

Cooperative Enforcement in Immigration Law

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ABSTRACT: Immigration officials take two approaches to unauthorized immigrants: Either they seek to deport them, or they exercise prosecutorial discretion, allowing certain categories of unauthorized immigrants to remain in the United States without legal status. Neither method is working. The executive lacks the resources to remove more than a small percentage of the unauthorized population each year, and prosecutorial discretion is by definition an impermanent solution that leaves unauthorized immigrants vulnerable to exploitation at both work and home—harming not just them, but also the legal immigrants and U.S. citizens with whom they live and work.

This Article suggests a third way. Immigration officials could supplement the current removal-or-forgiveness dichotomy with a cooperative-enforcement approach, under which they would assist those unauthorized immigrants who are low priorities for removal to legalize their status. Administrative law scholars have long promoted cooperative enforcement in other fields, describing how administrative agencies have begun to replace the rigid, adversarial, command-and-control regime that dominated the regulatory environment in the 1970s and 1980s with a collaborative approach to rulemaking and enforcement. Just as officials at other federal agencies now work with regulated entities to help them come into compliance with federal law, immigration officials could also employ a combination of outreach and education, flexible interpretation of regulations and statutes, and the liberal exercise of their discretion to assist unauthorized immigrants apply for, and obtain, legal status.

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I. INTRODUCTION

On June 23, 2016, an eight-member Supreme Court announced that it had deadlocked in *United States v. Texas*,¹ one of the most important

1. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

immigration cases in decades.² Texas and 25 other states had challenged the Obama Administration's blanket exercise of prosecutorial discretion granting a temporary reprieve from removal to millions of unauthorized immigrants. Although the tie vote set no precedent, it kept in place the lower court's nationwide preliminary injunction and, together with the election of Donald J. Trump to be the next president, sounded the death knell for Obama's initiative.³ The case exemplifies the problems with the longstanding dichotomy in immigration enforcement, in which immigration officials believe they have only two choices: deport unauthorized immigrants or exercise prosecutorial discretion, allowing certain categories of unauthorized immigrants to remain in the United States without legal status.

This Article suggests a third way: The immigration bureaucracy could adopt a cooperative enforcement model similar to that used by other federal agencies, under which government officials would proactively assist a subset of unauthorized immigrants come into compliance with the law. Administrative law scholars have long promoted cooperative enforcement in other fields, arguing that administrative agencies should replace the rigid, adversarial, command-and-control regime that dominated the regulatory environment in the 1970s and 1980s with a collaborative approach to rulemaking and enforcement.⁴ Over the past 20 years, agencies such as the

2. See, e.g., Linda Greenhouse, *The Supreme Court vs. the President*, N.Y. TIMES (Feb. 4, 2016), <https://www.nytimes.com/2016/02/04/opinion/the-supreme-court-vs-the-president.html> (describing the case as presenting a "blockbuster constitutional question"); Dara Lind, *United States v. Texas*, *the Biggest Immigration Case in a Century, Explained*, VOX (Apr. 15, 2016, 10:50 AM), <http://www.vox.com/2016/4/15/11424614/supreme-court-immigration-dapa-daca>; Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html> (describing the Court's decision in *United States v. Texas* as "perhaps [the Supreme Court's] most important statement this term").

3. See Liptak & Shear, *supra* note 2 (stating that the Court's decision "effectively end[ed]" President Obama's deferred action initiatives).

4. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 5 (1992) (promoting responsive regulation in which agencies emphasize "flexibility," "participat[ion]," and "negotiation" with regulated entities rather than the top-down, "punitive" and "repressive" regulatory style of the past); JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 29 (2002) (explaining that responsive regulation should be used "in deciding whether a more or less interventionist response is needed"); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLAL. REV. 1, 4-7 (1997) (describing new methods of regulation in which agencies shift away from adversarial enforcement and toward cooperation with regulated entities); Robert L. Glicksman & Dietrich H. Earnhart, *Depiction of the Regulator-Regulated Entity Relationship in the Chemical Industry: Deterrence-Based vs. Cooperative Enforcement*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 603, 611-44 (2007) (discussing the benefits of cooperative enforcement over punitive, command-and-control style regulation); Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1160 (2010) (explaining that one theory of enforcement assumes that "regulated parties want to comply with the law and will respond more positively to persuasion, education, and assistance than to penalties"); Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555, 557 (describing criticism of the "command-and-control"

Occupational Safety and Health Administration (“OSHA”), the Food and Drug Administration (“FDA”), the Environmental Protection Agency (“EPA”), and the Securities and Exchange Commission (“SEC”) have adopted initiatives to work together with regulated entities to assist them in coming into compliance with the law through education, consultation, and flexible interpretations of legal standards.⁵ The immigration bureaucracy could do the same.

The Immigration and Nationality Act contains a number of provisions permitting unauthorized immigrants to apply for legal status. For example, some unauthorized immigrants who are under 21 years of age, and who can show that they have been abused, abandoned, or neglected by one or both parents, are eligible to obtain legal status and eventually citizenship.⁶ Likewise, certain unauthorized immigrants who are victims of human trafficking or other serious crimes, and who are willing to assist law enforcement officers, can obtain visas allowing them to stay in the United States indefinitely and eventually adjust to lawful permanent resident (“LPR”) status and citizenship.⁷ Many unauthorized immigrants have a spouse or child who is a U.S. citizen or LPR, rendering them eligible for exceptions or waivers to the general prohibition against adjustment of status by those who entered the United States illegally.⁸ Studies have shown that a significant percentage of unauthorized immigrants qualify for at least one of these methods of obtaining legal status, but that most are unaware of it and, in any case, would find it difficult to navigate the complex process of applying and then proving their eligibility.⁹ The government could help them do so through education,

regulatory model); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343 (2004) (“Administrative agencies at the federal and state levels are increasingly promoting outreach programs and issuing nonbinding guidelines in lieu of their traditional top-down rule promulgation, implementation, and enforcement activities.”); Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 YALE J. ON REG. 535, 537–39 (1996) (discussing cooperative implementation programs and their benefits); Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713, 715–16 (1997) (discussing the benefits of regulators combining punishment with cooperation).

5. See *infra* Part III.A.

6. Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2012).

7. *Id.* § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (granting immigration visas to victims of certain crimes, including human trafficking, who meet other qualifications); *id.* § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (granting immigration visas to victims of human trafficking who meet other qualifications).

8. See, e.g., *Provisional Unlawful Presence Waivers*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> (last updated Sept. 13, 2016).

9. Tom K. Wong et al., *Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey*, 2 J. ON MIGRATION & HUM. SECURITY 287, 287 (2014) (surveying 67 legal service providers assisting applicants for deferred action for childhood arrivals, and finding that 14.3% of the unauthorized immigrants applying for this temporary forbearance were also eligible for a more permanent form of relief); see also *infra* notes 199–204 and accompanying text.

assistance, adoption of streamlined, user-friendly procedures, and the liberal exercise of discretion, just as federal agencies such as OSHA, FDA, EPA, and SEC regularly assist the entities and individuals they regulate come into compliance with federal law.¹⁰

Many of the arguments in favor of cooperative enforcement in other fields apply just as strongly to immigration. As in other regulatory contexts, the use of adversarial, command-and-control style enforcement of immigration law is both costly and inefficient. On average, it costs approximately \$12,000 to remove a single unauthorized immigrant,¹¹ and the immigration bureaucracy has the resources to remove only about 4% of the undocumented population each year.¹² Deportation alone cannot solve the nation's unauthorized immigration problems, just as enforcement actions alone cannot ensure compliance with environmental or workplace safety laws and regulations. Immigration officials could choose instead to follow the lead of regulators at federal agencies such as the EPA and OSHA, who have concluded that they can more efficiently achieve broader compliance through cooperation than through coercion.¹³

For the most part, the immigration bureaucracy has not adopted the collaborative governance initiatives embraced by much of the rest of the administrative state. Immigration enforcement agencies such as U.S. Immigration and Customs Enforcement ("ICE") and U.S. Customs and Border Protection ("CBP") remain focused on adversarial, command-and-control style enforcement, implemented through increased use of detention and removal; they seem to view the laws and regulations that permit unauthorized immigrants to regularize their status as loopholes to be applied narrowly rather than legitimate paths to legalization.¹⁴ Legal scholars have also failed to apply the cooperative enforcement lens to the field of immigration regulation and enforcement, perhaps because immigration law

10. See Amanda Frost, *The Overlooked Pathways to Legal Status*, THE ATLANTIC (June 19, 2016), <https://www.theatlantic.com/politics/archive/2016/06/the-overlooked-pathways-to-legal-status/487682>.

11. David Rogers, *At Stake in Immigration Debate: Billions of Dollars*, POLITICO (Feb. 10, 2015, 5:35 AM), <http://www.politico.com/story/2015/02/immigration-debate-price-115050> (reporting DHS statistics on the costs of deportation).

12. Brief for the Petitioners at 4, *United States v. Texas*, 136 S. Ct. 2271 (No. 15-674), 2016 WL 836758 ("[I]n any given year, more than 95% of the undocumented population will not be removed . . ."); The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C., at 1 (Nov. 19, 2014), <https://www.justice.gov/file/179206/download> ("DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year.").

13. See Frost, *supra* note 10.

14. See *infra* notes 103–14 and accompanying text.

is often viewed as exceptional, and thus outside the mainstream jurisprudence in constitutional and administrative law.¹⁵

Nor, at first glance, would the Trump Administration seem likely to embrace the idea of using cooperative enforcement techniques in the immigration context. Trump's campaign rhetoric expressed hostility to *all* unauthorized immigrants, without drawing distinctions between recently arrived criminal aliens and long-term, law-abiding unauthorized immigrants. At various points during his campaign, he vowed to remove all of the approximately 11.3 million unauthorized immigrants in the United States within two years of taking office.¹⁶ If the Trump Administration's primary goal is to instill fear in the immigrant population and appeal to anti-immigrant constituents, then Trump's immigration officials would likely reject cooperative enforcement because it would send the wrong message to both groups.

Since his election, however, Trump has backed away from his initial intention to deport the entire unauthorized population, perhaps in light of the practical difficulties and high cost of mass deportations.¹⁷ Trump has acknowledged that he will need to set "priorities" in immigration enforcement,¹⁸ and, in particular, that he will focus on removing unauthorized immigrants with criminal backgrounds.¹⁹ He issued an Executive Order on January 25, 2017, stating that his administration would prioritize the removal of unauthorized immigrants who have committed crimes, thus implicitly acknowledging that those without a criminal history

15. See, e.g., Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999) (defining immigration exceptionalism "as the view that immigration and alienage law should be exempt from the usual limits on government decisionmaking"); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1968 (2013) (describing how immigration law "stand[s] apart in both its procedural and substantive aspects"); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 593 (2017) (describing how immigration is often viewed as falling outside "mainstream legal norms").

16. 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>.

17. *Id.* (reporting that it would cost approximately \$400 billion to remove all unauthorized immigrants from the United States over 20 years); see also Eric Bradner, *Ryan: 'We Are Not Planning on Erecting a Deportation Force'*, CNN (Nov. 13, 2016, 3:10 PM), <http://www.cnn.com/2016/11/13/politics/paul-ryan-donald-trump-obamacare-deportation-force> ("We are not planning on erecting a deportation force. . . . I think we should put people's minds at ease. . . . That is not what we're focused on.").

18. Donald J. Trump, Presidential Campaign Speech on Immigration Policy in Phoenix, Arizona (Aug. 31, 2016), <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html>.

19. Interview by Lesley Stahl with Donald J. Trump, President-Elect of the United States, in New York, NY (Nov. 11, 2016), <https://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl>.

would not be targeted.²⁰ Perhaps most important, Congress has not yet shown any willingness to significantly increase resources for immigration enforcement. Accordingly, the Trump Administration—like the Obama and Bush Administrations before it—will have to continue to prioritize the removal of some unauthorized immigrants while allowing the rest to remain in the United States. In light of this reality, allowing immigration officials to help certain unauthorized immigrants take advantage of existing pathways to legal status might appeal as a way of reducing the unauthorized population without expending resources, harming the economy, or granting an amnesty—and all in accordance with the rule of law.

Significantly, cooperative enforcement can be tailored to the individual policy preferences of each presidential administration. Some administrations might prefer to prioritize deportation of those immigrants who are convicted felons, while allowing more highly educated unauthorized immigrants, who could benefit the economy, to stay. Others might prioritize removal of recent border crossers, while permitting unauthorized immigrants who are the parents of U.S. citizens and LPRs, or who have lived in the United States for over ten years, to remain.²¹ Moreover, unless Congress radically increases the resources for enforcement, *any* administration—even one that seeks to restrict immigration flows and remove as many unauthorized immigrants as possible—will have to make enforcement choices. The executive can make these enforcement choices permanent, as well as reduce the total number of unauthorized immigrants, by assisting unauthorized immigrants who are low priorities for removal to regularize their status.²²

Cooperative enforcement is both more legally defensible and politically palatable than the extensive use of prosecutorial discretion. President Obama's efforts to systemize and expand prosecutorial discretion were widely criticized as antithetical to the rule of law,²³ and were bogged down in

20. President Trump's January 25, 2017 Executive Order, "Enhancing Public Safety in the Interior of the United States," prioritizes the removal of any unauthorized immigrant who has been convicted of, charged with, or "committed acts that constitute a chargeable criminal offense"; or "pose[s] a risk to public safety or national security," but does not prioritize the removal of unauthorized immigrants solely on the basis of their lack of documented status. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017). However, the Executive Order *may* prioritize removal of unauthorized immigrants who entered the country illegally (as opposed to overstay their visas), since entry without inspection is a crime under 8 U.S.C. § 1325.

21. SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 14–32 (2015) (describing the history of prosecutorial discretion in immigration law).

22. Admittedly, a president whose sole goal is to make life as uncomfortable and difficult as possible for all unauthorized immigrants—regardless of the lack of resources to remove them, and the fact that their vulnerable status negatively affects the labor market for U.S. citizens—would not embrace this proposal. See *infra* Part IV (discussing incompatibility of cooperative enforcement and the theory of attrition through enforcement).

23. See, e.g., Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 746 (2014) ("Substantial nonenforcement of federal statutes clouds public perception of what

litigation for years. Texas and 25 other states sued the administration, arguing that the executive's proposal to forgo enforcement of immigration laws on a broad, categorical basis was at odds with the Immigration and Nationality Act and the Administrative Procedure Act, and violated the president's constitutional obligation to "take care that the laws be faithfully executed."²⁴ The district court entered a nationwide preliminary injunction, halting the program, which was affirmed by both the United States Court of Appeals for the Fifth Circuit and an eight-member Supreme Court's tie vote.²⁵ As a result, the initiative did not go into effect during the Obama Administration. In contrast, a cooperative enforcement policy seeks to use existing laws to assist unauthorized immigrants to regularize their status, and thus cannot be attacked as lawless or an abuse of executive power.

To be sure, cooperative enforcement is not a cure-all for the nation's unauthorized immigration crisis, nor will it be positively received in all quarters. Cooperative-enforcement techniques would likely legalize no more than 10% of the unauthorized population, leaving millions in the same illegal status.²⁶ Moreover, any administration implementing such a policy risks criticism for "rewarding lawbreakers" by helping unauthorized immigrants to obtain legal status—the same criticism initially leveled against federal agencies such as the EPA, OSHA, and FDA when they first engaged in similar cooperative enforcement techniques.²⁷ And cooperative enforcement would likely be opposed by proponents of "attrition through enforcement"—the policy of encouraging self-deportation through vigorous enforcement of laws and policies making life difficult for unauthorized immigrants, which the Trump Administration has, at times, appeared to support.²⁸ In short, cooperative immigration enforcement is not a panacea, or a substitute for a

conduct is unlawful, thus impairing rule-of-law values and diminishing Congress's political accountability for the range of conduct it has proscribed."); *House Rebukes Obama on Immigration*, TAMPA BAY TIMES (Dec. 4, 2014, 10:05 PM), <http://www.tampabay.com/news/nation/house-rebukes-obama-on-immigration/2209064> (reporting Representative Steve Scalise's assertion that President Obama's broad grants of deferred action violated the rule of law); Press Release, John A. Boehner, Speaker of the House of Representatives, "An Affront to the Rule of Law and to the Constitution Itself" (Jan. 14, 2015), <http://www.speaker.gov/press-release/affront-rule-law-and-constitution-itself> (describing deferred action as an "executive overreach" that "is an affront to the rule of law and to the Constitution itself").

24. See Brief for the State Respondent at 71–77, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 1213267.

25. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

26. See *infra* Part IV.B (discussing categories of unauthorized immigrants who could legalize their status under a cooperative enforcement approach).

27. Freeman, *supra* note 4, at 93 (describing objections to collaborative enforcement initiatives by the EPA and others, which some feared would lead companies to "exploit such experiments in an effort to circumvent environmental regulation to the maximum extent possible").

28. See generally JESSICA M. VAUGHAN, CTR. FOR IMMIGRATION STUDIES, ATTRITION THROUGH ENFORCEMENT: A COST-EFFECTIVE STRATEGY TO SHRINK THE ILLEGAL POPULATION (2006), <https://cis.org/sites/cis.org/files/articles/2006/back406.pdf>.

comprehensive legislative overhaul of U.S. immigration law. But it would be an improvement over the deeply flawed removal-or-forbearance dichotomy employed today, and it is grounded in a quarter-century tradition in which federal agencies have moved away from adversarial command-and-control style enforcement and towards a flexible, cooperative relationship with regulated entities.

This Article proceeds as follows: Part II outlines the weaknesses of the removal-or-forbearance model that dominates immigration enforcement today. Part III surveys the academic literature promoting collaborative governance techniques, such as cooperative enforcement, and describes how this approach is employed by federal agencies in other regulatory fields. This Part then explains how cooperative enforcement would work as a practical matter in the field of immigration law. It describes the existing statutes and regulations that permit unauthorized immigrants to regularize their status—in many cases creating a pathway to citizenship—and explains how immigration officials could employ the hallmarks of cooperative enforcement, such as education and outreach, assistance, flexible interpretation of legal standards, and liberal use of discretion to enable unauthorized immigrants to take advantage of these laws.

Part IV shifts from the descriptive to the normative, discussing the costs and benefits of cooperative enforcement in the field of immigration law, and anticipating critics who would likely claim that assisting immigration lawbreakers is antithetical to immigration enforcement. This Part also speculates as to why a regulatory tool employed successfully in other fields has yet to be embraced—or even discussed—in the context of immigration enforcement, and concludes that cooperative enforcement might help to bring immigration law back into the fold of mainstream administrative law and practice.

II. THE FAILURE OF THE REMOVAL-OR-FORBEARANCE APPROACH

In legal briefs, policy statements, and testimony before Congress, U.S. immigration officials have consistently stated that their goal is to reduce the size of the unauthorized population while at the same time taking into account humanitarian, economic, and national security concerns.²⁹ To

29. See Brief for the United States at 14, *Arizona v. United States*, 567 U.S. 387 (2012) (No. 11-182), 2012 WL 939048 (“In the [Immigration and Nationality Act], Congress vested the Executive Branch with the authority and the discretion to make sensitive judgments with respect to aliens, balancing the numerous considerations involved: national security, law enforcement, foreign policy, humanitarian considerations, and the rights of law-abiding citizens and aliens.”); see also *FY 2017 Budget Request for U.S. Customs and Border Protection & U.S. Immigration and Customs Enforcement Hearing Before the S. Comm. on Appropriations & Subcomm. on Homeland Sec.*, 114th Cong. (2016) (written testimony of ICE Deputy Director Daniel Ragsdale), <https://www.dhs.gov/news/2016/03/08/written-testimony-ice-deputy-director-senate-appropriations-subcommittee-homeland> (“[D]edicated officers enforce our nation’s immigration laws by identifying aliens amenable to removal, apprehending, detaining, and removing those individuals from the United States, consistent

accomplish this goal, the immigration bureaucracy has taken a dual approach: A small percentage of unauthorized immigrants are targeted for removal, while the large majority are categorized as low enforcement priorities.³⁰ Immigration officials will not seek out individuals categorized as low enforcement priorities for removal, and will sometimes choose to forgo removal even when these unauthorized immigrants come to their attention.³¹

In his January 25, 2017, Executive Order entitled “Enhancing Public Safety in the Interior of the United States,” President Trump announced that he would continue the removal-or-forgiveness approach—albeit using harsher rhetoric and expanding the categories of immigrants who are enforcement priorities.³² The Executive Order prioritized for removal all those who *committed* crimes, not just those convicted of serious crimes as had been the case under the Obama Administration.³³ The Executive Order also stated that *any* unauthorized immigrant who came to immigration officials’ attention is at risk for removal, even if that person would not otherwise be a removal priority.³⁴ Implicit in both these statements, however, was the concession that law-abiding unauthorized immigrants living in the interior of the United States are not targets for removal, which means that they are unlikely to be placed in deportation proceedings.

Yet by virtually all accounts, removal-or-forgiveness has failed. Currently, 11.3 million unauthorized immigrants live in the United States, an increase from 3.5 million in 1990.³⁵ Removal is expensive, disruptive, frequently inhumane, and cannot keep pace with the burgeoning unauthorized population. Forgiveness leaves unauthorized immigrants to live and work in the United States without legal status, making them vulnerable to exploitation while simultaneously undermining wage and labor conditions for legal immigrants and U.S. citizens. The unfortunate result is a record number of deportations, coupled with a record-high percentage of unauthorized

with DHS priorities . . . [such as] those who pose a threat to national security, public safety and on recent unlawful entrants.”).

30. See, e.g., Brief for the Petitioners, *supra* note 12, at 3–4 (explaining that “[l]imited appropriations make broad discretion [in immigration enforcement] a practical necessity,” and noting that “in any given year, more than 95% of the undocumented population will not be removed”); President Barack Obama, Remarks on the Supreme Court Decision in *United States v. Texas* (June 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/23/remarks-president-supreme-court-decision-us-versus-texas> (describing the Obama Administration’s immigration enforcement priorities).

31. Obama, *supra* note 30 (“As long as you have not committed a crime, our limited immigration enforcement resources are not focused on you.”).

32. See generally Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

33. *Id.* at 8800.

34. *Id.*

35. JEFFREY S. PASSEL ET AL., AS GROWTH STALLS, UNAUTHORIZED IMMIGRANT POPULATION BECOMES MORE SETTLED 4 (2014), <http://www.pewhispanic.org/files/2014/09/2014-09-03-Unauthorized-Final.pdf>.

immigrants putting down roots in the United States—both a cause for serious concern.

A. THE FAILURE OF REMOVAL

Detention and removal as a means of enforcing immigration laws has increased dramatically over the last two decades. In 1995, 85,730 immigrants were detained;³⁶ by 2013, the detained numbered 441,000.³⁷ In 1990, there were 30,039 removals from the United States; by 2015, that number reached 462,463.³⁸ During the eight years of President Obama's administration, immigration authorities set a record of 2.4 million removals,³⁹ and that number will likely climb quickly in a Trump Administration.

Enforcement of immigration law through targeted removal is expensive and requires the investment of considerable resources. CBP takes the lead in enforcing immigration laws against noncitizens who seek to enter the United States without permission.⁴⁰ The Border Patrol has expanded from 3,715 officers in 1990⁴¹ to over 19,000 officers today.⁴² Between 2003 and 2013, funding for CBP doubled from \$5.9 billion to \$11.9 billion.⁴³ For those unauthorized immigrants in the interior of the United States, enforcement falls within the jurisdiction of ICE, which has also doubled in size. Funding for ICE rose from \$3.3 billion in 2003 to \$5.9 billion in 2013, and the number of ICE agents assigned to Enforcement and Removal Operations more than doubled from 2,710 to 6,338.⁴⁴

Despite the record expenditures and the record number of removals, immigration enforcement cannot keep pace with the size of the unauthorized

36. DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 126 (2013), <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.

37. JOHN F. SIMANSKI, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 1 (2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

38. Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLY INST. (Mar. 8, 2017), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

39. Julia Preston, *Low-Priority Immigrants Still Swept Up in Net of Deportation*, N.Y. TIMES (June 24, 2016), <https://www.nytimes.com/2016/06/25/us/low-priority-immigrants-still-swept-up-in-net-of-deportation.html>.

40. See U.S. Customs and Border Protection, *About CBP*, <https://www.cbp.gov/about>.

41. See MEISSNER ET AL., *supra* note 36, at 18.

42. Brian Naylor, *Trump's Plan to Hire 15,000 Border Patrol and ICE Agents Won't Be Easy*, NPR (Feb. 23, 2017, 5:12 AM), <http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill>.

43. AM. IMMIGRATION COUNCIL, THE GROWTH OF THE U.S. DEPORTATION MACHINE: MORE IMMIGRANTS ARE BEING "REMOVED" FROM THE UNITED STATES THAN EVER BEFORE 4 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_growth_of_the_us_deportation_machine.pdf.

44. *Id.* ICE was responsible for slightly less than half of the 438,421 deportations in 2013, which removed immigrants living in the interior of the United States. Julia Preston, *Deportations Up in 2013; Border Sites Were Focus*, N.Y. TIMES (Oct. 1, 2014), <https://www.nytimes.com/2014/10/02/us/deportation-up-in-2013-border-sites-were-focus.html>.

population. Over the last two decades, the number of unauthorized immigrants expanded rapidly. In 1990, an estimated 3.5 million unauthorized immigrants lived in the United States.⁴⁵ By 2000, that number had jumped to 7.9 million, and by 2007 it hit a record 12.2 million before decreasing to approximately 11.3 million in 2013, where it has remained.⁴⁶

Removal is an extraordinarily expensive way to enforce immigration law. In 2011, ICE Director Kumar Kibble stated that on average it cost \$12,500 to deport an individual unauthorized immigrant—a number that averages the cost of deporting immigrants at the border (which is relatively cheap) with the cost of deporting immigrants in the interior (which is far more expensive).⁴⁷ A 2010 report by the Center for American Progress examined the budget appropriations for ICE and concluded that the total cost of apprehension, detention, legal proceedings, and transportation of unauthorized immigrants living in the interior of the United States amounted to \$23,480 per individual.⁴⁸ Even though ICE and CBP have doubled in size since 2003, these agencies have not been able to remove more than about 400,000 people each year—approximately 4% of the unauthorized population.⁴⁹ In short, federal agencies have been unable to decrease the unauthorized population through removal.

During his campaign, Trump declared that he would seek to remove *all* unauthorized immigrants from the United States within two years of taking office.⁵⁰ The American Action Forum—described by the *New York Times* as “a conservative-leaning research group”⁵¹—estimates the costs of removing the entire unauthorized population at \$400 billion—about two-and-a-half times times what the federal government spends each year on its veterans, and roughly the same amount that the states and federal government together spend on Medicaid.⁵² Paul Ryan has already stated that Congress will not fund

45. PASSEL ET AL., *supra* note 35, at 4.

46. *See id.* at 4–6.

47. Jana Kasperkevic, *Deporting All of America's Illegal Immigrants Would Cost a Whopping \$285 Billion*, BUS. INSIDER (Jan. 30, 2012, 10:00 AM), <http://www.businessinsider.com/deporting-all-of-americas-illegal-immigrants-would-cost-a-whopping-285-billion-2012-1>.

48. *Id.*

49. The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, *supra* note 12, at 1.

50. Tom LoBianco, *Donald Trump Promises 'Deportation Force' to Remove 11 Million*, CNN (Nov. 12, 2015, 6:42 AM), <http://www.cnn.com/2015/11/11/politics/donald-trump-deportation-force-debate-immigration>.

51. Preston et al., *supra* note 16.

52. 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/>; *see* Preston et al., *supra* note 16; Philip E. Wolgin, *What Would it Cost to Deport 11.3 Million Unauthorized Immigrants?*, CTR. FOR AM. PROGRESS (Aug. 18, 2015, 9:03 AM), <https://www.americanprogress.org/issues/immigration/news/2015/08/18/119474/what-would-it-cost-to-deport-11-3-million-unauthorized-immigrants>.

such a deportation force,⁵³ and most experts agree that mass deportations would disrupt communities and harm the economy.⁵⁴ In short, removal alone cannot resolve the nation's unauthorized immigration problem.

President Trump now appears to agree. In an interview shortly after the election, he backed away from plans to remove all 11.3 million unauthorized immigrants immediately, promising instead to focus on the removal of criminals—a number he puts at two or three million people.⁵⁵ He explained that after removing these criminal aliens and securing the border, his administration would then make a “determination” about what to do with the rest of the unauthorized population.⁵⁶ In short, despite the campaign rhetoric, President Trump appears to support a continuation of the Obama Administration's removal-or-forgiveness approach, albeit with an intent to increase the pace of removals and to abandon categorical relief programs for unauthorized immigrants.

B. THE FAILURE OF FORBEARANCE

In part due to the expense and difficulty of removal, the executive branch has long relied on prosecutorial discretion policies to allocate its limited resources.⁵⁷ Prosecutorial discretion refers to officials' discretionary decisions to forbear from enforcing the laws against an individual or a group.⁵⁸ In the immigration context, prosecutorial discretion sometimes serves humanitarian purposes. For example, immigration officials have chosen not to deport noncitizens to countries suffering from civil war or natural disasters, or to deport noncitizens who have close family members who are legally present

53. Bradner, *supra* note 17 (“We are not planning on erecting a deportation force. . . . I think we should put people's minds at ease. . . . That is not what we're focused on.”).

54. Preston et al., *supra* note 16 (describing the reaction of former senior immigration and border official as “skeptical, to put it mildly” of Trump's proposal to deport all 11.3 million unauthorized immigrants from the United States because of the “enormous” costs and “chaos” that would result).

55. See Interview by Lesley Stahl with Donald J. Trump, *supra* note 19. The number of unauthorized immigrants with a criminal record is contested, and it is not clear where President Trump got the number of two or three million. The nonpartisan Migration Policy Institute reports that approximately 820,000 unauthorized immigrants have been convicted of crimes. See Haeyoun Park & Troy Griggs, *Could Trump Really Deport Millions of Unauthorized Immigrants?*, N.Y. TIMES, <http://www.nytimes.com/interactive/2016/11/29/us/trump-unauthorized-immigrants.html> (last updated Feb. 21, 2017).

56. See Interview by Lesley Stahl with Donald J. Trump, *supra* note 19.

57. WADHIA, *supra* note 21, at 14–32.

58. *Id.* at 1, 7; see also Memorandum from Doris Meissner, Comm'r, Immigration and Naturalization Serv., to Reg'l Dirs. et al. 2 (Nov. 17, 2000), <http://library.niwap.org/wp-content/uploads/2015/IMM-Memo-ProsDiscretion.pdf> (“The ‘favorable exercise of prosecutorial discretion’ means a discretionary decision not to assert the full scope of the [Immigration and Naturalization Service's] enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing [a Notice to Appear] . . . not detaining an alien placed in proceedings . . . and approving deferred action.”).

and who would suffer financially or otherwise if the noncitizen were deported.⁵⁹ More often, prosecutorial discretion serves the practical purpose of allocating the nation's limited immigration enforcement resources. Because the number of unauthorized immigrants far exceeds the available resources to remove them, the executive has long prioritized deportation of those who pose a danger to the United States, as well as recent arrivals whose removal would not disrupt families and communities.⁶⁰

Prosecutorial discretion takes many forms and can be exercised at various points in the removal process. To give just a few common examples: A Border Patrol officer can decide not to stop and question a person found near the U.S.–Mexico border; an ICE officer can decide not to seek a warrant to enter a home in which unauthorized immigrants reside; a Department of Homeland Security (“DHS”) attorney can choose not to trigger a removal proceeding by issuing a Notice to Appear; or a U.S. Citizen and Immigration Services (“USCIS”) adjudicator can grant an application for deferred action.⁶¹

In 2012, the Obama Administration began using systemized, categorical grants of deferred action as a tool with which to set immigration selection policy.⁶² On June 15, 2012, Secretary of Homeland Security Janet Napolitano announced that USCIS would grant deferred action to unauthorized immigrants who were brought to the United States as children if they met other qualifying conditions.⁶³ Under this program, known as Deferred Action for Childhood Arrivals (“DACA”), immigrants could submit applications to USCIS seeking this status, and those found eligible were granted a two-year, renewable reprieve from removal and could apply for work authorization.⁶⁴ As of August 2016—four years after the program launched in 2012—63% of the 1.7 million unauthorized immigrants eligible for DACA applied for relief from deportation, and 728,285 applications had been approved.⁶⁵

59. WADHIA, *supra* note 21, at 8.

60. *Id.* at 8 (“Because the government has limited resources, permitting the agency and its officers to refrain from asserting their maximum enforcement authority against particular populations or individuals is cost-saving and arguably allows the agency to focus its work on the ‘truly’ dangerous.”).

61. See WADHIA, *supra* note 21, at 11 (describing the various nonenforcement decisions that constitute prosecutorial discretion).

62. President Obama’s administration was not the first to establish categorical grants of deferred action. For example, in November 2005, USCIS granted deferred action to foreign students and their dependents impacted by Hurricane Katrina. Again, in 2009, DHS granted deferred action to certain widows and widowers of U.S. citizens whose spouses had died before completing petitions to obtain LPR visas for their spouses. See WADHIA, *supra* note 21, at 32, 56–57.

63. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar et al. 1 (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

64. *Id.* at 2–3.

65. Faye Hipsman et al., *DACA at Four: Participation in the Deferred Action Program and Impacts on Recipients*, MIGRATION POL’Y INST. 1–2 (Aug. 2016).

In November 2014, President Obama announced a new deferred action initiative for certain parents of U.S. citizens and LPRs—a group of approximately four million people, amounting to 35% of the unauthorized population.⁶⁶ The stated goal was to bring these unauthorized immigrants “out of the shadows,” giving them legal permission to work and allowing them to live for a period of time without fear of removal.⁶⁷ Texas and 25 other states immediately challenged this program, known as Deferred Action for Parents of U.S. Citizens and Lawful Permanent Residents (“DAPA”), on the ground that it violated the Administrative Procedure Act, federal immigration law, and the U.S. Constitution.⁶⁸ Texas prevailed before both a federal district court and the United States Court of Appeals for the Fifth Circuit, and in June 2016 the Supreme Court issued a one-sentence *per curiam* opinion affirming the judgment by an equally divided Court.⁶⁹ The Trump Administration rescinded DAPA on June 15, 2017, before it ever went into effect,⁷⁰ and then rescinded DACA on September 5, 2017.⁷¹

The Obama Administration’s attempt to use prosecutorial discretion to shape immigration policy was not always successful. Political appointees have limited control over the line-level enforcement officials responsible for implementing these policies in the field. For example, memos from INS Director Doris Meissner in 2000 and ICE Director John Morton in 2011 listed the factors to be taken into account when determining whether to exercise prosecutorial discretion, such as duration of residence in the United States, close family relationships with U.S. citizens and LPRs, and the absence of a criminal record.⁷² In practice, however, ICE and CBP officers continued to

66. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf. Obama’s 2014 initiative also expanded DACA to cover more people who had arrived as children, and it extended the time period to renewable three-year reprieves from removal. *Id.*

67. President Barack Obama, Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> (stating that deferred action recipients “can come out of the shadows”).

68. *Texas v. United States*, 809 F.3d 134, 149 (5th Cir. 2015) (quoting U.S. CONST. art. II, § 3, cl. 5).

69. *United States v. Texas*, 136 S. Ct. 2271 (2016) (*per curiam*).

70. Memorandum from John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin K. McAleenan et al. (“DAPA”) 3 (June 15, 2017), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf>.

71. Memorandum from Elaine C. Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCament et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

72. Memorandum from Doris Meissner, *supra* note 58, at 1; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All Field Office Dirs. et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 1 (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All Field Office Dirs. et al., Prosecutorial Discretion: Certain

place unauthorized immigrants who were not priorities for removal in removal proceedings.⁷³ Between 2002 and 2011, 85% of the noncitizens removed from the United States had not been convicted of any crimes other than immigration violations, despite the Meissner Memo's instructions to focus resources on removing felons.⁷⁴ Some of these noncitizens were long-term residents of the United States with close U.S. citizen family members.⁷⁵ Moreover, race and ethnicity appeared to play an outsized role in the selection process—a clear violation of official DHS policy.⁷⁶ The Obama Administration then turned to categorical grants of deferred action in an attempt to formalize prosecutorial discretion, thereby avoiding inconsistent and ad hoc decisions by line-level officials on the ground,⁷⁷ but the courts stymied these efforts.

Furthermore, because prosecutorial discretion cannot provide unauthorized immigrants with legal status, they remain at risk of being targeted by Congress, future administrations, the states, and private actors.⁷⁸ For example, Congress has mandated that the executive detain at least 34,000

Victims, Witnesses, and Plaintiffs 1 (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

73. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 187 (2015) (noting that there were “few observable changes” in the use of prosecutorial discretion following issuance of the Morton memos, and that “[a]ccording to widespread accounts, ICE continued to place immigrants who should have been among the lowest enforcement priorities in removal proceedings, routinely ignoring individual requests for deferred action”); Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 230 (2014); Julia Preston, *Deportations Under New U.S. Policy are Inconsistent*, N.Y. TIMES (Nov. 12, 2011), <http://www.nytimes.com/2011/11/13/us/politics/president-obamas-policy-on-deportation-is-unevenly-applied.html>.

74. Rabin, *supra* note 73, at 230.

75. Preston, *supra* note 73.

76. See SIMANSKI, *supra* note 37, at 6; Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 25 (2015) (noting that although only about 78% of unauthorized immigrants were Latino from 2008 through 2012, more than 96% of those removed in 2012 were Latino).

77. Cox & Rodríguez, *supra* note 73, at 187 (describing how the immigration bureaucracy's refusal to follow enforcement guidelines pushed President Obama to propose broad, categorical grants of deferred action).

78. As the United States explained in its brief to the Supreme Court in *United States v. Texas*, deferred action does not provide any defense to removal and the executive has “absolute discretion to revoke deferred action unilaterally, without notice or process.” Brief for the Petitioners, *supra* note 12, at 5. Several candidates for the Republican nomination for president in 2016 vowed that if they were president, they would reverse course and deport deferred action recipients on “day one.” See, e.g., Suzanne Gamboa, *Dreamer Says She Fears Deportation After Exchange with Ted Cruz*, NBC NEWS (Jan. 7, 2016), <http://www.nbcnews.com/news/latino/dreamer-says-she-fears-deportation-after-ted-cruz-exchange-n492246> (reporting Cruz's statements that he would eliminate DACA and deport recipients of deferred action); Julia Preston, *Family of Immigrants, Only One a Citizen, Anxiously Awaits Supreme Court Ruling*, N.Y. TIMES (Apr. 16, 2016), <https://www.nytimes.com/2016/04/17/us/family-of-immigrants-only-one-a-citizen-anxiously-awaits-supreme-court-ruling.html> (reporting that both Donald Trump and Ted Cruz have stated they would deport all 11 million unauthorized immigrants).

immigrants each day, directed the Secretary of Homeland Security to prioritize removal of noncitizens who commit certain types of crimes, and instructed the executive to identify and remove criminal aliens⁷⁹—all of which constrain the executive’s enforcement discretion.

Prosecutorial discretion also cannot protect unauthorized immigrants from hostile state laws. Many states deny driver’s licenses,⁸⁰ funding and access to public universities and colleges,⁸¹ and professional licenses⁸² to unauthorized immigrants. Some make it difficult for unauthorized immigrants to rent apartments,⁸³ obtain birth certificates for their U.S. citizen children,⁸⁴ or register their children in schools.⁸⁵ Some states seek to keep these benefits off limits even to unauthorized immigrants who have been granted deferred action and work authorization.⁸⁶ Although the constitutionality of some of these state laws is contested, a state has far greater leeway to bar services and licenses to unauthorized immigrants—even those who have been granted deferred action—than to those immigrants who have legal status.⁸⁷

79. See DHS Appropriations Act of 2015, Pub. L. No. 114-4, 129 Stat. 39 (Mar. 4, 2015); Brief for the Petitioners, *supra* note 12, at 4.

80. Thirty-eight states do not grant driver’s licenses to unauthorized immigrants. See *Alternative Driver’s Licenses for Unauthorized Immigrants*, PEW CHARITABLE TR. (Dec. 11, 2015), <http://www.pewtrusts.org/en/research-and-analysis/collections/2015/12/alternative-drivers-licenses-for-unauthorized-immigrants>.

81. *In-State Tuition and Unauthorized Immigrant Students*, NAT’L CONF. ST. LEGISLATURES (Feb. 19, 2014), <http://www.ncsl.org/research/immigration/in-state-tuition-and-unauthorized-immigrants> (finding that 30 states do not offer in-state tuition to unauthorized immigrants in that state, and most do not offer state financial assistance to unauthorized immigrants).

82. Deepti Hajela, *For Some Immigrants, an Easier Path to Professional Work*, WASH. TIMES (Mar. 12, 2016), <http://www.washingtontimes.com/news/2016/mar/12/for-some-immigrants-an-easier-path-to-professional>.

83. Warren Richey, *No Supreme Court Review for Local Laws Against Harboring Illegal Immigrants*, CHRISTIAN SCI. MONITOR (Mar. 3, 2014), <http://www.csmonitor.com/USA/Justice/2014/0303/No-Supreme-Court-review-for-local-laws-against-harboring-illegal-immigrants>.

84. Manny Fernandez, *Immigrants Fight Texas’ Birth Certificate Rules*, N.Y. TIMES (Sept. 17, 2015), <https://www.nytimes.com/2015/09/18/us/illegal-immigrant-birth-certificates.html> (describing Texas’s policy of limiting the types of ID parents can show to receive their children’s birth certificates).

85. Rebecca Kaplan, *Feds to schools: You must accept children of undocumented immigrants*, CBS NEWS, May 8, 2014, <https://www.cbsnews.com/news/feds-to-schools-you-must-accept-children-of-undocumented-immigrants> (explaining that some states had adopted enrollment practices that “chill or discourage the participation, or lead to the exclusion, of students,” including undocumented students).

86. See generally, e.g., *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (staying an Arizona state law barring DACA recipients from obtaining driver’s licenses).

87. See, e.g., David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v Davis*, 2001 SUP. CT. REV. 47, 48–55 (comparing the constitutional rights of citizens, LPRs, and unauthorized immigrants and concluding that they are subjected to different levels of constitutional protection); Brief for the Petitioners, *supra* note 12, at 26 n.7 (asserting that a state may distinguish among noncitizens provided that it has a “substantial, independent state justification” for its choices aside from disagreement with federal immigration policies).

As the recent election demonstrates, one administration's prosecutorial discretion policies can easily be reversed by the next. The Trump Administration has rescinded both DAPA and DACA, putting at risk for removal the same unauthorized immigrants that Obama's administration had sought to protect.⁸⁸ Indeed, his administration could potentially deport unauthorized immigrants using the identifying data that the Obama Administration encouraged unauthorized immigrants to provide when paying taxes or applying for immigration benefits.⁸⁹ By executive order, President Trump has expanded the categories of unauthorized immigrants targeted for removal.⁹⁰ As these changes illustrate, prosecutorial discretion is by definition impermanent and leaves recipients vulnerable to shifts in policy.

Prosecutorial discretion also cannot protect unauthorized immigrants from being exploited at both work and home. Although employers are supposed to follow labor and employment laws for all their employees regardless of immigration status,⁹¹ studies show that unauthorized immigrants are more likely to be victims of wage theft, to be discriminated against, and to be injured at the work place than are legally present employees.⁹² Unauthorized immigrants may not be aware of their legal rights, and in any case are unlikely to assert those rights when they fear that doing so could lead to being fired or deported.⁹³ Employers are more likely to exploit unauthorized employees, assuming (correctly) that this subset of the population will be reluctant to report them.⁹⁴ As Professor Linda Bosniak has

88. Amanda Frost, *How Painful Can Trump Make the Lives of Immigrants?*, SLATE (Nov. 16, 2016, 5:55 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/11/trump_s_immigration_agenda_goes_to_washington.html.

89. Amanda Frost, *Can the Government Deport Immigrants Using Information It Encouraged Them to Provide?*, 2 ADMIN. L. REV. ACCORD 97, 99 (2017).

90. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017).

91. See, e.g., *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 891 (1984) (holding that the National Labor Relations Act applies to unauthorized immigrants); *Equal Emp't Opportunity Comm'n v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (holding that Title VII protects unauthorized immigrants from discrimination in the workplace); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) ("[I]t is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant.").

92. See NAT'L EMP'T LAW PROJECT, WORKPLACE VIOLATIONS, IMMIGRATION STATUS, AND GENDER: SUMMARY OF FINDINGS FROM THE 2008 UNREGULATED WORK SURVEY 1 (2011), http://www.nelp.org/content/uploads/2015/03/Fact_Sheet_Workplace_Violations_Immigration_Gender.pdf (finding that undocumented workers experience violations of wage and hour laws at higher rates than U.S.-born workers); see also Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 484 (2009) (detailing recent trends in occupational fatalities and injuries among foreign-born workers in the United States).

93. Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 582-83 (2010) (finding that undocumented workers are reluctant to demand better workplace protections out of fear of deportation).

94. See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004) ("While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights,

observed, “the rights [unauthorized] immigrants formally enjoy as persons and as residents are always held in the long shadow of the government’s immigration enforcement power.”⁹⁵

Unauthorized immigrants are also vulnerable outside the workplace. They are more likely to be victims of crimes, including domestic violence, in part because the perpetrators know they are less likely to report these crimes.⁹⁶ Their fear of deportation is often exploited by “notarios,” who charge them high fees for worthless services that they claim will help them gain legal status.⁹⁷ Landlords fail to maintain housing conditions for their unauthorized tenants, again because they know that these tenants are unlikely to report them.⁹⁸

Lawful immigrants and U.S. citizens can also suffer collateral harm from the mistreatment of unauthorized immigrants. When unauthorized immigrants receive less than minimum wage, work in unsafe conditions, or pay above-market rents, they undermine the labor and housing market for all.⁹⁹ Helping unauthorized immigrants gain legal status under existing laws would also protect these lawful residents from exploitation and harm.

C. THE POLITICAL COSTS OF REMOVAL-OR-FORBEARANCE

The removal-or-forbearance approach comes at significant political cost to the executive branch. The right criticized President Obama for being soft on immigration enforcement even as the left labeled him the “deporter-in-chief.”¹⁰⁰ Both critiques are supported by the facts: Obama’s administration

undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution.”)

95. Linda Bosniak, *The Undocumented Immigrant: Contending Policy Approaches*, in DEBATING IMMIGRATION 85, 87 (Carol M. Swain ed., 2007).

96. See Jacob Bucher et al., *Undocumented Victims: An Examination of Crimes Against Undocumented Male Migrant Workers*, 7 SW. J. CRIM. JUST. 159, 159 (2010) (finding that undocumented workers experience a high rate of victimization, yet are unlikely to report the crimes); Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resource and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POLY 245, 293 (2000).

97. *About Notario Fraud*, A.B.A., https://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud.html (last visited Oct. 1, 2017).

98. Annie Sciacca, *Facing Threats from Landlords, Immigrants Push for Tenant Protections*, MERCURY NEWS (May 23, 2017, 11:53 AM), <http://www.mercurynews.com/2017/05/23/facing-threats-from-landlords-immigrants-push-for-tenant-protections>.

99. See, e.g., *Sure-Tan, Inc. v. Nat’l Labor Relations Bd.*, 467 U.S. 883, 892 (1984) (observing that exploitation of unauthorized immigrants in the workplace will degrade the wages and working conditions of U.S. citizens); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 345 (2001) (same).

100. Nora Caplan-Bricker, *Obama Will Review Deportations. Here’s What He Can Do to Stop Them*, NEW REPUBLIC (Mar. 17, 2014), <https://newrepublic.com/article/117052/obamas-executive-authority-immigration-how-far-can-he-expand-daca> (observing that Obama’s rate of deportation

was responsible for a record number of deportations *and* for the highest number of unauthorized immigrants in the nation's history.¹⁰¹ Moreover, with the important exception of DACA recipients, most of the beneficiaries of Obama's prosecutorial discretion policies would never know that they were low priorities for removal, and thus neither they nor their families had reason to credit the Obama Administration for allowing them to remain in the United States. In short, the removal-and-forbearance policy weakened Obama's credibility and influence over immigration policy with both the left and the right, undermining his efforts to persuade Congress to enact comprehensive immigration reform.

III. COOPERATIVE ENFORCEMENT IN THE ADMINISTRATIVE STATE

In light of the shortcomings of the removal-or-forbearance model, and the low probability that Congress will address immigration enforcement in a comprehensive way in the near future, the immigration bureaucracy should consider alternative enforcement strategies. Cooperative enforcement techniques could reduce the size of the unauthorized population in ways that are both cost-efficient and better protect the humanitarian, economic, and national security concerns that underlie prosecutorial discretion policies. In addition, because cooperative enforcement relies on existing laws to regularize the status of unauthorized immigrants, such a policy would avoid the controversy and legal challenges surrounding President Obama's deferred action initiatives. Cooperative enforcement cannot solve the nation's undocumented immigration problem. Nor would it appeal to those who hope to encourage unauthorized immigrants to self-deport through attrition-through-enforcement policies. But for an administration that seeks to target certain categories of unauthorized immigrants for removal while exercising prosecutorial discretion for the rest—as both the Bush and Obama Administrations did, and as the Trump Administration appears to be doing thus far—cooperative enforcement provides another alternative method of reducing the unauthorized population.

Under a cooperative enforcement approach, government officials enforce the law by assisting regulated entities to come into compliance rather than by initiating adversarial proceedings to sanction lawbreakers. The approach has been heralded by administrative law scholars and embraced by federal and state agencies in a variety of regulatory fields, but it has yet to be applied to immigration enforcement.¹⁰² Part III.A briefly surveys the academic literature describing this approach, and then provides several examples of

is "far ahead of where George W. Bush was at this point in his presidency, . . . earning him the unsavory nickname of 'deporter-in-chief'").

101. Serena Marshall, *Obama Has Deported More People than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), <http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661>.

102. See *infra* Part III.A–B.

federal agencies that have used cooperative enforcement techniques to promote compliance with federal law. Part III.B then describes how similar cooperative enforcement techniques could be used to facilitate the enforcement of immigration law.

A. FROM COERCION TO COOPERATION

Over the last 25 years, administrative law has shifted from top-down, coercive, command-and-control regulation to an approach that favors cooperation among federal officials, regulated entities, and stakeholders.¹⁰³ Under a coercive enforcement approach, agencies closely monitor regulated entities and impose fines, criminal penalties, administrative orders, and injunctions to penalize lawbreakers and deter noncompliance. In the 1980s and 1990s, administrative law scholars began to critique these methods as unnecessarily adversarial, costly, and inefficient.¹⁰⁴ In a movement that is known by a variety of labels—including “cooperative enforcement,” “democratic experimentalism,” “collaborative governance,” and “new governance”—scholars argued that “rigid forms of regulation are ill suited to accomplish their designated tasks.”¹⁰⁵ In their place, they promoted a more flexible, responsive regulatory regime in which agencies worked cooperatively with regulated entities.¹⁰⁶ These scholars praised agencies such as the EPA and OSHA for experimenting with this new approach to regulation, and urged more agencies to abandon top-down, command-and-control regulation in favor of consensus-based approaches.¹⁰⁷

103. See, e.g., Glicksman & Earnhart, *supra* note 4, at 623 (“Scholars and environmental policymakers have conducted a spirited debate about the comparative merits of the coercive and cooperative approaches to enforcement of the nation’s environmental laws.”); Michael, *supra* note 4, at 537 (“[P]olicy makers throughout the federal government are increasingly insistent that regulations be more efficient, less intrusive, and less costly.”). See generally Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633 (2012) (analyzing 25 years of scholarship critiquing command-and-control type regulation and promoting forms of cooperative regulation).

104. See, e.g., Short, *supra* note 103, at 636 (analyzing approximately 1,400 law review articles on command-and-control regulation published between 1980 and 2005, and finding that scholars were concerned about the “coercive” nature of such government regulation, as well as its cost and inefficiency).

105. William W. Buzbee, *Interaction’s Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 152–54 (2007) (describing scholarship falling under the label of “democratic experimentalism”); see also Freeman, *supra* note 4, at 15–16 (criticizing EPA officials for their “adversarial” approach, illustrated by their rejection of a permit without providing information about how the permit could be amended to satisfy federal standards).

106. See, e.g., Shapiro & Rabinowitz, *supra* note 4, at 715; Freeman, *supra* note 4, at 33–65 (describing new methods of regulation in which agencies shift away from adversarial enforcement and toward cooperation with regulated entities). See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). See generally Karkkainen, *supra* note 4.

107. On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2130 (2008) (“New governance theory views adversarial commands as potentially counterproductive.”).

For example, in a 1997 article promoting collaborative governance, Professor Jody Freeman noted that the EPA is “neither adequately funded nor sufficiently staffed to meet its enforcement responsibilities,” and, as a result, enforcement through fines and penalties is both inconsistent and ineffective.¹⁰⁸ She urged the EPA to switch tactics and work collaboratively with stakeholders—encouraging practices such as joint problem solving, broad participation in the process, the use of provisional solutions, and the division of regulatory responsibility between the public and private spheres—methods that she concluded are more likely to accomplish the agency’s ultimate goal of protecting the environment.¹⁰⁹

Professor Orly Lobel has chronicled the collaborative governance movement in a series of articles. As she explains, “[i]n a cooperative regime, the role of government changes from regulator and controller to facilitator, and law becomes a shared problem-solving process rather than an ordering activity.”¹¹⁰ In place of “substantive prohibitions and adversarial enforcement, new governance approaches attempt to actively involve firms in the legal process, including the processes of interpreting and complying with legal norms.”¹¹¹ Likewise, Professor Freeman praised cooperative enforcement techniques for shifting agency regulators away from their role as rigid and heavy-handed disciplinarians and encouraging them to be “flexible” and “engaged” in helping regulated entities come into compliance with federal law.¹¹²

Agency officials have applied the collaborative approach to all stages of the regulatory process—from the promulgation of new regulations and creation of new guidance memos to their implementation and enforcement. Agency officials are now encouraged to work together with regulated entities and stakeholders throughout the process, crafting solutions to regulatory problems through cooperative consultation, such as through negotiated rulemakings in which agency officials, regulated entities, and stakeholders work together to craft new rules. Regarding enforcement in particular, agencies employing this approach collaborate with regulated entities to bring them into compliance through outreach and education about the relevant legal standards, assistance in complying with them, and by interpreting standards flexibly and exercising discretion liberally.¹¹³

That is not to say that cooperative enforcement has, or should, replace all forms of coercive enforcement. Today, the mainstream view is that the two enforcement regimes should work together: First, collaboration encourages

108. Freeman, *supra* note 4, at 17.

109. See generally *id.*

110. Lobel, *supra* note 4, at 377.

111. Amir & Lobel, *supra* note 107, at 2128.

112. See Freeman, *supra* note 4, at 31–33.

113. See *infra* Part III.A.1–4 (giving examples of cooperative enforcement).

and assists regulated entities to come into compliance, and the imposition of fines and other penalties follow if entities do not comply.¹¹⁴

Below are brief descriptions of four such cooperative enforcement techniques from four different federal agencies. These examples are chosen not because they could be applied identically to the immigration context, but rather because they illustrate a mindset and a practical approach that could prove beneficial in immigration enforcement. Each technique demonstrates at least one of the key components of collaborative governance: (1) Agency officials approach regulated entities with a collaborative, rather than adversarial, mindset; (2) they engage in outreach and education about legal standards; (3) they seek to assist regulated entities comply with the law, rather than punish them for past transgressions; and (4) they employ flexible interpretations of statutes and regulations to promote overall compliance rather than to maximize opportunities for penalties and sanctions.

1. The EPA's Protection of Endangered Species

The EPA led the charge to replace command-and-control with a collaborative governance approach to regulation. Traditional environmental regulation consisted of a "staggering number" of laws that regulated entities were required to follow, and imposed fines and other penalties for the violation of those laws.¹¹⁵ In contrast, the collaborative governance approach embraced by the government, industry, and environmental rights groups in the 1980s and 1990s "aims to be participatory, collaborative, decentralized, and focused on problem solving."¹¹⁶ The government's role in this new regulatory framework is to assist and provide incentives for voluntary compliance through new, flexible applications of existing laws and regulations.

One prominent example is the shift in approach to endangered species and habitat conservation. Under the previous adversarial, command-and-control approach, the EPA administered a statute prohibiting any person or entity from "taking" a species designated as endangered by the U.S. Fish and

114. See, e.g., David A. Dana, *The New "Contractarian" Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 47 (describing how the "default regime of command-and-control regulation" provides an incentive for parties to engage in collaborative compliance); Shapiro & Rabinowitz, *supra* note 4, at 715 (concluding that "a mix of cooperation and punishment can maximize employer compliance with agency regulations"); Short, *supra* note 103, at 682 ("[V]oluntary and cooperative approaches . . . work best when embedded within a more coercive, deterrence-based enforcement scheme."); Sidney A. Shapiro, Book Review, 50 AM. J. COMP. L. 229, 232 (2002) ("To maximize the influence of non-enforcement incentives to comply with regulations, reformers suggest that cooperation should be paired with punishment, structured in a pyramid-like fashion, with initial or minor violations treated leniently, while repeated or significant violations are punished with increasingly severe sanctions.").

115. See Lobel, *supra* note 4, at 425.

116. *Id.*

Wildlife Service.¹¹⁷ The agency had interpreted the term “taking” very broadly to include incidental and unintentional harm.¹¹⁸ Recognizing that this rigid, coercive approach had been unsuccessful, stakeholders came together and developed consensus agreements that allowed some “taking” of endangered species in return for long-term efforts to create and protect their environment.¹¹⁹ Eventually, Congress responded by enacting new laws that relaxed existing rules and encouraged flexible, consensus-based planning. Under the new law, the taking of endangered species is allowed “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,” but only if the U.S. Fish and Wildlife Service first approves a Habitat Conservation Plan.¹²⁰ Although participation was low at first, the government engaged in education and outreach about this flexible compliance option, and gradually the program picked up speed and is now widespread.¹²¹ In the words of one new governance scholar, the Habitat Conservation Plan process “allow[s] landowners to escape the rigidities of a notoriously inflexible command-style rule,” replacing it with a flexible and collaborative means of compliance with federal standards.¹²²

2. The SEC’s “No-Action” Letters

The SEC has a long history of encouraging the use of informal processes to help guide the general public’s understanding of securities laws.¹²³ In addition to providing guidance through telephone conversations and in comments on filings, the SEC has established a process by which “[a]n individual or entity who is not certain whether a particular product, service, or action would constitute a violation of the federal securities law may request” guidance from agency staff in the form of a “no-action” letter.¹²⁴ Such no-action letters inform the inquirer whether the agency would seek to prevent

117. *Id.* at 427.

118. *See* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978) (adopting the agency’s broad interpretation of the term “taking” to include unintentional and incidental killing of endangered species).

119. Lobel, *supra* note 4, at 428.

120. 16 U.S.C. § 1539(a)(1)(B) (2012); *see* Albert C. Lin, *Participants’ Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 *ECOLOGICAL Q.* 369, 376–77 (1996) (discussing Habitat Conservation Plan requirements).

121. *See* Bradley C. Karkkainen, *Toward Ecologically Sustainable Democracy?*, in *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* 208, 208–09 (Archon Fung & Erik Olin Wright eds., 2003).

122. *Id.* at 208.

123. Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 *BUS. LAW.* 1019, 1020–21 (1987) (“The Commission early on recognized the need for, and encouraged the development of, a procedure whereby its expert staff could provide informal advice and assistance to members of the public and practitioners seeking to engage in lawful and appropriate conduct.”).

124. *No Action Letters*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/answers/noaction.htm> (last updated Mar. 23, 2017).

or penalize the described transaction, and also contain interpretations of laws and regulations that are made public.¹²⁵

Although a single no-action letter is not binding precedent, and does not preclude an enforcement action by the SEC, these letters serve as an important means by which regulated entities can learn how to bring their conduct into compliance with the law.¹²⁶ Furthermore, if an agency consistently takes a position in no-action letters, it may not subsequently reverse course without a formal rulemaking.¹²⁷

The SEC's no-action letters benefit the regulated parties and the agency alike. They assist regulated entities by providing them with the information they need to comply with the law, but without the cost and controversy that would accompany being the target of an enforcement action. No-action letters also provide a more efficient and cost-effective means for the SEC to promote compliance with securities laws than it could through enforcement actions alone. The SEC knows that it lacks the resources to pursue each and every violation of the federal securities laws, which means that it is more likely to achieve compliance by encouraging regulated entities to seek the agency's advice.¹²⁸

3. The FDA's "Notice of Detention and Hearing" for Illegal Products

The FDA, working together with CBP, is responsible for inspecting products imported into the United States to ensure that they comply with the Food, Drug, and Cosmetic Act ("FDCA") and associated regulations.¹²⁹ The FDA has the power to order that tainted or deficient products be detained at a port of entry, returned to their country of origin, or even destroyed.¹³⁰ But the FDA does not employ these coercive enforcement efforts until after notifying the importer of the violation and providing the importer with the opportunity to relabel or recondition the product to bring it into compliance.¹³¹

125. Lemke, *supra* note 123, at 1022.

126. If the SEC concludes that the staff erred in a no-action letter, it may nonetheless permit a company that reasonably and in good faith relied on the no action letter to act in accordance with that letter. See United Brotherhood of Carpenters and Joiners of America, SEC No-Action Letter, 2002 WL 31749942 (Dec. 6, 2002).

127. See 1 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 1.35 (7th ed. 2016); see also *Am. Fed'n of State, Cty., & Mun. Emps. v. American Int'l Grp.*, 462 F.3d 121, 123 (2d Cir. 2006) ("We believe that an agency's interpretation of an ambiguous regulation made at the time the regulation was implemented or revised should control unless that agency has offered sufficient reasons for its changed interpretation.").

128. Lemke, *supra* note 123, at 1023 ("[B]y assisting the public in complying with the law, [no-action letters] promote[] voluntary compliance and lessen[] the demand on the SEC's limited regulatory and enforcement resources.").

129. FOOD & DRUG ADMIN., REGULATORY PROCEDURES MANUAL § 9-1-2 (2017).

130. *Id.* § 9-1.

131. *Id.* § 9-1-5.

As explained in the FDA's compliance manual, if the FDA determines that a product violates the FDCA, it will notify the importer of the problem through a "Notice of Detention and Hearing" that "shall specify the nature of the violation charged."¹³² The importer is then given an opportunity to demonstrate the admissibility of the product at an informal hearing that usually occurs within ten business days of detention.¹³³ But the importer may instead choose to "propose a manner in which an article . . . can be brought into compliance with the Act or be removed from coverage under the Act."¹³⁴ If the FDA authorizes relabeling or reconditioning of the product to bring it into compliance with the FDCA, and the product then passes a second inspection, the product will then be approved for importation into the United States.¹³⁵ In short, the FDA first seeks to assist importers to come into compliance with the law, and does not impose sanctions or penalties for the importation of illegal products unless the importer fails to relabel or recondition a product to meet the legal standards.

4. OSHA's Education and Outreach

OSHA has a broad mandate to protect workplace health and safety, but very limited enforcement resources to inspect and sanction violators. Since 2000, OSHA has expanded programs within its Cooperative Compliance Office—an office designed to assist and facilitate employers' efforts to meet federal worker safety standards—rather than simply punish noncompliance.

For example, the Safety and Health Achievement Recognition Program ("SHARP") exempts small employers in high risk industries from general, scheduled OSHA inspections, and reduces the size of penalties.¹³⁶ To qualify, an employer must schedule consultations with an OSHA-funded, state-run program that will regularly meet with the employer to evaluate workplace health and safety.¹³⁷ Similarly, OSHA has developed a Strategic Partnership Program in which it works with employers in high-risk industries to reduce and eliminate specific workplace hazards, and in return reduces the number of inspections and the size of penalties.¹³⁸

OSHA also engages in broad outreach programs designed to educate and train employers seeking to improve health and safety and ensure compliance with federal standards. The agency distributes newsletters and has created an

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. 29 C.F.R. § 1908.7 (2016).

137. *Id.*; see also Orly Lobel, 57 ADMIN. L. REV. 1071, 1106 (2005) (describing SHARP).

138. *OSHA Strategic Partnership Program (OSPP)*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dcspp/partnerships/index.html> (last visited Oct. 1, 2017).

interactive website to assist employers to meet federal standards.¹³⁹ The OSHA Training Institute offers over 80 training courses in workplace health and safety.¹⁴⁰ OSHA has also created a Training Grant Program that provides funding to nonprofits to develop training and education programs in workplace health and safety.¹⁴¹ All of these initiatives prioritize education, flexible interpretation of legal standards, and assistance with compliance over penalties, fines, and injunctions.

* * *

These four examples of cooperative enforcement from four different agencies share a few common features. All replace a rigid, rule-bound, adversarial model of regulation with a cooperative and consensus-based approach. All are intended to encourage greater compliance at lower cost—both to the agency and to the regulated entities. And all use education, outreach, consultation, flexibility, and the liberal exercise of discretion to promote the end goal of assisting regulated entities to comply with regulatory standards as efficiently and effectively as possible.

B. COOPERATIVE ENFORCEMENT IN IMMIGRATION LAW

Like the EPA of old, immigration officials at ICE and CBP consider themselves primarily responsible for enforcing complex and arcane immigration laws through command and control strategies.¹⁴² As described in Part II, these agencies are focused on investigation, detention, and removal—all adversarial processes with a coercive end-goal of forcing unauthorized immigrants to leave the United States. These agencies track the number of immigrants placed in removal proceedings, the number of removal orders issued, and the number of people deported each year.¹⁴³ Tellingly, however, they do not keep count of the overall number of people who moved from unlawful to lawful status, or credit particular immigration officials or agencies with assisting them in that process.

Nonetheless, immigration officials at times adopt a cooperative enforcement approach. Immigration agencies seek to educate immigrants

139. See *OSHA QuickTakes Newsletter*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/as/opa/quicktakes/index.html> (last visited Oct. 1, 2017); Occupational Safety & Health Admin., *OSHA Hazard Identification Training Tool*, DEPT. LAB., <https://www.osha.gov/hazfinder> (last visited Oct. 1, 2017).

140. *OSHA Training Institute*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dte/oti/index.html> (last visited Oct. 1, 2017).

141. See *Susan Harwood Training Grant Program*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dte/sharwood> (last visited Oct. 1, 2017).

142. See Freeman, *supra* note 4, at 13 & n.31 (describing how the EPA has viewed itself primarily as an “enforcement agency” whose “institutional mission since its creation has been to enforce compliance with environmental statutes through primarily command and control strategies”).

143. See DEPT OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2014 YEARBOOK OF IMMIGRATION STATISTICS 91–115 (2016), https://www.dhs.gov/sites/default/files/publications/ois_yb_2014.pdf.

about their options for obtaining a visa to visit, work, or study in the United States. The USCIS website includes information and forms to assist immigrants in applying for visas and other immigration benefits, and the agency does its best to translate convoluted statutes and regulations into plain English.¹⁴⁴ USCIS has also recently begun to streamline procedures and craft new waivers and exceptions to bars to legal status, which suggests that it might be willing to embrace a cooperative enforcement approach.¹⁴⁵

As it stands today, however, the system provides very little information to those who are unauthorized about how to legalize their status. Nor is there any mechanism by which an unauthorized immigrant can seek out assistance without risk of becoming subject to an enforcement action. To the contrary, the immigration bureaucracy approaches the task of reviewing petitions for adjustment of status or applications for naturalization with a “gotcha” mentality, scouring petitions and applications to determine whether the applicants have ever been out of status, or were granted status in error in the past, and then denying the application or commencing removal proceedings as a result.¹⁴⁶ Immigration practice manuals warn that even immigrants who believe that they are legally present in the United States run a risk when they apply to adjust to LPR status or seek to naturalize; their applications may lead immigration officials to search for errors that will lead to their removal—even if the error was on the part of the immigration authorities and not the immigrant.¹⁴⁷ As USCIS’s policy manual explains, every naturalized citizen is at risk of having his citizenship revoked and being removed if “any eligibility requirement” was subsequently found not to have been met, “even if the person is innocent of any willful deception or misrepresentation.”¹⁴⁸ In short, the agencies responsible for regulating immigration take an adversarial rather than cooperative approach to enforcement.¹⁴⁹

The immigration enforcement bureaucracy could change course. Just as the EPA, SEC, FDA, and OSHA are now willing to assist individuals and

144. *Id.*

145. *See infra* Part III.B.4.

146. *See, e.g.*, Julia Preston, *Perfectly Legal Immigrants, Until They Applied for Citizenship*, N.Y. TIMES (Apr. 12, 2008), <http://www.nytimes.com/2008/04/12/us/12naturalize.html>.

147. *See, e.g., id.* (describing how long-term, legal immigrants who apply for naturalization can be deported for minor errors in their visa applications to enter the United States).

148. *See Grounds for Revocation of Naturalization—USCIS Policy Manual—Volume 12, Part L, Chapter 2*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartL-Chapter2.html> (last visited Oct. 1, 2017) (“[A]ny eligibility requirement for naturalization that was not met can form the basis for an action to revoke the naturalization of a person. This includes the requirements of residence, physical presence, lawful admission for permanent residence, good moral character, and attachment to the U.S. Constitution.”); *see also* Immigration and Nationality Act § 340, 8 U.S.C. § 1451 (2012) (describing the grounds for revoking naturalization).

149. *Cf. Freeman, supra* note 4, at 13 (describing how “agency officials frequently see themselves in only one institutional light, as part of, for example, an ‘enforcement agency’”).

corporations come into compliance through outreach, education, assistance, flexible interpretation of ambiguous statutory and regulatory terms, and liberal use of discretion, immigration authorities can do the same by helping unauthorized immigrants take advantage of existing pathways to legal status. Indeed, studies show that a significant percentage of unauthorized immigrants can apply for legal status and even citizenship, but are often unaware of their options or unable to navigate the system on their own.¹⁵⁰ Thus, it appears that immigration officials could play an important role in helping unauthorized immigrants obtain legal status, which in turn could be a cost-effective and efficient means of accomplishing their ultimate goal of reducing the unauthorized population while taking into account humanitarian, economic, and national security concerns that inevitably arise in immigration enforcement.

This Part briefly describes some of the existing pathways to legal status, and then explains how immigration officials could adopt a cooperative enforcement approach to assist unauthorized immigrants to take advantage of them.

1. Cancellation of Removal

Some unauthorized immigrants are eligible for a statutory form of relief known as “cancellation of removal,” which provides recipients with LPR status and puts them on a path to citizenship.¹⁵¹ To be eligible, an immigrant must show continuous physical presence in the United States for ten years; that he or she is a person of “good moral character” who has not committed certain crimes; and that removal would result in “exceptional and extremely unusual hardship” to his or her U.S. citizen or LPR spouse, parent, or child.¹⁵² Cancellation is a discretionary form of relief, meaning that even if an applicant qualifies, he or she may be denied relief if an immigration judge concludes that the equities are not in his or her favor.¹⁵³

As currently employed, few unauthorized immigrants qualify for this form of relief. By statute, relief is capped at 4,000 people each year.¹⁵⁴ Under current policies, immigration judges will not adjudicate requests for cancellation of removal until a slot under that quota is available, forcing all those seeking such relief to wait years for a hearing on the matter before an immigration judge.¹⁵⁵ In addition, the Board of Immigration Appeals (“BIA”)

150. See *supra* note 9 and accompanying text.

151. Immigration and Nationality Act § 240A(b)(1), 8 U.S.C. § 1229b(b)(1).

152. *Id.*

153. See *id.*

154. *Id.* § 240A(e)(1), 8 U.S.C. § 1229b(e)(1).

155. 8 C.F.R. 1240.21(c)(1) (2016) (“[F]urther decisions to grant or deny [cancellation of removal] shall be reserved until such time as a grant becomes available under the annual limitation in a subsequent fiscal year.”); see also Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L.

has interpreted the term “exceptional and extremely unusual hardship” to mean hardship “substantially beyond that which would ordinarily be expected to result from the alien’s deportation.”¹⁵⁶ Finally, even those who are eligible under the statutory standards may be denied relief in an immigration judge’s discretion.

Furthermore, the remedy is only available to those in removal proceedings. Accordingly, unauthorized immigrants who benefit from prosecutorial discretion policies will never have an opportunity to legalize their status using cancellation of removal.¹⁵⁷ Ironically, then, the only unauthorized immigrants who can seek this remedy are those the government seeks to deport—a group that is, on the whole, less sympathetic and less likely to qualify for cancellation of removal.¹⁵⁸ Indeed, one of the problems with the removal-or-forbearance model of immigration enforcement is that those unauthorized immigrants whom the executive branch decides are not enforcement priorities—typically long-term, law-abiding unauthorized immigrants with close family members who are U.S. citizens or LPRs—will never have access to a form of relief specifically intended to benefit them.¹⁵⁹

& POL. 527, 544 (2015) (describing how eligible immigrants are in “legal limbo” for years as they wait for their cancellation of removal hearings); Memorandum from Brian M. O’Leary, Chief Immigration Judge, to All Immigration Judges et al. 2–3 (Feb. 3, 2012), <https://www.justice.gov/sites/default/files/eoir/legacy/2012/02/03/12-01.pdf> (explaining that the Chief Immigration Judge will announce when 3,500 applications have been granted in the fiscal year, after which Immigration Judges must reserve their decisions unless the applicant is statutorily ineligible and wait for the Chief Immigration Judge to allocate the remaining 500 non-LPR cancellation grants to ensure that the statutory cap is not breached).

156. *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 56, 59 (B.I.A. 2001). The BIA’s interpretation is consistent with the legislative history, in which Congress explained that it “deliberately changed the required showing of hardship from ‘extreme hardship’ to ‘exceptional and extremely unusual hardship’ to emphasize that the alien must provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien’s deportation.” H.R. REP. NO. 104-828, at 213–14 (1996) (Conf. Rep.).

157. By statute, authority to grant cancellation of removal has been delegated to the Attorney General and not the Department of Homeland Security. *See* Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b(b) (“The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States . . .”). Under current practice, immigration judges award cancellation of removal after receiving an application for this form of relief in a removal proceeding. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FORM EOIR-42B, APPLICATION FOR CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR CERTAIN NONPERMANENT RESIDENTS, <https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir42b.pdf> (last updated July 2015).

158. *See* Taylor, *supra* note 155, at 545 (“Ironically, a robust system of prosecutorial discretion, which focuses enforcement resources on high priority cases, will often identify individuals who qualify for non-LPR cancellation as low priority cases that should not be pursued, thereby cutting off access to this durable form of relief because those who qualify must be in removal proceedings to apply.”).

159. On rare occasions, immigration attorneys advise clients to ask immigration officials to place them in removal proceedings so that they can seek cancellation of removal. *See* LAUREN HARTLEY & JAMES GILBERT, AM. IMMIGRATION COUNCIL, NOTICES TO APPEAR: LEGAL CHALLENGES

Unauthorized immigrants could more easily legalize their status through cancellation of removal if immigration officials adopted cooperative enforcement techniques such as education and outreach, streamlining procedures, altering interpretation of statutory terms, and liberal use of discretion. For example, immigration officials could allow noncitizens to affirmatively apply for this remedy, rather than limit access only to those noncitizens who are already in removal proceedings. Such a change in policy is not unprecedented. In the late 1990s, the Department of Justice promulgated rules allowing nationals of El Salvador, Guatemala, the former Soviet Union, and certain Eastern European countries to affirmatively apply for such relief through USCIS, without regard to whether they were in removal proceedings.¹⁶⁰ This rule change could be expanded to allow all eligible unauthorized immigrants to apply for cancellation of removal through affirmative applications to USCIS, making this remedy available to many more unauthorized immigrants than can currently take advantage of it—including those long-term, law-abiding unauthorized immigrants who are most likely to qualify for the remedy.¹⁶¹ Once such a change in procedure occurs, the agency could then advertise the availability of cancellation of removal and encourage eligible unauthorized immigrants to apply for it.

In addition, as Professor Margaret Taylor has suggested, immigration officials could choose to adjudicate cancellation of removal applications immediately, even if the 4,000-person cap has been reached.¹⁶² Those applicants found to be eligible could be granted conditional approval that is suspended until they reach their spot in the queue. These conditionally-approved applicants could then be granted deferred action and allowed to remain in the United States until the date at which approval is formally granted.¹⁶³ Allowing for the immediate adjudication of applications for cancellation of removal provides more security and certainty for successful applicants, who will wait their turn in the queue knowing that they will eventually obtain legal status. Immediate adjudication also has the collateral benefit of enabling rapid deportation of those in removal proceedings who are *not* eligible. The result would be both more efficient and more humane,

AND STRATEGIES 17-18 (June 2014), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_fin_6-30-14.pdf.

160. Taylor, *supra* note 155, at 538 (describing the change in policy); *see also* Applications for Suspension of Deportation or Special Rule Cancellation of Removal Under Section 203 of Pub. L. 105-100, 8 C.F.R. 1240.60 to .70 (2016).

161. Section 1103(a)(1) of the Immigration and Nationality Act provides that “[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens.” Immigration and Nationality Act § 103(a)(1), 8 U.S.C. § 1103(a)(1).

162. Taylor, *supra* note 155, at 535-47.

163. *See id.* at 538 (discussing suspension and cancellation of deportation procedures).

and would reduce the overall number of unauthorized immigrants in the United States.¹⁶⁴

In addition to altering procedures to make the remedy of cancellation of removal more readily available, immigration officials could exercise their discretion more liberally. They could adopt a broader interpretation of “extreme and unusual hardship” so that more applicants are eligible for the remedy. They could also choose to grant relief to *all* who are eligible under the statutory standard, instead of denying it to those whom they find undeserving.

These proposed changes resemble the collaborative governance initiatives adopted by other federal agencies described in Part III.A. For example, the EPA adopted a narrower interpretation of the term “taking” under the Endangered Species Act provided that the landowners developed a comprehensive plan to protect endangered species, which allowed landowners to obtain permits that once would have been denied to them under an adversarial style of enforcement.¹⁶⁵ The SEC adopted the no-action letter to quickly provide information to those who wanted to determine whether their conduct would subject them to an enforcement action.¹⁶⁶ OSHA changed its methods of inspections and sanctions to accommodate employers who took steps to comply with the overall goals of worker health and safety.¹⁶⁷ Immigration officials, like officials in these other federal agencies, have the same ability to enforce through streamlined procedures and flexible application of the law—providing finality for all who apply, and legal status for some.

2. U Visas for Victims of Crimes

U visas are available to victims of certain serious crimes who have suffered physical or mental abuse and are willing to assist law enforcement in investigating or prosecuting the crime.¹⁶⁸ To be eligible for the visa, a law enforcement official must certify that the victim was or will likely be of

164. Immediately adjudicating applications would also reduce the number of noncitizens who apply for this remedy despite having non-meritorious cases. *See id.* at 543 (stating that “immigration judges have voiced frustration that, in their view, too many respondents apply for non-LPR cancellation when the claimed hardship to qualifying relatives does not meet the stringent ‘exceptional and extremely unusual hardship’ standard”). Today, the long delay between application for cancellation of removal and a hearing date, coupled with the high likelihood that the noncitizen can obtain work authorization during that period, “creates a powerful incentive for non-LPRs in removal proceedings to file unsubstantiated cancellation claims.” *Id.*

165. *See supra* Part III.A.1.

166. *See supra* Part III.A.2.

167. *See supra* Part III.A.3.

168. Immigration and Nationality Act § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2012). To be successful, a U visa applicant also must be admissible to the United States, or eligible for a waiver of any ground of inadmissibility. *See id.*; *see also id.* § 214(b), 8 U.S.C. § 1184(b).

assistance.¹⁶⁹ The number of U visas is capped at 10,000 each year.¹⁷⁰ Although the cap is frequently reached before the end of the fiscal year, USCIS continues to review pending petitions for eligibility, and those who are eligible receive deferred action from removal and work authorization while they wait their turn in the queue.¹⁷¹ Those who successfully obtain U visas may apply to adjust to LPR status after three years,¹⁷² and if successful may apply to naturalize five years after obtaining LPR status.

Many more unauthorized immigrants are eligible for this visa than apply for it.¹⁷³ Some who are eligible likely do not know about the remedy, or do not know how to apply for it. The need to obtain “certification” from a law enforcement agency is particularly daunting for unauthorized immigrants, many of whom view law enforcement with suspicion.¹⁷⁴ Many law enforcement officials are unaware of the U visa for crime victims, and the role they must play to help immigrants qualify for it, and thus may refuse to certify that the immigrant has provided them with assistance.¹⁷⁵ Finally, as with other such forms of relief, unauthorized immigrants might hesitate to apply for the visa, reluctant to draw attention to themselves for fear that if they fail to qualify they will then become targets for removal.¹⁷⁶

Cooperative enforcement techniques could assist unauthorized immigrants to obtain U visas. Immigration officials could proactively educate

169. See *id.* § 214(p)(1), § 1184(p)(1).

170. *Id.* § 214(p)(2), § 1184(p)(2).

171. NAT'L IMMIGRANT JUSTICE CTR., PRO BONO ATTORNEY MANUAL ON IMMIGRATION RELIEF FOR CRIME VICTIMS: U VISAS 27 (2017), <https://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-03/U-visa-Manual-2017-03.pdf>.

172. See *Victims of Criminal Act Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, (Aug. 17, 2017, 3:09 PM), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

173. Sarah Childress, *For Shadow Victims of Violence, the “U Visa” Can Help*, FRONTLINE (June 24, 2013, 7:17 PM), <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/for-shadow-victims-of-violence-the-u-visa-can-help> (“[I]mmigration attorneys say that there are many . . . victims of abuse who don’t come forward, or are arrested anyway and deported, because of the Secure Communities program . . . These attorneys say that the program works at cross-purposes to the U visa, driving victims of domestic violence and other crimes back underground.”).

174. Gustavo Solis, *Undocumented Immigrants Who Are Crime Victims Can Apply for U Visas. But Police Don’t Always Cooperate.*, USA TODAY (Feb. 8, 2017, 8:05 AM), <https://www.usatoday.com/story/news/2017/02/08/new-data-shows-how-california-law-helps-undocumented-immigrants-obtain-legal-status/97454834>.

175. See, e.g., Leslye E. Orloff et al., *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules—A Call for Consistency*, 11 GEO. J. GENDER & L. 619, 637–38 (2010).

176. See, e.g., IMMIGRANT LAW CTR. OF MINN., QUESTIONS AND ANSWERS FOR U VISA APPLICANTS 1–2 (2016), <https://www.ilcm.org/wp-content/uploads/2016/01/U-visa-client-FAQ-English.pdf> (explaining that “immigration [officials] could decide to forward your [U visa application] information to another branch of the Department of Homeland Security, including [Immigration and Customs Enforcement],” and adding that “we have not yet seen this happen”).

unauthorized immigrants about the availability of this remedy and then assist them in applying for it, just as OSHA provides trainings and education to employers about how to satisfy federal legal standards.¹⁷⁷ Likewise, immigration officials could educate state and local law enforcement officers about their role in the process, and provide a liaison to answer their questions. Immigration officials can exercise their discretion liberally by granting U visas to all who qualify under the statutory standard, just as the EPA, OSHA, and SEC officials make an effort to approve the activities of those who work with them to try to meet statutory standards.¹⁷⁸ Finally, immigration officials could agree not to target for removal unauthorized immigrants who came to their attention solely because they applied for this benefit, just as OSHA officials do not impose full penalties on employers who have worked in good faith to try to meet their standards.¹⁷⁹

3. Special Immigrant Juvenile Status

A federal statute permits unauthorized immigrants who are under 21 years of age to apply for Special Immigrant Juvenile Status (“SIJS”), which allows them to adjust to LPR status and, eventually, to apply for citizenship.¹⁸⁰ To be eligible, juveniles must first obtain a ruling by a state court that: (1) they are “dependent on a juvenile court” or “legally committed to, or placed under the custody of,” a state agency or department “or an individual or entity appointed by a [s]tate or juvenile court”; (2) “reunification with [one] or both . . . parents is not viable due to abuse, neglect, [or] abandonment” (or a similar state-law standard); and (3) it is not in their best interest to return to their “country of nationality or country of last habitual residence.”¹⁸¹ Armed with this predicate order, the juvenile can then apply to USCIS for SIJS. USCIS officials have the discretion to refuse to grant an application if they believe that the juvenile sought the court order primarily to obtain a legal immigration status, rather than for protection from an abusive or neglectful parent.¹⁸²

SIJS applications are capped at 10,000 per year, though that number had never been reached before 2016.¹⁸³ Minors are often unaware that they are eligible for SIJS status and, in any case, lack the knowledge and resources to

177. See *supra* notes 139–41 and accompanying text.

178. See *supra* note 5 and accompanying text.

179. See *supra* note 136 and accompanying text.

180. Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. 1101(a)(27)(J) (2012); *id.* § 203(b)(4), 8 U.S.C. 1153(b)(4).

181. *Id.* § 101(a)(27)(J), 8 U.S.C. 1101(a)(27)(J).

182. See Memorandum from Donald Neufeld, Acting Assoc. Dir., & Pearl Chang, Acting Chief, U.S. Citizenship & Immigration Servs., to Field Leadership 3 (Mar. 24, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf.

183. Kimberly Krone, *US Immigration Caps Put Abused Children at Risk*, THE HILL (Jan. 12, 2016, 7:00 AM), <http://thehill.com/blogs/congress-blog/civil-rights/265510-us-immigration-caps-put-abused-children-at-risk>.

argue their case before a state court and then a federal agency.¹⁸⁴ State courts are inconsistent in their approach to SIJS applications, and USCIS officials have at times second-guessed state court determinations that a child has been abused, abandoned, or neglected by one or both parents.¹⁸⁵

As with any of the remedies described here, applying for SIJS is risky. A practice guide for SIJS applicants warns: “Children who are not in removal proceedings must carefully consider the potential risks and benefits of filing a SIJS petition [because the] application will bring the child to the attention of USCIS, which may lead to the initiation of removal proceedings against the child should the petition be denied.”¹⁸⁶

Using a cooperative enforcement approach, USCIS officials could engage in outreach to immigrant communities to inform them of the availability of SIJS, and could focus on educating school guidance counselors and teachers about this option. USCIS could also do more to educate state court judges about their role in the process to avoid inconsistent rulings and confusion over interpretation of the statutory terms governing SIJS predicate orders. In addition, USCIS adjudicators could choose to accept any state court finding of abuse, abandonment, and neglect as a rebuttable presumption that the juvenile is eligible for SIJS, thereby avoiding a second inquiry into the legitimacy of the state court order. (Such an approach would also be more respectful of state courts, who currently make final decisions that USCIS officials can disregard.) Finally, USCIS could adopt a policy of not pursuing failed SIJS applicants for removal absent extraordinary circumstances, thereby reducing the risks of applying for SIJS and encouraging more potentially eligible juveniles to do so. All of these techniques—education and outreach, flexibility in interpreting and applying federal standards, cooperation with state actors, and encouraging voluntary compliance—are consistent with the

184. Maura M. Ooi, Note, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 896 (2011). Children at Risk, a nonpartisan research and advocacy organization dedicated to improving the quality of life for children in Texas, has urged increased training for school counselors, teachers, and CBP to ensure that children eligible for SIJS are identified and provided the information they need to apply for this status. See CHILDREN AT RISK, CHILDREN ON THE BORDER: THE USE AND LIMITATIONS OF SPECIAL IMMIGRANT JUVENILE STATUS 32 (2015), <http://173.45.238.175/content/wp-content/uploads/2015/08/Children-On-The-Border.pdf>.

185. See Wendi J. Adelson, *The Case of the Eroding Special Immigrant Juvenile Status*, 18 J. TRANSNAT'L L. & POL'Y 65, 80 (2008). However, a memo to USCIS adjudicators instructed them to “not second-guess the [juvenile] court’s rulings or question whether the court’s order was properly issued.” *Id.* at 68 (alteration in original) (quoting Memorandum from William R. Yates, Associate Dir. For Operations, U.S. Citizenship & Immigration Servs., to Regional Dirs. & District Dirs. (May 27, 2004), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf).

186. KIDS IN NEED OF DEFENSE, CHAPTER 4: SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) 8, <https://supportkind.org/wp-content/uploads/2015/04/Chapter-4-Special-Immigrant-Juvenile-Status-SIJS.pdf>.

cooperative enforcement techniques used by other federal agencies, as described in Part III.A.

4. Waivers and Exceptions for Unlawful Presence

One path to legal permanent residence in the United States is for a close family member to petition for a visa on the noncitizen's behalf. However, this option is unavailable to unauthorized immigrants who entered the United States without inspection, who must leave the United States and apply for a visa at a consular office abroad.¹⁸⁷ If these immigrants have remained in the United States without lawful status for more than 180 days, they are barred from returning to the United States for three years after leaving the country.¹⁸⁸ If they have accrued more than a year of unlawful presence, they are barred from returning for ten years.¹⁸⁹

Unauthorized immigrants in this situation are eligible for a waiver to the three/ten-year bars if: (1) they are the spouse or child of a U.S. citizen or LPR; and (2) can demonstrate that their absence from the United States will cause "extreme hardship" to that relative.¹⁹⁰ Few unauthorized immigrants have been willing to leave the United States to apply for this waiver, however, because they fear being denied the waiver and thus barred from returning.¹⁹¹ Moreover, even those who are granted the waiver can be separated from their families for many months—sometimes even over a year—while USCIS considers their application.¹⁹² Thus, many unauthorized immigrants who could both adjust status and qualify for the waiver allowing them to return quickly to the United States never even try to do so.

187. Immigration and Nationality Act § 245, 8 U.S.C. § 1255 (2012).

188. *Id.* § 212(a)(g)(B)(i)(I), 8 U.S.C. § 1182(a)(g)(B)(i)(I).

189. *Id.* § 212(a)(g)(B)(i)(II), 8 U.S.C. § 1182(a)(g)(B)(i)(II). Congress enacted the three/ten-year bars to discourage immigrants from remaining in the United States without status. Ironically, however, these bars may have contributed to the spike in the unauthorized population because many immigrants who might have once adjusted status are now unable to do so. *See* MASSEY ET AL., *supra* note 46, at 128–33.

190. Immigration and Nationality Act § 212(a)(g)(B)(v), 8 U.S.C. § 1182(a)(g)(B)(v). In addition to these requirements, the noncitizen must also be "admissible" aside from the unlawful presence bar, which bars noncitizens convicted of certain crimes and immigration violations from obtaining such waivers. *See Provisional Unlawful Presence Waivers, supra* note 8.

191. In its rulemaking to establish a new streamlined process for applying for the waiver, the Department of Homeland Security explained that "[e]xisting demand [for waivers] is constrained by the current process that requires individuals to leave the United States and be separated for unpredictable and sometimes lengthy amounts of time from their immediate relatives in the United States in order to obtain an immigrant visa to become an LPR." Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 535, 566 (Jan. 3, 2013) (to be codified at 8 C.F.R. pt. 212).

192. In its rulemaking, DHS explained: "As a result of the often lengthy processing times and uncertainty about whether they qualify for a waiver of the unlawful presence inadmissibility grounds, many immediate relatives who may qualify for an immigrant visa are reluctant to proceed abroad to seek an immigrant visa." *Id.* at 536.

In 2013, DHS responded to this problem by promulgating a new regulation creating a provisional unlawful presence waiver, known as the 601A waiver.¹⁹³ Those who may be eligible for the waiver can now apply *before* leaving the United States.¹⁹⁴ If the waiver is granted, they can then leave to apply for adjustment of status abroad knowing that they will be permitted to return in the near future.¹⁹⁵

The 601A waiver is itself a good example of cooperative enforcement. By allowing immigrants to apply for the waiver without leaving the country, DHS made the waiver accessible to more of those unauthorized immigrants who were eligible for it, reducing both the risk of going abroad and the amount of time these unauthorized immigrants would have to be separated from their families, jobs, and lives in the United States.¹⁹⁶ Furthermore, the new process also benefitted USCIS by “reduc[ing] the degree of interchange between the U.S. Department of State and USCIS” and by “creat[ing] greater efficiencies for both the U.S. Government and most provisional unlawful presence waiver applicants.”¹⁹⁷

USCIS could do even more to make this waiver available for eligible unauthorized immigrants using cooperative enforcement techniques. The agency could engage in education and outreach to inform unauthorized immigrants who are unaware of the waiver of its existence, and then assist them in the application process. The agency could adopt a more flexible and expansive definition of the “extreme hardship” standard required for eligibility—a vague term that is open to broader interpretation than the agency currently gives it. And USCIS could grant all the waivers of those who qualify, rather than exercising its discretion to deny some eligible noncitizens from obtaining these waivers.¹⁹⁸

* * *

Cooperative enforcement’s potential was illustrated by a recent survey of 67 legal service providers assisting applicants for DACA. The survey found that 14.3% of the applicants for DACA were *also* eligible to legalize their status through one of the pathways to permanent legal status described above, which they learned only after they were encouraged to come out of the shadows and apply for deferred action.¹⁹⁹ Over 25% of those eligible for legal status could

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* (“The Department of Homeland Security (DHS) anticipates that these changes will significantly reduce the length of time U.S. citizens are separated from their immediate relatives who engage in consular processing abroad.”).

197. *Id.*

198. *See* Immigration & Naturalization Serv. v. Jong Ha Wang, 450 U.S. 139, 144 (1981) (per curiam) (holding that the term “extreme hardship” is “not self-explanatory, and reasonable men could easily differ as to [its] construction,” and further concluding that the federal agency in charge of implementing the statute should determine its meaning).

199. Wong et al., *supra* note 9, at 289.

do so through a family-based petition.²⁰⁰ Another 23.9% could apply for a U visa as crime victims who had assisted law enforcement officers in pursuing the perpetrators of that crime.²⁰¹ Adjustment to SIJS was an option for 12.6% because they had been abused, abandoned, or neglected by one or both parents, and could show that return to their home country was not in their best interest.²⁰²

Although these DACA applicants had lived in the United States for many years, they had either not known about these options for obtaining legal status, or had been unable to navigate the application process on their own. As explained above, most of these routes to legal status are obscure and involve a complex application process, so it is not surprising that the unauthorized immigrants who came forward to apply for DACA—a well-publicized program—had not figured out on their own that they were eligible for a better, more durable legal status that could put them on the pathway to citizenship.²⁰³

The executive's broad reliance on prosecutorial discretion has, ironically, exacerbated the problem. Immigrants who benefit from prosecutorial discretion are the ones most likely to qualify for discretionary forms of relief such as cancellation of removal, U visas, SIJS, and exceptions to the bars to adjustment of status. But most of these unauthorized immigrants will never learn about, or have an opportunity to apply for, certain types of relief.²⁰⁴ Thus, the current strategy of removal-or-forbearance impedes unauthorized immigrants from accessing pathways to legal status—a result that undermines immigration officials' enforcement goals. Federal immigration officials could reverse this trend by adopting cooperative enforcement techniques to help unauthorized immigrants shift from illegal to legal status.

IV. ASSESSING A COOPERATIVE APPROACH TO IMMIGRATION ENFORCEMENT

Assuming cooperative enforcement in the immigration context is feasible, is it desirable? This Part examines the arguments on either side of that question to assess whether the cooperative enforcement techniques used by other federal agencies have a role in immigration enforcement.

200. *Id.*

201. *Id.*

202. *Id.*

203. A survey of unauthorized immigrants who were potentially eligible for DACA but did not apply found that many could not afford the \$465 fee (43%), did know how to apply (10%), or feared sending personal information to the government (15%). ROBERTO G. GONZALES & ANGIE M. BAUTISTA-CHAVEZ, AM. IMMIGRATION COUNCIL, TWO YEARS AND COUNTING: ASSESSING THE GROWING POWER OF DACA (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf.

204. See Taylor, *supra* note 155, at 544.

A. OBJECTIONS TO COOPERATIVE ENFORCEMENT IN IMMIGRATION LAW

Enforcement techniques should be measured not simply by their short-term effectiveness, but also by their expressive value and the incentives they create.²⁰⁵ Critics of cooperative enforcement in immigration might argue that this approach sends the wrong message to unauthorized immigrants about the gravity of their legal transgressions and the nation's willingness to accept them as full members of society, which in turn might increase the flow of unauthorized immigrants into the United States. They might further argue that because immigration law is closer to criminal than administrative law, the enforcement techniques used by other federal agencies are inappropriate in the immigration context.

1. Rewarding Lawbreakers

Critics might argue that cooperative enforcement techniques reward lawbreakers by granting legal status and eventually citizenship to those who flouted immigration laws by entering or remaining in the United States without permission.²⁰⁶ This critique sweeps too broadly, however. Some of the unauthorized immigrants who could benefit from cooperative enforcement were brought or sent to the United States as children, and thus cannot be blamed for being in the United States without permission. For others, the life-threatening violence and poverty in their home countries offsets their culpability. Deportation of unauthorized immigrants can also harm third parties, such as U.S. citizen children, who have done nothing to deserve the loss of a parent. Accordingly, the argument that cooperative enforcement rewards lawbreakers is not grounds for objecting to this enforcement method

205. See, e.g., Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 374 (1999) (discussing the broader expressive value of various types of criminal sanctions); Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1388–91 (2007) (same).

206. See, e.g., Kris W. Kobach, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 2007 *National Lawyers Convention of the Federalist Society*, 36 HOFSTRA L. REV. 1323, 1329–31 (2008) (arguing that legislative amnesty would incentivize illegal immigration); Elizabeth Llorente, *Sen. Ted Cruz Moves Front and Center in GOP Response to Border Crisis*, FOX NEWS (July 21, 2014), <http://www.foxnews.com/politics/2014/07/21/sen-ted-cruz-moves-front-and-center-in-gop-response-to-border-crisis.html> (describing how Republicans in Congress opposed President Obama's deferred action initiatives because they were a "reward to lawbreakers"); Jessica Vaughan, *Senate Bill Rewards & Protects Lawbreakers, Undermines Law Enforcement*, CTR. FOR IMMIGR. STUD. (May 2, 2013), <http://cis.org/vaughan/senate-bill-rewards-protects-lawbreakers-undermines-law-enforcement> (criticizing proposed legislation that would have legalized most of the unauthorized population as "designed to reward and protect lawbreakers"); see also Darryl Fears, *Discord on the Immigration Accord*, WASH. POST (May 21, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/20/AR2007052001281.html> (same).

across the board—though it may be a reason to carefully select which categories of immigrants can benefit from it.²⁰⁷

Furthermore, Congress already made the policy choice to assist certain unauthorized immigrants because it wished to show mercy, or because removal of these immigrants would do more harm than good. For example, Congress passed legislation enabling crime victims to qualify for visas if they assisted law enforcement because lawmakers prioritized deterring crime and apprehending criminals over removing every person who violates immigration laws.²⁰⁸ Similarly, Congress provides the remedy of cancellation of removal because it recognized that a decade or more of presence in the United States, coupled with the hardship that would be suffered by close family members who are U.S. citizens or lawful residents, justifies overlooking violations of immigration law.²⁰⁹ By adopting cooperative enforcement techniques, the executive branch assists Congress in realizing these goals.

In any case, the charge of “rewarding lawbreakers” could be leveled against the use of cooperative enforcement in *any* field, from occupational safety to the taking of endangered animals. Landowners who violated environmental regulations, or employers who did not meet OSHA standards, or importers who brought tainted products into the United States are also “lawbreakers,” just like unauthorized immigrants.²¹⁰ The question is not whether regulated entities break the law, but rather which regulatory policies will most quickly and efficiently bring them into compliance, and ensure compliance going forward. Proponents of cooperative enforcement believe that a policy of working *with* regulated entities to assist them in complying with regulatory goals is more efficient and effective than penalizing each and every illegal act.²¹¹ The same is true in the context of unauthorized immigration.

207. See generally Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65 (2009) (describing why some unauthorized immigrants are not to blame for their illegal status).

208. Immigration and Nationality Act § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2012) (granting immigration visas to victims of certain crimes who meet other qualifications); *id.* § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (granting immigration visas to victims of human trafficking who meet other qualifications)

209. See *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 967 (9th Cir. 2003) (“Congress did intend *some* counterweight to the general policy of not rewarding extended illegal stays. Otherwise, there would be no cancellation of removal proviso at all.”).

210. See *supra* notes 115–41 and accompanying text; see also Freeman, *supra* note 4, at 93 (describing objections to collaborative enforcement initiatives by the EPA and others, which some feared would lead companies to “exploit such experiments in an effort to circumvent environmental regulation to the maximum extent possible”).

211. See *supra* notes 104–07 and accompanying text.

2. Incentivizing Illegal Immigration

Another serious critique of cooperative enforcement in immigration law is that it could encourage more noncitizens to enter or remain in the United States illegally. If immigration officials assist unauthorized immigrants to obtain legal status, then noncitizens may decide to come illegally rather than wait for a visa in their home country. Furthermore, if immigration officials help unauthorized immigrants gain legal status after jumping the queue, they will demoralize those immigrants who obey the law by applying and then waiting years for their visas.²¹²

If cooperative enforcement were equivalent to a blanket grant of amnesty to all or most unauthorized immigrants, then it could incentivize immigrants to come to the United States illegally. As explained in Part III, however, cooperative enforcement would assist only those who qualify for existing pathways to legal status, which, based on previous studies, is unlikely amount to more than ten percent of the unauthorized population.²¹³ Furthermore, many of the laws allowing adjustment to legal status require that the unauthorized immigrant has been brought into the United States as a child, live in the United States for years, or have a close family relationship with U.S. citizens or LPRs.²¹⁴ Thus, even if immigration officials were to fully embrace cooperative enforcement techniques, unauthorized immigrants would have no easy or automatic route to legal status.

In any case, for most unauthorized immigrants the only real deterrent would be the certainty of swift deportation. For noncitizens with powerful incentives to come to the United States—such as those fleeing violence and poverty in their home country—the ability to *stay* in the United States, legally or not, is the real incentive to immigrate without permission.²¹⁵ The unauthorized immigrants who might benefit from cooperative enforcement are unlikely to be removed from the United States in light of limited enforcement resources.²¹⁶ The Obama Administration announced that it

212. See *supra* note 204 and accompanying text.

213. See Wong et al., *supra* note 9, at 289 (finding that 14.3% of the DACA-eligible population was eligible for a more permanent form of relief).

214. See *supra* notes 190–92 and accompanying text.

215. Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175 (2010) (explaining that a limited amnesty is unlikely to encourage future unauthorized immigration); Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J. C.R. & C.L. 233 (2007) (same).

216. For example, those who qualify for cancellation of removal have, by definition, lived in the United States for over a decade, have no criminal record, and have a close family member who is legally present in the United States. Those who might qualify for a waiver of the unlawful presence bar have no serious criminal record and have a spouse, child, or parent who is a U.S. citizen, and would suffer hardship from their absence. These categories of unauthorized immigrants are low on the list of priorities for removal, as consistently stated in immigration enforcement guidance memos stretching back to 2000. Memorandum from Doris Meissner, *supra* note 58, at 1; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft,

would prioritize the removal of convicted criminals and recent border crossers, allowing most of the rest of the unauthorized population to remain.²¹⁷ Even President Trump has acknowledged the need to set deportation priorities, backing away from an initial pledge to remove all 11.3 million unauthorized immigrants and instead stating that he will focus on removing unauthorized immigrants with criminal backgrounds.²¹⁸ Because the unauthorized immigrants who could benefit from cooperative enforcement face minimal risk of removal, the incentive to enter remain in the United States without legal immigration status already exists.

3. Immigration Exceptionalism

Immigration is often viewed by scholars, practitioners, and even the general public as fundamentally different from other areas of federal regulation,²¹⁹ and thus practices that work in other fields might be inappropriate for immigration. Defenders of immigration exceptionalism note that immigration impacts existential issues such as sovereignty, identity, and national security.²²⁰ Courts are remarkably deferential to the government in immigration cases, and have concluded in the past that regulation of immigration is “exempt from the usual limits on government decisionmaking.”²²¹ As one scholar put it, “[i]mmigration law can seem to be in its own world, divorced from the evolution of important legal concepts.”²²² Arguably, then, a flexible and forgiving approach to immigration enforcement might be incompatible with its central role defining and protecting the nation.

As this critique suggests, whether cooperative enforcement is appropriately applied to immigration turns in part on whether immigration has an “exceptional position within the constitutional structure,” or

to All Field Office Dirs. et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, *supra* note 72, at 1; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All Field Office Dirs. et al., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, *supra* note 72, at 1; Memorandum from Julie L. Myers, *supra* note 72, at 1.

217. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All Field Office Dirs. et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, *supra* note 72, at 1.

218. See *supra* notes 55–56 and accompanying text.

219. See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 461 (2009); see also Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 566 (2012) (describing how “[i]mmigration law can seem to be in its own world”); Motomura, *supra* note 15, 1363; Rosenbloom, *supra* note 15, at 1981–89; Rubenstein & Gulasekaram, *supra* note 15, at 593.

220. See Cox & Rodríguez, *supra* note 219, at 461.

221. Motomura, *supra* note 15, at 1363.

222. Family, *supra* note 219, at 566.

alternatively should be given an “ordinary place in administrative law.”²²³ If immigration is considered to be just another area of federal regulation, like environmental protection or workplace safety, then the same rules and practices that govern in those areas should apply. If immigration is *sui generis*, raising uniquely existential concerns and issues, then perhaps it calls for uniquely strict enforcement.

These larger theoretical questions about role of immigration law cannot be fully addressed within the confines of this Article. But it is worth noting that immigration is not the only area of federal regulation that raises existential concerns. Regulation of international trade, the environment, energy, and transportation also affect national security and international relations and can have profound effects on the future and well-being of the country (indeed, the world). Yet these other fields are viewed as comfortably within the administrative state and subject to administrative enforcement norms.

In a related critique, some might argue that immigration is more closely aligned with the criminal justice system than with the administrative state. The lines between immigration and criminal law have blurred in recent years: Criminal convictions often carry serious immigration consequences, and some immigration violations are now federal crimes.²²⁴ If violations of immigration law are crimes, or the moral equivalent of crimes, then arguably the flexible and forgiving cooperative enforcement techniques are inappropriate and send the wrong message to immigration violators.

Yet even in the criminal justice context the law is, at times, enforced through methods akin to cooperative enforcement. Over the last few decades, diversionary programs and specialized courts have sought to rehabilitate offenders to bring them back into compliance with the law rather than penalize them for their past transgressions.²²⁵ For example, drug courts often “sentence” drug users or small-time dealers to a period of supervised rehabilitation in which they are offered services and support to overcome their addiction, enroll in school, and find employment.²²⁶ If they succeed,

223. Cox & Rodríguez, *supra* note 219, at 461.

224. See, e.g., Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (describing how immigration and criminal law have converged over the last 20 years).

225. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 463–64 (1999) (describing the role of drug courts as intended to rehabilitate rather than incarcerate drug offenders); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1590–91 (2012) (describing the expansion of specialized courts, which often serve to rehabilitate offenders and avoid incarceration).

226. See, e.g., Richard S. Gebelein, *Delaware Leads the Nation: Rehabilitation in a Law and Order Society; a System Responds to Punitive Rhetoric*, 7 DEL. L. REV. 1, 8–9 (2004) (describing drug courts in Delaware); Martin I. Reising, *Rediscovering Rehabilitation: Drug Courts, Community Corrections and Restorative Justice*, 77 MICH. B.J. 172, 173–74 (1998) (describing drug courts in Michigan).

they can sometimes avoid a conviction and jail time altogether.²²⁷ In both the civil and criminal context, sometimes the best way to enforce the law is to help the violator come into compliance rather than punish past transgressions. Indeed, although this Article has argued that immigration officials should adopt the cooperative enforcement techniques used by many administrative agencies in other fields, it could have drawn upon the trend in alternatives to incarceration in the criminal justice system to make the same point.

4. Antithetical to Attrition-Through-Enforcement Strategies

In a recent executive order, President Trump acknowledged the need to set priorities by announcing that his administration would prioritize removal of unauthorized immigrants who have committed crimes.²²⁸ In doing so, he implicitly conceded that unauthorized immigrants living in the interior of the United States who have not committed a crime will not be targeted for removal, and thus are likely to remain unless they voluntarily choose to leave the country or come to immigration officials' attention for some other reason. Theoretically, the Trump Administration might embrace cooperative enforcement as an improvement over the removal-or-forgiveness approach.

However, cooperative enforcement would likely be viewed as antithetical to the policy of attrition through enforcement advocated by hardline immigration restrictionists such as Kansas Secretary of State Kris Kobach and the Center for Immigration Studies—both informal advisors to President Trump.²²⁹ Proponents of attrition through enforcement argue that vigorous

227. In 1966 Congress passed the Narcotic Addict Rehabilitation Act of 1966, which “g[ave] courts the authority to sentence drug addicts who violated Federal criminal laws to treatment programs as an alternative to imprisonment.” Megan N. Krebbeke, *One Step at a Time: Reforming Drug Diversion Programs in California*, 13 CHAP. L. REV. 417, 419 (2010); see also GOV'T ACCOUNTABILITY OFFICE, ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS 21–22 (2011), <http://www.gao.gov/assets/590/586793.pdf> (detailing a study in which participation in drug court diversion programs across varying jurisdictions throughout the United States significantly reduced recidivism); see also CAL. PENAL CODE § 1000 (West 2015) (allowing individuals who have successfully completed drug diversion through the Deferred Entry of Judgment (DEJ) program to withdraw the guilty pleas that were required before entry into the program); FLA. STAT. § 948.08 (2016) (allowing eligible individuals to participate in a program of substance abuse education and treatment for a minimum of 90 days while their underlying criminal charges are continued, and upon successful completion of the program, the underlying criminal charges are dismissed without prejudice).

228. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (prioritizing the removal of any unauthorized immigrant who has been convicted of, charged with, or “committed acts that constitute a chargeable criminal offense”; or “pose[s] a risk to public safety or national security,” but does not prioritize the removal of unauthorized immigrants solely on the basis of their lack of documented status).

229. VAUGHAN, *supra* note 28, at 1; Walter Ewing, *The Ideological Roots of Donald Trump's Immigration Team*, AM. IMMIGR. COUNCIL: IMMIGR. IMPACT (Nov. 15, 2016), <http://immigrationimpact.com/2016/11/15/ideological-roots-donald-trumps-immigration-team>; see also Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 156

enforcement of laws and policies will encourage unauthorized immigrants to “self-deport,” as well as discourage new immigrants from coming without permission, resulting in the gradual decrease in the unauthorized population without the enormous cost and disruption of mass removals.²³⁰

Attrition through enforcement requires officials to ramp up immigration enforcement and anti-immigration measures so that *all* unauthorized immigrants are affected, including those who have not committed crimes and who have lived in the United States for many years. Key components of such a strategy include: “mandatory workplace verification of immigration status; . . . partnerships with state and local law enforcement officials”; increased removals of unauthorized immigrants who have not committed crimes; and expansion of state and local laws hostile to unauthorized immigrants.²³¹ As Kobach put it, “if *every* illegal alien found it difficult to obtain employment in the United States and the risks of enforcement (including the possibility of detention during removal hearings) were to increase for all . . . [a]ttrition through enforcement would occur.”²³² Accordingly, he and other proponents of attrition through enforcement would likely oppose assisting unauthorized immigrants obtain legal status, since doing so might undermine the climate of fear that would encourage unauthorized immigrants to leave.²³³

President Trump has yet to explicitly adopt attrition through enforcement. Although at times his rhetoric embraces such policies, his executive order prioritizing the removal of unauthorized immigrants who have committed crimes is somewhat inconsistent with a philosophy that requires threatening the detention and removal of each and every unauthorized immigrant, no matter how sympathetic.²³⁴ Moreover, a policy of

(2008) (“Illegal aliens can be encouraged to depart the United States on their own, through a concerted strategy of attrition through enforcement.”); Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, BACKGROUND (Ctr. for Immigration Studies, Wash., D.C.), May 2005, at 1, <https://cis.org/sites/cis.org/files/articles/2005/back605.pdf> (advocating a policy of enforcing immigration law to “[s]hrink the illegal population”).

230. Kobach, *supra* note 229, at 162 (arguing that attrition through enforcement is “relatively inexpensive” as compared to mass deportations); VAUGHAN, *supra* note 28, at 7 (same). The effectiveness of attrition through enforcement is disputed. The American Immigration Council and other pro-immigrant groups argue that the United States has already spent billions on immigration enforcement without good results because the current immigration laws are “unworkable.” See e.g., AM. IMMIGRATION COUNCIL, *THE FALLACY OF “ENFORCEMENT FIRST”: IMMIGRATION ENFORCEMENT WITHOUT IMMIGRATION REFORM HAS BEEN FAILING FOR DECADES 1* (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_fallacy_of_enforcement_first.pdf.

231. VAUGHAN, *supra* note 28, at 1.

232. Kobach, *supra* note 229, at 157.

233. VAUGHAN, *supra* note 28, at 12 (“The strategy of attrition through enforcement envisions a doubling of non-criminal removals, both to decrease the size of the illegal alien population directly and to create a climate of enforcement that encourages voluntary compliance as the likelihood of detection increases.”).

234. At times, President Trump’s rhetoric has suggested zero tolerance, but he has also referred to some unauthorized immigrants, such as Dreamers, in sympathetic terms, calling them

attrition through enforcement is not inherently incompatible with cooperative enforcement. Immigration officials could both ramp up detention and removals of unauthorized immigrants while at the same time assisting those who are eligible to adjust to legal status. After all, proponents of attrition through enforcement do not claim that there should be no method by which unauthorized immigrants can adjust their status and, in any case, they would have to acknowledge the law currently creates such opportunities. Admittedly, however, the two approaches are in considerable tension, and it seems unlikely that an administration that embraced one technique in immigration enforcement would adopt the other.

B. BENEFITS OF COOPERATIVE ENFORCEMENT IN IMMIGRATION LAW

For those who conclude that cooperative enforcement is compatible with the overarching goals of immigration law, there is much to recommend it. Cooperative enforcement has the potential to reduce the size of the unauthorized population efficiently and humanely, and in ways that are legally sound and politically more palatable than the removal-or-forbearance model employed today. In addition, cooperative enforcement could help to bring immigration law back into the fold of mainstream administrative law, possibly altering public perception of unauthorized immigrants in the process.

1. Reducing the Size of the Unauthorized Immigrant Population

Cooperative enforcement, combined with removals and border security, can assist immigration officials reduce the size of the unauthorized population, and can do so more cheaply and effectively than the current removal-or-forbearance approach. Immigration enforcement is typically equated with the removal of unauthorized immigrants. But legalizing the status of unauthorized immigrants also decreases the size of the unauthorized population, and does so with less disruption to the community in which those immigrants live and work.

The detention and removal of unauthorized immigrants from the interior of the country costs about \$23,480 per person²³⁵ and may deprive U.S. citizen family members of financial support.²³⁶ In contrast, assisting that same unauthorized immigrant to legalize his or her status will be far cheaper—either revenue neutral (since many of the paths to legal status require the recipient to pay fees that cover the administrative costs of

“terrific people” and hinting that his administration might find a way to allow them to remain in the United States. Interview by Lesley Stahl with Donald J. Trump, *supra* note 19.

235. See Kasperkevic, *supra* note 47; see also Philip E. Wolgin, *What Would it Cost to Deport All 5 Million Beneficiaries of Executive Action on Immigration?*, CTR. FOR AM. PROGRESS (Feb. 23, 2015, 8:53 AM), <https://www.americanprogress.org/issues/immigration/news/2015/02/23/106983/what-would-it-cost-to-deport-all-5-million-beneficiaries-of-executive-action-on-immigration>.

236. Wolgin, *supra* note 52.

processing the application), or even profitable (since studies show that unauthorized immigrants earn more after obtaining employment authorization and thus will pay more in taxes).²³⁷ For those immigrants with U.S. citizen children, legalization is also less disruptive and more humane, since it avoids the social and economic harm that ensues whenever parents are forcibly removed from their children's homes.

Cooperative enforcement may be particularly effective in immigration because individual immigrants are in greater need of assistance to come into compliance with the law than are regulated entities in other fields, such as corporations and employers, who are likely to be repeat players and have access to legal counsel. A surprising number of DACA applicants were found to be eligible for more permanent forms of relief, which they only realized when they consulted lawyers to assist them with their DACA applications.²³⁸ Many other unauthorized immigrants are also likely unaware that they are eligible for pathways to legal status and thus would benefit from government assistance.

2. Bringing Beneficiaries Out of the Shadows

Legalization is also an improvement over prosecutorial discretion, which leaves unauthorized immigrants in “legal limbo”—and thus at risk of changes in law or policy by the federal or state government—as well as vulnerable to exploitation by employers and landlords.²³⁹ Many of the unauthorized immigrants eligible to regularize their status are long-term, law-abiding residents of the United States with close ties to U.S. citizens and LPRs, and thus are low priorities for removal. But under the current removal-or-forbearance approach, these unauthorized immigrants will spend a lifetime in the United States without legal status—ever afraid of being deported, unable to build secure lives or protect their own rights in the workplace and at home, and degrading wages and working conditions for all employees.²⁴⁰

237. Tom K. Wong et al., *Results from a Nationwide Survey of DACA Recipients Illustrate the Program's Impact*, CTR. AM. PROGRESS (July 9, 2015, 12:01 AM), <https://www.americanprogress.org/issues/immigration/news/2015/07/09/117054/results-from-a-nationwide-survey-of-daca-recipients-illustrate-the-programs-impact> (reporting that “after receiving DACA, 69 percent of [the survey's] respondents report[ed] moving to a job with better pay”).

238. Wong et al., *supra* note 9, at 289 (surveying 67 legal-service providers assisting applicants for deferred action for childhood arrivals and finding that 14.3% of the unauthorized immigrants applying for this temporary forbearance were also eligible for a more permanent form of relief).

239. Taylor, *supra* note 155, at 544.

240. See, e.g., *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 892 (1984) (observing that exploitation of unauthorized immigrants in the workplace will degrade the wages and working conditions of U.S. citizens); Nessel, *supra* note 99, at 347 (same); see also President Barack Obama, Remarks on Immigration Reform (Jan. 29, 2013), https://www.washingtonpost.com/politics/president-obama-discusses-his-proposals-for-immigration-reform-transcript/2013/01/29/73074f9c-6a3c-11e2-af53-7b2b2a7510a8_story.html (explaining that “the wages and working conditions of American workers are threatened” by undocumented workers in the “shadow economy,” and that

Some forms of prosecutorial discretion, such as deferred action, come with permission to live and work in the United States for a set time period, which provides some security and protection against exploitation.²⁴¹ As the *United States v. Texas* litigation illustrated, however, even these more durable forms of prosecutorial discretion are at risk of reversal by the executive or Congress, and the recipients may have to contend with hostile state legislation.²⁴² In any case, the beneficiaries of deferred action know that it is temporary and can be terminated at any time. Enabling these unauthorized immigrants to regularize their status would *permanently* bring unauthorized immigrants “out of the shadows”—the stated goal of the Obama Administration’s deferred action initiatives.²⁴³

3. Bipartisan Appeal

Cooperative enforcement can be tailored to fit the priorities of each administration, and therefore should have a broader political appeal than the categorical grants of deferred action favored by the Obama administration. Even an administration that wishes to take a hard line against unauthorized immigrants might recognize the desirability of helping a sympathetic subset of the population adjust status.²⁴⁴ After all, any administration will have to make choices about which groups of the unauthorized immigrant population to prioritize for removal, acknowledging that the rest are likely to remain. Only a president who is committed to ousting all 11.3 million unauthorized immigrants—and who prefers to make life as uncomfortable as possible for that population, regardless of the costs to U.S. citizens and legal residents who live and work with them—would reject cooperative enforcement as completely antithetical to his immigration policies.

Cooperative enforcement should also appeal to the executive because it enables policymakers to make choices that cannot be easily undone by Congress or a future administration, or by state legislation. President Obama wanted to grant deferred action to a large subset of the unauthorized population—those who were brought to the United States as children, as well as parents of U.S. citizens and LPRs—amounting to one-third of the

businesses “trying to do the right thing [by] hiring people legally, paying a decent wage, following the rules . . . [also] suffer”).

241. See *supra* notes 61–65 and accompanying text (describing deferred action).

242. Brief for the Petitioners, *supra* note 12, at 5 (“An alien with deferred action remains removable at any time, and DHS has absolute discretion to revoke deferred action unilaterally, without notice or process.”).

243. Obama, *supra* note 67.

244. Michael Scherer, *2016 Person of the Year: Donald Trump*, TIME, <http://time.com/time-person-of-the-year-2016-donald-trump> (last visited Oct. 1, 2017) (reporting that Trump “made clear he would like to find some future accommodation” for unauthorized immigrants brought to the United States as children, whom he spoke of in sympathetic terms); Interview by Lesley Stahl with Donald J. Trump, *supra* note 19 (same).

unauthorized population.²⁴⁵ As a result of Texas's successful legal challenge, only his initiative for childhood arrivals went into effect. Even if Obama had succeeded in granting deferred action to millions of unauthorized immigrants, none of the recipients would have been protected from the Trump Administration's decision to rescind these programs. In contrast, the cooperative enforcement approach provides unauthorized immigrants with a tangible, permanent form of relief—one that often provides a pathway to citizenship and could produce future voters eager to reward the party that granted them legal status.

Cooperative enforcement is also on sounder legal footing than widescale grants of deferred action. President Obama's initiatives to grant deferred action to a third of the unauthorized population were criticized as violating the rule of law by unilaterally giving work authorization and a reprieve from removal to millions whose presence in the United States violated federal law.²⁴⁶ Texas and 25 other states sued the Obama Administration, arguing that deferred action conflicted with the Immigration and Nationality Act, and was also an abdication of the president's constitutional obligation to "take care that the laws be faithfully executed."²⁴⁷ In contrast, cooperative enforcement relies on existing laws to move unauthorized immigrants into legal status, and thus cannot be challenged as an executive effort to bypass existing laws.

4. Normalizing Immigration Law

Cooperative enforcement might also help bring immigration enforcement policy back into the fold of mainstream administrative law practice and tradition. Today, immigration law is frequently treated as exceptional, and thus exempted from the norms of the administrative state, which in turn means that immigration officials do not look to the practices of other agency officials for guidance. The manner and method by which law is enforced can have an expressive value.²⁴⁸ If immigration officials were to embrace the enforcement policies of other administrative agencies, it would help to send the message that immigration is similar to other regulatory fields, such as the regulation of the environment, the workplace, or imported products, and that the regulatory initiatives that succeed in those fields also have a place in immigration enforcement.

Bringing immigration law back under the umbrella of the administrative state might even alter the public's perception of unauthorized immigrants. Unauthorized immigrants are often viewed as dangerous criminals, even though most immigration violations are not crimes, and even though

245. See *supra* Part I.

246. Brief for the Petitioners, *supra* note 12, at 5.

247. See *supra* Part I.

248. See *supra* note 205 and accompanying text.

immigrants are less likely to commit crimes than the general population.²⁴⁹ The public also tends to view immigrants in binary terms: They are either legal and thus “good,” or illegal and thus “bad.” But in fact, immigrants can shift in and out of legal status, as a number of federal laws recognize.²⁵⁰ If cooperative enforcement became the norm, it might change the public’s impression of the unauthorized population as permanently tainted by their illegal status. Rather than criminals who must be expelled from the United States, they could be viewed as temporary lawbreakers who can be rehabilitated—much like other regulated entities who sometimes break the law and then benefit from assistance by federal regulators.

V. CONCLUSION

The U.S. immigration bureaucracy has approached immigration enforcement as though there were only two choices: removal or forbearance. Although immigration officials spend enormous resources detaining and deporting unauthorized immigrants, historically they have not been able to remove more than about 4% of the unauthorized population each year.²⁵¹ As a result, immigration officials classify much of the unauthorized population as low priorities for removal and do not actively seek to remove them. But this removal-or-forbearance approach has only exacerbated the nation’s unauthorized immigration crisis, in which the size of the unauthorized population has ballooned even as immigration officials deport a record number of noncitizens.

This Article proposes that immigration authorities supplement the removal-or-forbearance dichotomy with a cooperative enforcement approach, using techniques that have been embraced by other administrative agencies. Under such an approach, immigration officials would work with a subset of unauthorized immigrants to help them regularize their status through a combination of education and outreach, assistance, flexible application of legal standards, and the liberal use of discretion. In doing so, immigration officials would be following the lead of multiple federal agencies that have abandoned an adversarial, punitive style of regulation for softer, more collaborative methods of promoting compliance. Just as regulators at the EPA, FDA, SEC, and OSHA have realized that it is more efficient and effective to work together with regulated entities to achieve their overall goals,

249. Walter Ewing et al., *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL (July 23, 2015), <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states> (describing the “stereotype” that immigrants are more likely to be criminals, but observing that the crime rate for both authorized and unauthorized immigrants is lower than the crime rate for the native-born population).

250. Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2048 (2008) (noting that many unauthorized immigrants can eventually obtain legal status).

251. The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, *supra* note 12, at 1.

immigration officials could reduce the unauthorized population at a lower cost—both in terms of dollars and societal disruption—if they sought to help unauthorized immigrants access existing pathways to legal status.

Although cooperative enforcement would not solve the nation's unauthorized immigration problems, it would provide a permanent solution for those unauthorized immigrants who are a low priority for removal in any presidential administration: long-term unauthorized immigrants with close U.S. citizen or LPR family members and without criminal records. Cooperative enforcement can be tailored to accommodate the immigration priorities of any administration—whether Republican or Democrat—which recognizes that removal of all or most of the 11.3 million unauthorized immigrants in the United States is not a realistic possibility. In addition, because cooperative enforcement uses existing laws permitting the shift from illegal to legal status, it avoids the charge of lawlessness leveled against President Obama's wide-scale use of prosecutorial discretion.

Finally, cooperative enforcement would be a small step toward bringing immigration back into the fold of mainstream administrative law. Federal regulators have seen the benefit of working together with regulated entities in fields such as environmental protection and workplace safety to help them meet federal standards; they should take the same approach to unauthorized immigrants, who would welcome the opportunity to legalize their status if only they knew how to do so.