcement scheme thus requires a radical reduction in the scale of punitive enforcement. This first pillar could be largely implemented through executive direction and without any change in law.

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

There are large categories of undocumented immigrants who are both potentially subject to deportation and also eligible to obtain lawful status. For example, someone who came to the United States lawfully, overstayed their visa, but married a citizen may either be deported or allowed to obtain legal permanent residence. Immigration authorities have a choice between two enforcement pathways: punish the noncompliance through deportation, or allow the individual to come into compliance by applying for permanent residence.

Administrative-law scholars have widely praised the trend toward "cooperative enforcement" where administrative agencies outside the immigration context increasingly favor efforts to help entities come into compliance over punitive measures.<sup>51</sup> When the regulated parties are corporations rather than immigrants, the government seems comfortable with this approach. It is the approach now favored by federal agencies like the Occupational Safety and Health Administration, the Food and Drug Administration, the Environmental Protection Agency, and the Securities and Exchange Commission.<sup>52</sup> Indeed, it is the approach that the IRS has favored in modern times, which has helped it successfully transition away from heavy-handed punitive enforcement.<sup>53</sup>

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50. See Scott Borger & Leah Muse-Orlinoff, *Economic Crisis vs. Border Enforcement: What Matters Most to Prospective Migrants?*, in *MEXICAN MIGRATION AND THE U.S. ECONOMIC CRISIS: A TRANSNATIONAL PERSPECTIVE* 95, 97-102 (Wayne A. Cornelius et al. eds., 2010); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 *UCLA L. REV.* 622, 635, 637-38 (2015); *supra* notes 24-29 and accompanying text.

51. See, e.g., Freeman, *supra* note 12, at 4-7; Karkkainen, *supra* note 12, at 557; Lobel, *supra* note 12, at 343; Shapiro & Rabinowitz, *supra* note 12, at 715-16.

52. Frost, *supra* note 11, at 3-4

53. *National Taxpayer Advocate Delivers Annual Report to Congress; Focuses on Taxpayer Bill of Rights and IRS Funding*, INTERNAL REVENUE SERV. (Jan. 9, 2014), <https://www.irs.gov/newsroom>

But when it comes to immigration, the government has done the opposite.<sup>54</sup> Instead of diverting people out of the punitive-enforcement stream – ICE’s deportation machine – into compliance-assistance mechanisms – USCIS application processes – it does the reverse. When an eligible-but-deportable individual applies for an immigration benefit, however, USCIS frequently declines to grant their application and diverts them into the deportation system.<sup>55</sup> There are large categories of undocumented individuals eligible to obtain lawful status right now.<sup>56</sup> There are other significant categories of people being pushed through the deportation pipeline who will, in time, become eligible for lawful status.<sup>57</sup> In addition, there are many more people eligible to obtain or maintain status through mechanisms that are currently only available defensively in deportation proceedings, such as cancelation or withholding of removal.<sup>58</sup>

Prosecutorial discretion is the mechanism that has generally been used to determine which enforcement pathway to pursue, and it has failed to deliver a reliable preference for compliance assistance. Accordingly, the second pillar of a humane and effective immigration-enforcement scheme is to enact mandatory rules that give people the *right* to affirmatively pursue pathways to lawful status before they can be subject to any punitive enforcement action. This mandatory preference could be implemented through regulation<sup>59</sup> and, like the first pillar,

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/national-taxpayer-advocate-delivers-annual-report-to-congress-focuses-on-taxpayer-bill-of-rights-and-irs-funding [https://perma.cc/F643-8BPJ] (“[T]he U.S. tax system is built on voluntary compliance.”).

54. See Frost, *supra* note 11, at 9-13.

55. U.S. Immigration & Customs Enforcement, *Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Admissible and Deportable Aliens*, U.S. DEP’T HOMELAND SECURITY (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> [https://perma.cc/A4QZ-72NY]; Noah Lanard, *Married Immigrants Seeking Green Cards Are Now Targets for Deportation*, MOTHER JONES (Apr. 20, 2018), <https://www.motherjones.com/politics/2018/04/married-immigrants-seeking-green-cards-are-now-targets-for-deportation> [https://perma.cc/N5FJ-CDBF].

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

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

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

59. See *You Xiu Qing v. Nielsen*, 321 F. Supp. 3d 451, 466 (S.D.N.Y. 2018) (interpreting the INA to forbid the use of unadjudicated affirmative application as a mechanism to initiate removal and suggesting that an alternative reading of the statute would raise serious constitutional questions); see also Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 501-14 (2017) (discussing rule-based categorical exercises of prosecutorial discretion, including the common usage in the immigration arena).

would not require any congressional action.<sup>60</sup> In addition, Congress should consider making compliance mechanisms that are presently only available defensively, instead available on an affirmative basis. Most dramatically, implementing this pillar could address the majority of noncompliance if Congress created new affirmative pathways to citizenship for undocumented individuals, as it has done in the past.<sup>61</sup> With a significantly reduced investment in punitive enforcement, the United States could increase compliance by redirecting resources to USCIS (or some successor agency responsible for delivering immigration benefits) to speed up processing times, expand legal assistance, and reduce application fees for immigration benefits.

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

Even if the United States dramatically reduces the scale of punitive enforcement and relies principally on compliance assistance, there will still be situations where individuals cannot be brought into compliance and where enforcement is warranted. Accordingly, there must be some consequences that can be triggered by noncompliance. The current regime relies only on a single penalty—deportation—which is grossly disproportionate to the overwhelming majority of immigration offenses. A binary choice between no penalty and the harshest possible penalty is not how other effective enforcement systems work. Imagine the injustice that would follow if we had a criminal-justice system where the only two choices were no penalty or the death penalty. Accordingly, implementing a new system of scalable penalties is the third pillar of a humane and effective immigration-enforcement scheme.

To create such a system, the United States should implement a set of scalable penalties.<sup>62</sup> Fines are the most obvious option and are widely used across the administrative state. As recently as 2000, fines were also a critical part of the immigration-enforcement system. Certain individuals who entered unlawfully were permitted to obtain lawful permanent residency if they paid a \$1,000

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60. As noted above, the creation of any new affirmative pathways for legal status that do not currently exist would likely require legislation.

61. See, e.g., Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C. (2018)).

62. See generally Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, Center for American Progress (July 22, 2019), <https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-law-fair-humane-workable-immigration-system/>; Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416 (2012) (setting forth proportionality principles relevant to the immigration context).

penalty.<sup>63</sup> Any such fines would need to be of sufficient magnitude to be significant to the regulated population but also within their ability to pay. Other scalable penalties could include, for example, delayed access to immigration or other public benefits, lengthened pathways to citizenship, or mandated community-service obligations. As with the former \$1,000 penalties noted above, any such scalable penalties would then unlock a previously unavailable pathway to status. Any such new penalties and the ability to access lawful immigration status thereafter would require an act of Congress. As with other administrative schemes, the penalties could be offered as a negotiated resolution of noncompliance by USCIS, or the successor services agency, and if no agreement could be reached, such penalties and any defenses thereto could be litigated through the immigration courts. ICE currently acts as the prosecutor in immigration court. However, as with most other federal administrative schemes, we would not need a separate agency to play such a role, as USCIS could serve that function itself.

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

Even with the reforms outlined above, there will be outlier cases where the agency is unsuccessful in bringing individuals into compliance or where an individual fails to comply with the imposed scalable penalty, and where thereafter, the proportional punishment is deemed to be deportation.<sup>64</sup> In such cases, the United States has a legal and moral obligation to find mechanisms to ensure people appear in court and comply with deportation orders without unnecessarily severe deprivations of liberty.

The first step in that effort must be to eliminate the immigration-detention system. Virtually every other federal agency has found a way to enforce its civil administrative scheme without putting people in cages. There is no reason why deportation proceedings or even the deportation process itself must begin with handcuffs. For most of U.S. history, those processes began with notices.<sup>65</sup> The

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63. See, e.g., 8 U.S.C. § 1255(i)(1)(c) (2018) (describing such a system for certain individuals physically present in the United States on December 21, 2000).

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

65. See Lenni B. Benson, *By Hook or by Crook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813, 815 n.12, 832 (1994); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 130 (2013); García Hernández, *supra* note 5, at 248; David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1319 (1990).



question then becomes, how can we more humanely ensure people's appearance in immigration court and ultimately, for some, their compliance with deportation orders?

The answer begins with due process. The data demonstrate that the most important thing we can do to improve appearance rates in immigration court is to provide lawyers. The most recent publicly available data show that virtually every family who was released from immigration detention and had a lawyer showed up for all of their immigration court hearings (99%).<sup>66</sup> Those without lawyers were significantly less likely to consistently appear (76%).<sup>67</sup> Lawyers help ensure that individuals have accurate information about the time and place of hearings. Lawyers also remove the terror of walking into an unfamiliar courtroom alone and litigating in one of the most complex arenas of American law, against trained government prosecutors, without any legal training, and often in an unfamiliar language. In addition, there is a wealth of empirical research about how the perception of procedural fairness enhances compliance,<sup>68</sup> which also helps explain the impact that lawyers have on appearance rates. Moreover, the feasibility of an assigned-immigration-counsel program has been robustly demonstrated in the City and State of New York, which have had universal appointed counsel programs dating back to 2013.<sup>69</sup> To be sure, implementing such a program on a national scale would be costly, but the massive scale-down in punitive enforcement contemplated in pillar one would more than offset any such costs. Providing lawyers is thus the first step toward ensuring that individuals know and comply with their obligations in immigration court.<sup>70</sup>

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66. *Most Released Families Attend Immigration Court Hearings*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (June 18, 2019) [hereinafter *Most Released Families*], <https://trac.syr.edu/immigration/reports/562> [<https://perma.cc/VYR4-Z9AX>]. These data are consistent with earlier studies, which also showed that the presence of counsel is strongly correlated with appearance rates in immigration court. See, e.g., Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 73 (2015).

67. *Most Released Families*, *supra* note 66.

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

69. See generally Jennifer Stave et al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, VERA INST. JUST. (Nov. 2017), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy\\_downloads/new-york-immigrant-family-unity-project-evaluation.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf) [<https://perma.cc/KT33-VTZW>] (describing and evaluating the New York program).

70. Of course, there are also a host of reasons why appointing counsel in deportation proceedings is sound policy and arguably required due process, which are wholly unrelated to promoting compliance. See Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN'S L. REV. 915, 917 (2016).

In addition, other countries such as Canada have engaged in promising experiments with inducements to improve compliance with deportation orders.<sup>71</sup> Canada used financial inducements of up to \$2,000 to encourage voluntary compliance with deportation orders. With the United States spending an average of \$12,000 per deportation, the cost-saving opportunities of such a program are significant.<sup>72</sup> The incentivizing force of money is self-evident but could be particularly powerful in this context, where low-income individuals are often extremely scared about returning to countries where they may lack any means of economic survival. Other inducements for those who promptly comply with deportation orders—such as reduced wait times for readmission and continued access to earned domestic benefits like Social Security—could also be powerful tools to promote compliance.<sup>73</sup>

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

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71. See Richard Black et al., *Pay-to-Go Schemes and Other Non-Coercive Return Programs: Is Scale Possible?*, MIGRATION POL'Y INST. 2 (Apr. 2011), <https://www.migrationpolicy.org/research/pay-go-schemes-and-other-noncoercive-return-programs> [https://perma.cc/GW3X-QC68].

72. See Frost, *supra* note 11, at 5; Ben Gitis, *The Personnel and Infrastructure Needed to Remove All Undocumented Immigrants in Two Years*, AM. ACTION F. (Feb. 28, 2016), <https://www.americanactionforum.org/research/the-personnel-and-infrastructure-needed-to-remove-all-undocumented-immigrants-in-two-years> [https://perma.cc/TG9E-LT69].

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

Collectively, by providing due process, inducements for compliance, and reentry services, a new enforcement regime could increase compliance, reduce costs, and all but eliminate the use of physically coercive state power.<sup>74</sup>

## CONCLUSION

ICE has failed by every measure. It has brutalized communities, wasted billions of dollars, and failed to increase compliance with immigration laws. The four pillars set forth above provide a blueprint for how a radically new vision for immigration enforcement could increase compliance while simultaneously reducing the human and fiscal costs of enforcement. This blueprint would allow us to abolish ICE and to create an effective and humane enforcement system without the need for any dedicated agency of immigration police. In place of ICE, the United States would need to increase public investment in an immigration agency, like USCIS, that delivers services to immigrants and that would be responsible for facilitating compliance-assistance programs. Such an agency, however, should not be housed inside DHS. Instead, the immigration agency should be housed in a department, like Health and Human Services, that has a mission consistent with appropriate immigration policy goals: to look after the well-being and economic vitality of immigrants and of the nation as a whole.

The ability to theorize a workable and humane immigration-enforcement system is a necessary but insufficient precursor to realizing the reforms that our nation's immigration system desperately needs. Substantive immigration reform is a separate and perhaps even more critical need, because it is impossible to construct a just enforcement system if the laws being enforced are themselves unjust. To date, much effort has gone into theorizing needed substantive reforms. However, comparatively little work has been done to think through the structures of a just enforcement system. This Essay seeks to help move our national conversation about immigration enforcement forward by providing a starting point for the immigrant-rights movement and for policy-makers to use, critique, and improve upon.

*Professor of Law, Benjamin N. Cardozo School of Law. I am grateful for the feedback and insights shared by the accomplished advocates and immigrant community leaders who generously participated in interviews for this project. In that regard, I would especially like to thank Silky Shah from Detention Watch Network; Mizue Aizeki and Marie Mark from the Immigrant Defense Project; Paromita Shah from Just Futures Law;*

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74. In those rarest of instances where physically coercive state power is needed, the immigration-services agency, *see infra* Conclusion, could include, like most federal agencies, a small cohort of enforcement officers.

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