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Enforcing Immigration Equity

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ENFORCING IMMIGRATION EQUITY

Jason A. Cade*

Congressional amendments to the immigration code in the 1990s significantly broadened grounds for removal while nearly eradicating opportunities for discretionary relief. The result has been a radical transformation of immigration law. In particular, the constriction of equitable discretion as an adjudicative tool has vested a new and critical responsibility in enforcement officials to implement rigid immigration rules in a normatively defensible way, primarily through the use of prosecutorial discretion. This Article contextualizes recent executive enforcement actions within this scheme and argues that the Obama Administration's targeted use of limited enforcement resources and implementation of initiatives such as Deferred Action for Childhood Arrivals reflect defensible efforts to systematize equitable decision making principles within the new world of American immigration law.

Having laid bare the practical realities of the modern immigration system, this Article then argues that reliance on executive discretion alone has thus far failed to ensure that individuals are deported only when justified. Of particular importance, the Department of Homeland Security under the current administration has all but abandoned any consideration of the normative merits of removal when it comes to noncitizens with any kind of criminal history. Indeed, the agency has used criminal history as an indiscriminate marker of undesirability, regardless of the seriousness of the underlying offense, the passage of time, the permanent resident status of the noncitizen, the severity of hardship that deportation would cause for the noncitizen's family, and any other mitigating factors. A deportation system that allocates all responsibility for fairness and proportionality to enforcement actors raises other problems as well, including lack of finality and heightened risk of conflict with other branches and levels of government. These difficulties in turn can stymie the use of enforcement discretion as an effective equitable tool.

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The situation cries out for legal redress. The reinvigoration of adjudicative discretion and rollback of overly broad removal grounds through statutory reform are goals well worth pursuing, and this Article describes important measures that lawmakers might take toward those ends. In the absence of congressional intervention, there remain important steps the Executive could take to help ensure the proportionality and fairness of the deportation system, despite the drawbacks of enforcement-based equity. This Article concludes by suggesting that if neither of the political branches takes adequate steps to address this new set of problems, it will be left to the federal judiciary to increase structural opportunities for equitable consideration through closer regulation of the modern deportation system.

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INTRODUCTION

On November 20, 2014, President Barack Obama announced an executive program that would allow some undocumented noncitizen parents of U.S. citizens and lawful permanent residents (LPRs) to seek a temporary reprieve from removal.¹ The initiative, called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), closely resembles Deferred Action for Childhood Arrivals (DACA), a similar program implemented in 2012 that gave some children and young adults the

1. See *Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <http://www.uscis.gov/immigrationaction> (last visited Oct. 21, 2015) [<http://perma.cc/DXN9-SHLX>].

opportunity to apply for discretionary deferment of removal.² These unusual executive immigration actions have drawn fierce criticism from some corners³ and praise from others.⁴ They have been targeted by ongoing litigation⁵ and proposed reversionary legislation.⁶

This Article contextualizes DAPA and DACA as part of a significant and ongoing transition in immigration law. These programs, though important in themselves, are best seen as one component of the broad relocation of equitable authority within the American deportation system from, back-end adjudicators to frontline enforcement officials. This Article explains the sources of this transformation, traces the primary ways in which the executive branch has attempted to implement equitable enforcement, and discusses the drawbacks of our new deportation system, which locates discretionary authority almost exclusively in enforcement actors.

For much of immigration law's history, immigration judges, as well as state and federal sentencing judges in criminal cases concerning noncitizens, were granted a large measure of equitable discretion. In deciding individual cases, these adjudicators were empowered to take account of the severity of deportation and circumstances that weighed for or against the potential deportee.⁷ In the late twentieth century, however, Congress discarded this approach. Instead, amendments to the immigration code heralded the rise of criminal history, very broadly defined, as the

2. Memorandum from Jeh Johnson, U.S. Sec'y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship and Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't, R. Gil Kerlikowske, Comm'r, U.S. Customs and Border Prot., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States As Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/9WFE-WWLN>].

3. See, e.g., Michael W. McConnell, Opinion, *Why Obama's Immigration Order Was Blocked*, WALL STREET J., Feb. 18, 2015, at A15; Jeff Sessions, *Sessions Comments on President's Impending Executive Amnesty Announcement*, JEFF SESSIONS: U.S. SENATOR FOR ALA. (Nov. 19, 2014), <http://www.sessions.senate.gov/public/index.cfm/news-releases?ID=E06532D6-FAA1-4DC8-9A3A-F310B2CB72CE> [<http://perma.cc/4FWD-K9LN>]; Jan Ting, *President Obama's "Deferred Action" Program for Illegal Aliens Is Plainly Unconstitutional*, CTR. FOR IMMIGR. STUDS. (Dec. 2014), <http://cis.org/Obama-Deferred-Action-Amnest-Executive-Action-Unconstitutional> [<http://perma.cc/Y9HU-U5RB>].

4. See, e.g., Dick Durbin, *Immigration and the DREAM Act*, DICK DURBIN: U.S. SENATOR ILL., <http://www.durbin.senate.gov/issues/immigration-and-the-dream-act> (last visited Oct. 21, 2015) [<http://perma.cc/AYN8-J84Z>]; ROBERTO G. GONZALES & ANGIE M. BAUTISTA-CHAVEZ, AM. IMMIGRATION COUNCIL, TWO YEARS AND COUNTING: ASSESSING THE GROWING POWER OF DACA (2014), <http://www.immigrationpolicy.org/special-reports/two-years-and-counting-assessing-growing-power-daca> [<http://perma.cc/9E3T-FVDU>]; ZENEN JAIMES PÉREZ, CTR. FOR AM. PROGRESS, HOW DACA HAS IMPROVED THE LIVES OF UNDOCUMENTED YOUNG PEOPLE (2014), <https://www.americanprogress.org/issues/immigration/report/2014/11/19/101868/how-daca-has-improved-the-lives-of-undocumented-young-people/> [<http://perma.cc/5XRQ-WM8R>].

5. See *Texas v. United States*, No. B-14-254, 2015 WL 648579, at *1 (S.D. Tex. Feb. 16, 2015) (preliminarily enjoining expansion of the DACA program and the rollout of the DAPA program).

6. See, e.g., Defund Amnesty Act of 2015, H.R. 155, 114th Cong. (as introduced by House, Jan. 6, 2015).

7. See *infra* Part I.

primary marker of undesirability, while squeezing consideration of humanitarian or fairness concerns almost completely out of the adjudicative stages of deportation or criminal proceedings. As a result of this statutory shift, considerations of equity enter the deportation system (if at all) primarily through the discretionary decisions of enforcement actors at both federal and state levels.⁸

The size of the deportable population in the United States, and the inability of most unauthorized persons to regularize their status, amplifies the relative importance of enforcement discretion in immigration law.⁹ Over eleven million noncitizens living in the United States are potentially removable on the basis of immigration violations.¹⁰ Many hundreds of thousands more are lawfully present but now deportable because of criminal convictions.¹¹ These numbers far outrun the enforcement resources that Congress has made available to the Executive. Indeed, current funding levels—the highest ever—permit the removal of about 400,000 persons per year, a number that must be apportioned between both interior and border enforcement.¹²

Any normatively justifiable deportation system requires equity. By “equity” or similar terms, this Article means “fair-mindedness” or proportionality.¹³ Equity mitigates the effect of overly broad, punitive, and inflexible statutes in ways that help ensure the law is fair and proportional

8. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 518–19 (2009) (“Prosecutorial discretion has thus overtaken the exercise of discretion by immigration judges when it comes to questions of relief.”).

9. See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 19–55 (2014) (explaining the political and historical factors that contributed to the size of the current unauthorized population and the connection with enforcement discretion); Cox & Rodríguez, *supra* note 8, at 510–14.

10. See *Unauthorized Immigrant Population, by State, 2012*, PEW RESEARCH CTR. (Nov. 18, 2014), <http://www.pewhispanic.org/interactives/unauthorized-immigrants-2012/> (indicating that 11.2 million unauthorized persons resided in the United States in 2012) [<http://perma.cc/L6J3-QVFD>].

11. DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 12–13 (2012); Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 77 (2014); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

12. See Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to All ICE Emps., Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011) [hereinafter Morton Priorities Memo], <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (stating that the agency only has resources to remove a maximum of 400,000 persons per year) [<http://perma.cc/DE48-485T>].

13. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1658, 1662–88 (2010) (equating “equity” with “fair-mindedness” and citing Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 205 (2003)). In this Article, I do not use the term “equity” in the sense of the specific doctrines or remedies developed in the English Court of Chancery, strains of which survive in modern jurisprudence. See generally Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997 (2015).

in its application to individual human beings.¹⁴ This principle is well recognized in criminal law, where the extensive proliferation of penal laws to regulate behavior that is not clearly blameworthy, the establishment of mandatory minimum sentences, and the general inability of formal law to predict and accommodate all possible mitigating circumstances create the potential for injustice in many cases. These features of our criminal law have given rise to a system of prosecutorial discretion, under which enforcement officials wield wide-ranging authority to determine who should be prosecuted and what alleged lawbreakers should be charged with.¹⁵ While that degree of discretion creates the potential for overcharging and other forms of prosecutorial abuse, it is recognized as essential to temper and individuate the broad application of severe penalties within the criminal law system.

The removal system similarly imposes dire penalties on the basis of a broad range of civil infractions. These penalties consist primarily of deportation followed by lengthy or permanent bars to lawful return, which lead to collateral consequences, including the separation of caregivers from U.S. citizen children and the loss of workforce.¹⁶ Detention during deportation proceedings is also rampant.¹⁷ Sanctions as severe as these should be scaled to the gravity of the underlying offense and balanced against the noncitizen's personal mitigating circumstances.¹⁸ Where proportionality considerations are not part of back-end adjudicators' discretion, they must be channeled to other parts of the process.

President Obama's Administration clearly recognizes that the breadth and severity of modern immigration rules, along with the scale of the

14. See, e.g., Aristotle, *Nicomachean Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE bk. V, ch. 10, 1795–96 (Barnes ed., 1984) (“[A]ll law is universal but about some things it is not possible to make a universal statement which will be correct. . . . And this is the nature of the equitable, a correction of law where it is defective owing to its universality.”); Bowers, *supra* note 13, at 1685 (“Equitable discretion . . . tempers and thereby perfects broad laws.”); see also *infra* Part III.A.

15. See *infra* Part I.B.

16. See *infra* Part I.A; text accompanying notes 310–15.

17. See *infra* notes 276–79.

18. See Austin Lovegrove, *Proportionality Theory, Personal Mitigation, and the People's Sense of Justice*, 69 CAMBRIDGE L.J. 321, 330 (2010) (“[T]he severity of the punishment should be proportionate to the seriousness of the offence in question; but it also should be appropriate, having regard to the offender's personal mitigation.”); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 56 (1992) (“People have a sense that punishments scaled to the gravity of offenses are fairer than punishments that are not.”); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416 (2012) (“Proportionality is the notion that the severity of a sanction should not be excessive in relation to the gravity of an offense.”). Concerns based on equity, proportionality, or justice are generally thought to be distinct from those based on mercy or forgiveness. See generally Allison Brownell Tirres, *Mercy in Immigration Law*, 2013 BYU L. REV. 1563 (arguing that immigration reform should be centered on the language of justice rather than the language of mercy). *But cf.* Bowers, *supra* note 13, at 1681 (“A distinction can be drawn between the impulse to unjustly exercise mercy to provide an exception from unquestionably deserved punishment and the impulse to equitably exercise mercy to bridge the gap ‘between the inflexibility of the law and moral justice.’” (quoting Alwynne Smart, *Mercy*, 43 PHILOSOPHY 345, 355 (1968))).

removable noncitizen population, have created a system that consolidates tremendous power over the equitable implementation of immigration law in enforcement actors.¹⁹ It argued as much to the U.S. Supreme Court in *Arizona v. United States*,²⁰ when the administration challenged state immigration laws that might interfere with its own enforcement priorities, including decisions *not* to pursue some individuals for equitable reasons.²¹ Furthermore, in numerous public statements and internal agency policy memoranda, the Obama Administration has signaled its intention to “do the right thing” by ensuring that individual deportations are normatively justified.²²

Underlying the Executive’s approach to equitable immigration enforcement is a system of tiered enforcement priorities, which have structured the Administration’s choices about how to distribute limited enforcement resources and guided its approach to the exercise of discretion in individual cases.²³ First, with respect to its distribution of enforcement resources, the Obama Administration has shifted the Department of Homeland Security’s (DHS) focus toward border removals and programs that target noncitizens with criminal histories. Thus, while the Obama Administration has deported far more noncitizens than any previous administration, a majority of those removals appear to be recent border crossers or “criminal aliens.”²⁴

Second, since 2011, policy heads in Immigration and Customs Enforcement (ICE), a subagency of DHS, have labored to train and encourage agents and attorneys to exercise equitable discretion by deferring or eschewing removal in appropriate cases.²⁵ As I have shown elsewhere, this administrative move to expand prosecutorial discretion has had mixed results.²⁶ Many ICE operatives have strenuously resisted the call for more equitable enforcement.²⁷ To be sure, the agency’s efforts in this regard have increased consideration of mitigating factors in individual cases to some degree. Even so, ground-level implementation of the prosecutorial discretion guidelines remains highly inconsistent across the nation.²⁸

Third, DACA and DAPA represent large and categorical discretionary policy initiatives. These programs are designed to bring noncitizens who meet certain equitable criteria out of the shadows to affirmatively present themselves for discretionary consideration of temporary reprieves from

19. *See infra* Part I.

20. 132 S. Ct. 2492 (2013).

21. *See infra* Part II.A.

22. *See infra* Part II.A.

23. *See, e.g.*, 6 U.S.C. § 202(5) (2012) (charging the Secretary of Homeland Security with “[e]stablishing national immigration enforcement policies and priorities”); Morton Priorities Memo, *supra* note 12.

24. “Criminal aliens,” as defined by DHS, means noncitizens who have at least one prior conviction. *See generally infra* Part II.B.1.

25. *See infra* Part II.B.2.

26. *See generally* Cade, *supra* note 11.

27. *See infra* Part II.B.2.

28. *See infra* Part II.B.2.

deportation.²⁹ Importantly, the use of the DACA and DAPA mechanisms depart from the typical invocation of prosecutorial discretion in that they assign equitable assessments to a special unit within a separate DHS agency.³⁰ This institutional design for discretionary consideration offers the possibility of significant gains in transparency and consistency, not least because of the crushing workloads currently facing ICE prosecutors in deportation court.³¹ On the other hand, this division of agency functions has led some observers to argue that these programs involve the affirmative grant of benefits as opposed to discretionary forbearance with regard to removal.³² Indeed, on February 16, 2015, a federal district court preliminarily enjoined the rollout of DAPA along with the expanded version of DACA announced by President Obama in late 2014.³³

Although some critics of President Obama's enforcement policies argue he is "soft" on immigration,³⁴ the on-the-ground reality is more complex. The immigration enforcement agencies have taken an increasingly hard line against all noncitizens defined as "criminal aliens."³⁵ This designation all but guarantees removal, regardless of the seriousness of the underlying offense, the passage of time, the permanent resident status of the noncitizen, the degree of hardship that deportation would cause the noncitizen's family, or other mitigating factors.³⁶ In addition, government attorneys have pushed for expansive interpretations of the already broad criminal grounds of deportation, and they continue to do so even in the face of multiple reversals by the U.S. Supreme Court for ignoring "common sense."³⁷ The most recent of these cases, *Mellouli v. Lynch*,³⁸ concerned the government's deportation of a lawful permanent resident with significant equities who had been convicted of possessing a sock as drug paraphernalia.³⁹

The government's stringent, indiscriminate approach with respect to noncitizens who encounter the criminal justice system manifests in other ways as well. ICE operatives teach sympathetic local district attorneys' offices how to maximize the likelihood of removal following prosecution.⁴⁰

29. See *infra* Part II.B.3.

30. See *infra* Part II.B.3.

31. See Cade, *supra* note 11, at 50–54; see also *infra* text accompanying notes 206–09, 222–36.

32. See *infra* Part III.B.

33. Michael D. Shear & Julia Preston, *Dealt Setback, Obama Puts Off Immigrant Plan*, N.Y. TIMES, Feb. 18, 2015, at A1. See generally *infra* Part III.B.

34. See, e.g., Caitlin Dickson, *Is Obama Really the Deporter-in-Chief? Yes and No.*, DAILY BEAST (April 30, 2014), <http://www.thedailybeast.com/articles/2014/04/30/is-obama-really-the-deporter-in-chief-yes-and-no.html> ("To immigration enforcement hawks, [President Obama] is soft on illegal migrants, using his executive authority to make the interior of the country a haven for certain classes of undocumented immigrants.") [<http://perma.cc/P8LT-88F6>].

35. See *infra* Part III.A.

36. See Julia Preston, *Report Finds Deportations Focus on Criminal Records*, N.Y. TIMES, Apr. 30, 2014, at A16.

37. See *infra* Part III.A.

38. 135 S. Ct. 1980 (2015).

39. *Id.* at 1985.

40. See *infra* Part III.A.

Even arrests without conviction can trigger regulatory enforcement, as cooperative and integrated data-sharing programs in the criminal justice system have become ICE's primary method of identifying deportable noncitizens in the interior United States.⁴¹ Noncitizens with convictions are frequently detained during the pendency of removal proceedings.⁴² Furthermore, federal authorities outside the DHS now actively participate in the deportation (and criminalization) of noncitizens; indeed, crimes of migration (i.e., illegal entry or illegal reentry) have become the most prosecuted federal offenses by U.S. Attorneys.⁴³

In short, while the rise in prosecutorial discretion initiatives and the shifting of resources reflect an executive branch grappling with its obligation to implement immigration enforcement in normatively justifiable ways, the DHS under Obama has also embraced criminal history as a near-irrevocable proxy for noncitizen undesirability. Moreover, what qualifies as criminal history for this purpose is extremely broad—most of the criminal aliens removed in recent years have been convicted only of migration crimes, traffic offenses, or other misdemeanors.⁴⁴ Thus, equity through enforcement discretion has fallen short when it comes to noncitizens who encounter the criminal justice system.

There are other drawbacks to lodging deportation discretion exclusively in the hands of criminal and immigration law enforcers. Intense workloads, law enforcement biases, policy resistance, and other features of the removal system increase the likelihood that the DHS's ground-level operatives will inconsistently consider equity in enforcement decisions.⁴⁵ Enforcement-based equity also fails to provide the finality that has historically accompanied adjudicative discretionary relief, because it does not actually confer a change in immigration status, instead leaving the noncitizen in perpetual limbo.⁴⁶ Finally, attempts to systematize equitable consideration through enforcement discretion are more likely to be met with skepticism and controversy, as demonstrated by litigation and legislation embroiling President Obama's rollout of the DACA and DAPA initiatives.⁴⁷

This situation cries out for redress. Instead of continuing to rely on prosecutorial discretion to ensure fairness in the deportation system, Congress should enact legislation that both scales back the breadth of removal provisions and restores opportunities for adjudicators to balance equities in a wider swath of individual cases. Likewise, Congress should consider legalization programs that would allow undocumented persons with significant equities to become lawfully present, thus easing the burden on enforcement officials to sort out which of the eleven million removable noncitizens would not justifiably be deported. These reforms are critical if

41. *See infra* text accompanying notes 171–90, 282–84.

42. *See infra* text accompanying notes 276–79.

43. *See infra* text accompanying notes 280–81.

44. *See infra* text accompanying notes 191–92, 247–72.

45. *See infra* text accompanying notes 200–11, 238–45.

46. *See infra* Part III.C.

47. *See infra* Part III.B.

we want a removal system that consistently avoids disproportionate deportations.

It must be acknowledged, however, that comprehensive reform of statutory immigration law is notoriously difficult to accomplish.⁴⁸ Furthermore, even if Congress were to enact new laws in the near future, lawmakers might not significantly retreat from the criminal history proxy or establish wide scale legalization.⁴⁹ In the absence of legislative reform, the Executive must continue to strive to implement immigration laws in normatively justifiable ways, including when it seeks to deport noncitizens with criminal history. To be sure, this path to proportionality will continue to present challenges, and the controversy and litigation that have stymied programs like DACA may persuade executive branch officials that efforts to make equitable enforcement more systematic and transparent carry significant political risk. It would not be entirely surprising if, under future administrations, DHS either throws enforcement discretion completely to the wind or returns to the internal, secretive processes that were more common in the 1970s.⁵⁰ Those results would be unfortunate, but given these realities, it ultimately may be left to courts to increase structural opportunities for equitable consideration through closer scrutiny of the removal system.⁵¹

In undertaking the above analysis, this Article connects and contributes to several literatures. First, it continues recent work that a number of scholars have published on the role (and efficacy) of prosecutorial discretion in immigration law.⁵² This Article contextualizes wide scale prosecutorial discretion as a necessary, if imperfect, component of a system

48. See Burgess Everett & Seung Min Kim, *Immigration Reform Looks Dead in This Congress*, POLITICO (Mar. 9, 2015, 5:36 AM), <http://www.politico.com/story/2015/03/immigration-reform-congress-115880.html> [<http://perma.cc/CT26-GHMC>].

49. Much like criminal laws, political incentives tend toward the punitive when it comes to regulating noncitizens with any criminal history. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523–64 (2001) (describing legislators' political incentives in enacting punitive criminal codes).

50. See Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42, 42–43 (1976).

51. See Jason Cade, Mellouli in the Context of the Modern Deportation System, CRIMMIGRATION (June 5, 2015), <http://crimmigration.com/2015/06/05/mellouli-in-the-context-of-the-modern-deportation-system/> [<http://perma.cc/XD8P-KKVL>].

52. For a representative but incomplete sampling of this literature, see generally MOTOMURA, *supra* note 9; SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015); Cade, *supra* note 11; Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013); Erin Corcoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law*, 48 LOY. L.A. L. REV. 119 (2014); Cox & Rodríguez, *supra* note 8; Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619 (2012); David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011); Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195 (2014).

institutionally designed to locate primary responsibility for equitable decision making in enforcement actors.⁵³ More particularly, it parses and explains distinctions between individual case-by-case discretion, categorical initiatives like DACA and DAPA, and the use of targeted enforcement resources within this institutional design. Second, this Article draws on a substantial body of scholarly work on the integration of criminal law and immigration enforcement,⁵⁴ pointing out the particular implications of “cimmigration law” for the administration of equity in the modern removal system.

Third, this Article connects the role of prosecutorial discretion in immigration law with an emerging literature that argues for more proportionality in the immigration system—work that thus far has focused primarily on theoretical judicial challenges and legislative reforms.⁵⁵ To be sure, I concur with many commentators that Congress should amend the immigration code to roll back overly broad removal provisions and restore

53. Adam Cox and Cristina Rodríguez thoughtfully described in 2009 how reforms to the immigration code, as well as other historical and political developments in immigration law, have shifted substantial screening power over the admission and removal of immigrants to the executive branch and particularly to enforcement officials. See Cox & Rodríguez, *supra* note 8. In this Article, I rely primarily on the lens of proportionality to elaborate on that seminal work.

54. For a representative but incomplete sampling of this literature, see generally Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013); César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457; Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law”*, 29 N.C. J. INT’L L. & COM. REG. 639 (2004); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Yolanda Vázquez, *Constructing Cimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO STATE L.J. 599 (2015).

55. See KANSTROOM, *supra* note 11, at 216–24 (arguing that the United States should look to international human rights law for models of proportionality in the administration of immigration law); Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1303 (2013) (arguing for legislative reforms that would “grant the right to remain to categories of noncitizens based on immigration status, length of residence, family ties, military service, or other factors that accurately reflect connections”); Jordan Cunnings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 560–68 (2015) (arguing primarily for legislative solutions to reduce the possibility of deportation on the basis of minor marijuana offenses); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 520, 524–27 (2007) (arguing that courts could recognize and enforce greater procedural rights in immigration court to prevent “crime-related deportations [that] are grossly out of proportion to the underlying misconduct”); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1728–40 (2009) (exploring possibilities for a legislative scheme that would calibrate immigration sanctions based on the underlying goals of the immigration system and the strength of the noncitizen’s family and community ties); Wishnie, *supra* note 18, at 416 (arguing that individual removal orders should be subject to constitutional challenges based on disproportionality).

adjudicative equity, and I offer guidelines toward those ends. But I also confront the fact that prospects for legislative reform in this area remain dim and accordingly suggest practical measures the Executive might undertake to improve proportionality and fairness in the removal system.

Part I of this Article explains how the statutory amendments that broadened the criminal removal grounds and narrowed adjudicative equity, along with a substantial mismatch between funding and the size of the deportable population, have delegated to enforcement officials the responsibility to keep the system normatively just. Part II discusses the Obama Administration's efforts to systematize and implement equitable enforcement discretion by focusing on resource distribution, prosecutorial discretion, and the deferred action initiatives. Part III identifies the drawbacks and limits of enforcement discretion, highlighting the Administration's failure to ensure that noncitizens—specifically those with only minor criminal history—are not unjustifiably deported. Part IV outlines a range of potential legislative and executive actions that would improve the deportation system's commitment to proportionality. Finally, this Article concludes that in the absence of adequate legislative or executive reform toward these ends, courts may end up playing a greater role in regulating the deportation system.

I. THE DECLINE OF FORMAL EQUITY IN IMMIGRATION LAW

Broadly speaking, two groups of noncitizens are subject to deportation under U.S. immigration law. One consists of undocumented persons, who are deportable merely on the basis of being present in the United States without authorization.⁵⁶ The other group consists of lawfully present noncitizens who become deportable after being convicted of certain offenses or who engage in other prohibited behavior, such as unlawful voting. As the following sections explain, over time Congress has reduced the opportunities for noncitizens in either group to avoid deportation through adjudicative equitable discretion, instead shifting to a system that depends heavily on enforcement discretion to ensure proportionality.

A. *A Categorically Unforgiving Code*

Immigration law today extensively relies on criminal history, both before and after entry to the United States, to screen out undesirable noncitizens. Beginning in 1917, Congress periodically enacted laws providing for the deportation of noncitizens convicted of certain crimes, subject to

56. The applicable statutory provision depends on whether the noncitizen entered without inspection, overstayed an authorized period of admission, or failed to comply with specific visa requirements. *See* Immigration and Nationality Act (INA) of 2002 § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2012) (providing that persons present in the United States without having been admitted are inadmissible); 8 U.S.C. § 1227(a)(1)(B) (providing that persons who overstay authorized periods of admission are deportable); *id.* § 1227(a)(1)(C)(i) (providing that persons who violate the terms of their admission are deportable).

limitations, with various possibilities for relief.⁵⁷ Until the late twentieth century, however, criminal history did not play a significant role in determining the desirability of noncitizens, whether already inside U.S. borders or seeking entry for the first time.⁵⁸ The criminal grounds for removal that did exist were generally subject to limitations that prevented lawfully resident noncitizens from being deported on the basis of conduct that occurred long ago, or after they had been in lawful permanent status for a significant period of time.⁵⁹ Additionally, those who were subject to deportation, whether lawfully present or not, were usually afforded the opportunity to argue that their positive equities and connections in the United States outweighed the gravity of their infractions, even when convicted of serious criminal activity.⁶⁰

Today, immigration penalties are deeply enmeshed with (and often unavoidable consequences of) criminal convictions.⁶¹ As the Supreme Court observed in *Padilla v. Kentucky*,⁶² even minor convictions trigger detention, establish grounds for the removal of LPRs and other noncitizens, restrict most discretionary relief, and generally preclude the possibility of lawful return to the United States.⁶³ In the modern immigration code, criminal history has become a nearly irrevocable proxy for undesirability.

The hardwiring of the criminal history proxy consists of statutory provisions that impose immigration consequences on the basis of convictions. In the late twentieth century, Congress significantly expanded the kinds of criminal conduct triggering immigration consequences.⁶⁴ The precise consequences vary depending on the nature of the conviction and (sometimes) sentence, but they include deportation, detention, and

57. See, e.g., Act of Feb. 5, 1917, ch. 29, §§ 3, 19, 39 Stat. 874 (providing for the deportation of noncitizens convicted of a crime involving moral turpitude within five years of entry, or two crimes involving moral turpitude at any time, if a sentence of one year or more was imposed). See generally DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 133–36 (2007); Hernández, *supra* note 54, at 1464–66.

58. According to the federal government's statistics, between 1892 and 1984, 14,287 persons were excluded on the basis of a criminal or narcotics violation, out of a total of 633,918 exclusions during that period. U.S. IMMIGRATION & NATURALIZATION SERV., 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 175 tbl.60. During the period between 1908 and 1980, 56,669 persons were deported on the basis of a criminal or narcotics violation, out of a total of 812,915 persons deported during that period. *Id.* at 183 tbl.65. See generally Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758 (2013).

59. See generally THOMAS A. ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 664–74 (7th ed. 2012); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 621–24 (2006).

60. See *infra* text accompanying notes 96–102.

61. *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010); see also *id.* at 369 (noting that removal is a “presumptively mandatory” consequence of a wide range of convictions). Indeed, the breadth of the criminal history proxy in modern immigration law led the *Padilla* Court to expand noncitizens’ Sixth Amendment right to effective criminal counsel to include accurate information about the immigration consequences of convictions. *Id.*; see also Cade, *supra* note 51.

62. 559 U.S. 356 (2010).

63. See *infra* text accompanying notes 70–85, 100–15.

64. See generally Morawetz, *supra* note 11.

prohibition on lawful return, either for a lengthy period or permanently. At the same time, Congress tightly constricted opportunities for discretionary relief from removal at both the federal and state levels.

The most significant new criminal deportation ground enacted in this period was the “aggravated felony.”⁶⁵ Crimes that fall within the aggravated felony category trigger mandatory detention, deportation, and a permanent bar on lawful return to the United States.⁶⁶ Aggravated felons are statutorily disqualified from eligibility for asylum or other discretionary relief from removal.⁶⁷ Additionally, any noncitizen who is not an LPR and who has a conviction that DHS deems an aggravated felony can be placed in the “administrative removal” process—an expedited forum that offers even fewer protections or opportunities for remedial leniency than are available in regular immigration court.⁶⁸

Aggravated felonies initially consisted of only three serious offenses: murder, firearms trafficking, and drug trafficking.⁶⁹ Now the list includes twenty-eight offenses.⁷⁰ The aggravated felony categories encompass many minor offenses, including crimes defined as misdemeanors and barely punished under state penal law.⁷¹ Case law is replete with examples of how broadly and indiscriminately the aggravated felony category can reach, encompassing misdemeanor battery where no jail time is served, the sale of

65. INA § 101(a)(43)(A)–(U), 8 U.S.C. § 1101(a)(43)(A)–(U) (2012).

66. *See* 8 U.S.C. § 1182(a)(9)(A)(ii) (“Any alien . . . who seeks admission . . . at any time in the case of an alien convicted of an aggravated felony[] is inadmissible.”).

67. *See id.* § 1158(b)(2)(B)(i) (aggravated felony considered to be a “particularly serious crime” barring asylum and withholding of removal); *id.* § 1229b(a)(3) (cancellation of removal unavailable to LPRs convicted of an aggravated felony); *id.* § 1229b(b)(1)(C) (cancellation of removal unavailable to non-LPRs convicted of an aggravated felony or other criminal offenses specified in 8 U.S.C. §§ 1182(a)(2), 1227(a)(2), or 1227(a)(3)).

68. *See id.* § 1228(b)(1)–(2). *See generally* JOHN F. SIMANSKI, DEP’T. OF HOMELAND SEC.: OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013 2, Box 1 (2014), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf (“Administrative Removal: The removal of an alien not admitted for permanent residence, or of an alien admitted for permanent residence on a conditional basis pursuant to section 216 of the INA, under a DHS order based on the determination that the individual has been convicted of an aggravated felony (INA § 238(b)(1)). The alien may be removed without a hearing before an immigration judge.”) [<http://perma.cc/VF52-KR5Z>]; ALISON SISKIN, CONG. RESEARCH SERV., R43892, ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS 9–10 (2015) (describing expedited removal of non-LPRs deemed to have been convicted of aggravated felonies pursuant to INA section 238(b)).

69. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342, 7344(a), 102 Stat. 4181, 4469–71 (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii) (2012)).

70. 8 U.S.C. § 1101(a)(43)(A)–(U). Although there are only twenty-one subsections, several of the sections describe multiple offenses. *See, e.g., id.* § 1101(a)(43)(A) (defining aggravated felony to include murder, rape, or sexual abuse of a minor). Some of the aggravated felony grounds create further subcategories. *See, e.g., id.* § 1101(a)(43)(F) (crimes of violence as defined in 18 U.S.C. § 16 “for which the term of imprisonment [is] at least one year”); *id.* § 1101(a)(43)(G) (theft offenses “for which the term of imprisonment [is] at least one year”).

71. *See, e.g., id.* § 1101(a)(43)(G) (theft offenses “for which the term of imprisonment [is] at least one year”).

a single marijuana cigarette, simple marijuana possession (in some circumstances), petty shoplifting offenses, and other minor crimes.⁷²

Congress has also expanded the narcotics ground of removal to include any controlled substance offense. Lawfully present noncitizens with a controlled substance conviction, with the tiny exception of a single conviction for simple possession of thirty grams or less of marijuana, find themselves deportable and subject to mandatory detention during the pendency of their proceedings.⁷³ Although many states punish misdemeanor drug offenses only with small fines,⁷⁴ the level of punishment does not matter in triggering the controlled substance ground of removal.⁷⁵ Convictions for “domestic violence” crimes also trigger deportation, and, as with the controlled substance ground, the immigration code is indifferent as to whether the state provides for lenient sentences, diversion, or alternatives to incarceration.⁷⁶

Crimes involving moral turpitude (CIMT) are another expansive deportation category that includes both serious and minor offenses. For example, the CIMT category includes petty shoplifting,⁷⁷ theft of service offenses like turnstile jumping,⁷⁸ misdemeanor indecent exposure,⁷⁹ and passing bad checks.⁸⁰ Lawfully present noncitizens are deportable for one CIMT committed within five years of admission, or two CIMTs at any time, even if the criminal punishment amounts only to a fine or community service.⁸¹ While this category has been a ground of removal for nearly a century, until the 1990s multiple levels of equitable consideration were baked into the immigration code, giving both criminal and immigration judges authority to consider whether removal was appropriate in individual cases.⁸² Today, the commission of two CIMTs all but compels

72. See Cade, *supra* note 58.

73. 8 U.S.C. § 1227(a)(2)(B)(i).

74. See, e.g., CAL. HEALTH & SAFETY CODE § 11357(b) (West 2014); COLO. REV. STAT. ANN. § 18-18-406(1) (2014); MINN. STAT. ANN. § 152.027(4) (West 2012); NEV. REV. STAT. ANN. § 453.336(4)(a) (West 2013); N.J. STAT. ANN. § 2C:35-10(a)(4) (West 2013); N.Y. PENAL LAW §§ 221.05, .10 (McKinney 2013).

75. Cade, *supra* note 58, at 1760; 8 U.S.C. § 1227(a)(2)(B).

76. 8 U.S.C. § 1227(a)(2)(E).

77. *Da Rosa Silva v. Immigration & Naturalization Serv.*, 263 F. Supp. 2d 1005, 1011 (E.D. Pa. 2003) (holding that shoplifting is a crime constituting moral turpitude).

78. See *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).

79. See *Matter of Cortes Medina*, 26 I. & N. Dec. 79, 80 (B.I.A. 2013) (holding that CAL. PENAL CODE § 314(1) (2012), which includes misdemeanor-level indecent exposure violations, is a CIMT).

80. See, e.g., N.J. STAT. ANN. § 2C:21-2.4 (West 2013) (classifying the offense of passing bad checks as a “disorderly persons offense”); *Baer v. Norene*, 79 F.2d 340, 341 (9th Cir. 1935) (describing check forgery as an offense that involves moral turpitude); Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 312–13 (1997) (explaining that passing bad checks is a crime that may involve moral turpitude under deportation law).

81. 8 U.S.C. § 1227(a)(2)(A)(i) (CIMT within five years of admission). Two CIMTs make noncitizens deportable regardless of whether either was committed within five years of admission. *Id.* § 1227(a)(2)(A)(ii).

82. See *infra* notes 95–101 and accompanying text.

deportation.⁸³ Finally, although a single CIMT conviction does not categorically bar discretionary relief, in most cases no such relief will be available as a practical matter, as explained more thoroughly below.⁸⁴

A host of other criminal offenses inevitably lead to deportation.⁸⁵ In addition, although not all grounds of deportation mandate detention, noncitizens facing any criminal ground of removal are often detained on a discretionary basis.⁸⁶ Indeed, it appears that Congress has *required* that at least 34,000 persons be kept in immigration detention every single day.⁸⁷

Members of Congress also were concerned about noncitizens who managed to avoid conviction-based removals, despite their admission of guilt, through deferred adjudication or similar criminal court processes.⁸⁸ The legislative solution was to enact, as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a special, broader definition of “conviction” for immigration purposes.⁸⁹ Thus, under the current immigration code, a noncitizen qualifies as “convicted” so long as there was an adjudication or admission of guilt plus the imposition of any kind of penalty.⁹⁰ This expansive definition is of rising importance because state legislatures, prosecutors, and criminal court judges increasingly rely on diversion programs as opposed to incarceration for a wide range of offenses, including low-level drug, domestic violence, and traffic crimes.⁹¹ The key point is that even lawfully present persons who are tracked into diversion programs—and thus have the chance to clear their records for

83. 8 U.S.C. § 1227(a)(2)(A)(ii) (convictions of two or more crimes involving moral turpitude make any noncitizen deportable regardless of the length of sentence or date of commission); *id.* § 1229b(b)(1)(B)–(C) (nonpermanent residents ineligible for cancellation of removal if they lack good moral character or if convicted under 8 U.S.C. §§ 1182(a)(2), 1227(a)(2), or 1227(a)(3)).

84. *See infra* note 106 and accompanying text.

85. *See generally* MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS (5th ed. 2012).

86. *See* César Cuauhtémoc García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. REV. 1346, 1348–50, 1379–88 (2014).

87. Ted Robbins, *Little-Known Immigration Mandate Keeps Detention Beds Full*, NPR (Nov. 19, 2013, 3:05 AM), <http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full> [<http://perma.cc/VJ5L-JR9R>]. Some scholars have argued that Congress has required only that 34,000 detention beds be available, not necessarily that they be filled. *See, e.g.*, César Cuauhtémoc García Hernández, *More Humane Immigration Law*, CRIMMIGRATION (March 17, 2014), <http://crimmigration.com/2014/03/17/more-humane-immigration-law/> [<http://perma.cc/LKU9-6LK9>].

88. *See, e.g.*, H.R. REP. NO. 104-828, at 224 (1996) (Conf. Rep.) (indicating that members of Congress intended that a confession of guilt would be sufficient to establish a conviction for immigration purposes, even in cases where adjudication is deferred). *See generally* Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 380–81, 418–19 (2012).

89. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2012) (defining “conviction” as “a formal judgment of guilt . . . entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed”).

90. *Id.*

91. Cade, *supra* note 88, at 394–401.

state law purposes—remain “convicted” for federal immigration law purposes and are subject to deportation and other immigration consequences.

The Immigration and Nationality Act’s (INA) broad definition of conviction has facilitated other harsh results that many in Congress likely never foresaw but that are now commonplace.⁹² For example, the agency has applied this provision to justify removing noncitizens while their appeals were still pending on direct appeal,⁹³ as well as persons whose convictions were judicially expunged or vacated on rehabilitative rather than procedural grounds.⁹⁴

Even as Congress dramatically expanded criminal-based deportation, it simultaneously took a scalpel to the statutory opportunities for equitable adjudicatory assessment that had been a part of immigration law since the enactment of the first criminal deportation provisions. To begin with, Congress removed the ability of state law enforcement actors to avert the immigration consequences of convictions. From 1917 to 1990, the INA had explicitly delegated to state or federal judges presiding over noncitizen criminal cases the “authority to decide whether a particular conviction should be disregarded as a basis for deportation.”⁹⁵ This mechanism, which authorized issuance of a Judicial Recommendation Against Deportation (JRAD), was grounded in the understanding that the criminal court judge had access to valuable information about the facts of the crime and the

92. See, e.g., *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512, 529–46 (B.I.A. 1999) (Villageliu, Board Member, dissenting) (noting that the legislative record for IIRIRA only evinced intent to eliminate deferred adjudications and said nothing of vacatures and expungements).

93. See, e.g., *Waugh v. Holder*, 642 F.3d 1279, 1284 (10th Cir. 2011) (agreeing with the Government’s argument that under the INA’s definition of conviction, noncitizens may be deported while their convictions are still pending on direct appeal); *Planes v. Holder*, 652 F.3d 991, 996 (9th Cir. 2011) (same); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (same); *Moosa v. INS*, 171 F.3d 994, 1009 (5th Cir. 1999) (observing in dicta that IIRIRA abrogated the finality rule); Respondent’s Answer to Petition for Rehearing En Banc at 6–7, *Planes*, 652 F.3d 991 (No. 07-70730) (presenting the government’s argument that under the INA’s definition of conviction, noncitizens may be deported while their convictions are still pending on direct appeal).

94. Convictions that have been vacated for procedural or substantive defects generally will not trigger immigration consequences. The complex and inconsistent body of law in this area follows a tortuous legislative and judicial history. See generally *Matter of Pickering*, 23 I. & N. Dec. 621, 624 (B.I.A. 2003), *rev’d on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378, 1379–80 (B.I.A. 2000); *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512 (B.I.A. 1999), *rev’d on other grounds*, *Lujan-Armendariz v. INS*, 222 F.3d 728, 749 (9th Cir. 2000) (holding on equal protection grounds that expungement of first time drug offenses under state law should be given preclusive effect where the offender would meet the requirements of the Federal First Offender Act (FFOA)), *overruled by Nunez-Reyes v. Holder*, 646 F.3d 684, 688 (9th Cir. 2011) (holding that equal protection does not require expunged state convictions to be treated the same as federal drug convictions expunged under FFOA); Cade, *supra* note 88.

95. *Padilla v. Kentucky*, 559 U.S. 356, 362 (2010) (quoting *Janvier v. United States*, 793 F.2d 449, 452 (2d Cir. 1986)); see also Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge As Immigration Judge*, 51 EMORY L.J. 1131, 1145–51 (2002) (discussing Judicial Recommendations Against Deportation).

defendant's circumstances.⁹⁶ JRADs offered sentencing judges a powerful tool to avert unjust removals.⁹⁷ In 1990, however, Congress stripped state and federal courts of the ability to issue this equitable relief.⁹⁸ Another equity-squelching legislative reform from the 1990s affected state authority to limit the impact of convictions in the interest of justice, allowing immigration authorities to treat many (though not all) convictions as deportable offenses even when the noncitizen has been fully and unconditionally pardoned.⁹⁹

Congress also slashed adjudicative equitable relief at the federal level in this era. Before 1996, immigration judges were authorized by the INA to determine whether deportation was warranted in individual cases based on factors such as the nature of the offense, the length of the noncitizen's residence, the hardship that deportation would visit on the noncitizen's family members, and evidence of rehabilitation.¹⁰⁰ Immigration judges were empowered to make this determination for both lawfully present and undocumented noncitizens.¹⁰¹

The modern discretionary analogue, called "cancellation of removal," is less generous. To determine whether to grant this relief, immigration judges "must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf"¹⁰² For LPRs, cancellation is available only to those noncitizens who have resided continuously in the United States for seven years after lawful admission and who have been in LPR status for at least five years.¹⁰³ Furthermore, to qualify, noncitizens must have "good moral character" within the preceding

96. See, e.g., Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 39–40 (2010). Stephen Lee has suggested that another policy goal promoted by JRADs is increased transparency and supervision over the ways that criminal justice actors influence downstream immigration consequences. Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 598–99 (2013).

97. *Padilla*, 559 U.S. at 361–62.

98. See Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978 (1990).

99. See generally Cade, *supra* note 88, at 373–80; Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, 22 B.U. PUB. INT. L.J. 293 (2013); Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253 (2010).

100. See Lory D. Rosenberg & Denyse Sabagh, *A Practitioner's Guide to INA § 212(c)*, 93-04 IMMIGR. BRIEFINGS 1, 1 (1993).

101. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187, *repealed by* IIRIRA, Pub. L. No. 104-208, div. C, § 304(b), 110 Stat. 3009-546, 3009-597 (1996); former INA § 244, 8 U.S.C. § 1254 (*repealed* Sept. 30, 1996) (providing for suspension of deportation for non-LPRs); see also IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 1353 (14th ed. 2014) (citing cases holding that lawful domicile was sufficient for 212(c) relief, but noting some cases held to the contrary).

102. *Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998). The discretionary positive and negative criteria for those eligible to seek LPR cancellation remain roughly the same as they were for 212(c) relief. See *id.*; *Matter of Wadud*, 19 I. & N. Dec. 182, 186 (B.I.A. 1984); *Matter of Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978).

103. See INA § 240A(a), 8 U.S.C. § 1229b (2012).

seven years, defined to exclude persons who have been incarcerated for an aggregate of 180 days or more.¹⁰⁴ Even for this small group of noncitizens, commission of any removable offense or service of an immigration court charging document stops the accrual of time for purposes of establishing continuous residence.¹⁰⁵ Although not explicitly prohibited from seeking cancellation of removal, permanent residents deportable under the CIMT provision are by definition foreclosed from establishing the seven year residency requirement to qualify for this relief due to the time-stopping provision.¹⁰⁶ And, as already mentioned, noncitizens deportable on the aggravated felony ground are statutorily ineligible for this or other discretionary relief from removal proceedings, regardless of hardship, the strength of their ties in the United States, the passage of time since their offense, or whether their offense would have been classified as an aggravated felony at the time of conviction.¹⁰⁷

Noncitizens who are not LPRs are even less likely to secure discretionary relief from removal under this provision.¹⁰⁸ Such persons must show ten years of continuous physical presence in the United States immediately preceding the application and ten years of “good moral character” at the time of adjudication.¹⁰⁹ They must also demonstrate that removal would result in “exceptional and extremely unusual hardship” to a spouse, parent, or child. Notably, this family member must be a citizen or LPR for this hardship to qualify.¹¹⁰ As with LPR cancellation, continuous physical presence is deemed to end upon commission of certain criminal acts or service of the charging document.¹¹¹ Moreover, Congress capped the number of non-LPRs who could receive cancellation at 4000 annually.¹¹² This statutory limit is significant; over the last half-decade, the cap on available cancellation grants for non-LPRs has been reached early each fiscal year.¹¹³ Finally, Congress also has significantly limited judicial review of what little adjudicatory discretion remains.¹¹⁴

104. See 8 U.S.C. §§ 1101(f), 1229b(a).

105. See *id.* § 1229b(d)(1)(A)–(B).

106. See Morawetz, *supra* note 11, at 1941 (observing that commission of a crime stops accumulation of seven years residence for purposes of qualifying for cancellation of removal, functionally preventing a noncitizen deportable on the basis of having committed a CIMT within five years of entry from accessing this relief).

107. See 8 U.S.C. § 1229b(a). Various other factors or inadmissibility grounds also bar certain noncitizens from seeking LPR cancellation. See *id.* § 1229b(c).

108. See *id.* § 1229b(b).

109. *Id.*

110. See *id.* Even vacated convictions may be used to foreclose noncitizens from establishing good moral character for purposes of non-LPR cancellation. See, e.g., *Nunez-Reyes v. Holder*, 646 F.3d 684, 688–89 (9th Cir. 2011) (en banc).

111. See 8 U.S.C. § 1229b(d).

112. *Id.* § 1229b(e)(1).

113. See Margaret Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527, 540–42 (2015) (explaining that when the statutory gap is reached each fiscal year, the government’s policy and practice is to hold decisions in abeyance until following years).

114. See INA § 242(a)(2)(B)(i)–(ii) (“Notwithstanding any other provision of law, no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or . . . any other decision or action of the

The upshot is that under current law, most convictions trigger some ground for deportation or other significant immigration consequences, even for long-term lawfully present noncitizens.¹¹⁵ Distinctions between types of convictions still matter, to be sure, because some removal grounds preclude any opportunity to have individual equities or considerations of justice balanced by an adjudicator and may trigger mandatory detention or permanent banishment. Outside of the strict criteria described above, however, the INA no longer provides formal limitations on removal based on consideration of length of residence, contributions to society, the number and strength of relationships with U.S. citizen family members, health, or other equitable factors.¹¹⁶

B. Equitable Delegation

Removing equitable discretion from the purview of judges does not necessarily excise it from the system. As has long been recognized in the criminal law field, efforts to curtail adjudicative equitable consideration simply shift the locus of discretionary power to prosecutors and police.¹¹⁷ Likewise, when Congress broadened grounds for removal and reduced the authority of immigration judges to set aside morally questionable deportations by narrowing the possibilities for the statutory exercise of discretion, it transferred authority over equitable discretion to the system's other players.¹¹⁸ The effect was to directly increase the power of executive enforcement officials, who must determine how to prioritize the agency's scarce resources through enforcement decisions.

There are good reasons to think Congress favors, or at least has acquiesced in, a system in which the Executive is responsible for wielding equitable discretion through enforcement decisions. First, Congress is well aware of the relationship between the breadth or severity of penal laws, the

Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a) [asylum].”).

115. Minor convictions also affect eligibility for Temporary Protected Status, discretionary enforcement initiatives like DACA, and visa eligibility. *See* Cade, *supra* note 58, at 1761–62.

116. “Registry,” a form relief from removal based on long and continuous presence in the United States, still exists on the books but is now practically available to very few persons. *See* INA § 249, 8 U.S.C. § 1259 (2012) (giving the Attorney General discretion to allow noncitizens who entered the United States before January 1, 1972, have resided continuously since that time, have good moral character, and are not subject to various criminal bars, to adjust status to lawful permanent residence).

117. *See* Bowers, *supra* note 13, at 1687 (noting that “efforts to pretend away equitable discretion serve merely to channel it to the justice system’s least transparent actors (prosecutors)”); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008) (discussing how mandatory sentencing guidelines transfer equitable power to prosecutors); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981).

118. *See* Cox & Rodríguez, *supra* note 8, at 510–14 (observing that the size of the deportable population functionally gives the Executive much screening power to determine immigration priorities); Lee, *supra* note 96, at 572–77 (arguing that the immigration system’s reliance on criminal convictions transfers immigration screening power to criminal prosecutors).

restriction of judicial discretion, and the role of enforcement discretion. Congress “has created a system of criminal laws that requires—and has always required—the exercise of discretion.”¹¹⁹ Indeed, as Zachary Price’s recent research indicates, the acceptability of executive authority not to enforce fully Congress’s penal laws for reasons of justice or equity has roots reaching back to the early Republic.¹²⁰ The proliferation and breadth of penal laws—the core of the modern “overcriminalization” phenomenon—suggests that legislatures regularly pass punitive codes they do not actually wish prosecutors or police to enforce fully.¹²¹ Moreover, federal legislators have explicitly acknowledged, in the context of enacting sentencing guidelines, that curbing judicial discretion “will not eliminate discretion, but merely shift the discretion to an earlier stage.”¹²²

In short, the widely recognized consequence of broadening grounds for penalties and narrowing adjudicative discretion is that law enforcement actors functionally are delegated tremendous power to determine the penal code’s actual priorities.¹²³ Scholars have made similar insights about the administrative law system.¹²⁴ Professors Adam Cox and Cristina Rodríguez, in particular, have thoughtfully examined the connection between the stringency of the modern immigration code and the rise of the President’s screening power through agency enforcement decisions.¹²⁵

Notably, when media accounts and other reports suggested that the former Immigration and Naturalization Service (INS) began indiscriminately enforcing the harsher statutory deportation provisions Congress enacted in 1996, many of the same legislators who had voted for

119. Stith, *supra* note 117, at 1422.

120. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 716–48 (2014); *see also* Stith, *supra* note 117, at 1422.

121. ANGELA DAVIS, *ARBITRARY JUSTICE* 13 (2007) (“Legislatures pass laws criminalizing a vast array of behaviors, and some of these laws, such as fornication and adultery, for example, stay on the books long after social mores about these behaviors have changed. In addition, some offenses warrant prosecution in some instances but not others.”); Wayne R. LaFare, *The Prosecutor’s Discretion in the United States*, 18 AM. J. COMP. L. 532, 533 (1970); Stuntz, *supra* note 49, at 570–71 (“Legislators have good reason to criminalize more than they (or the public) would want punished . . .”).

122. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 263 (1993) (quoting H.R. REP. NO. 98-1017, at 35–36 (1984)).

123. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1354 (2008); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 746 (1996) (“[B]y creating too many policy choices, [legislatures] have effectively abdicated public policy-making to the prosecutor since it is the prosecutor, and not the legislature, that has the final decision in determining which public policy, if any, is breached by an individual’s conduct.”); Stuntz, *supra* note 49, at 519.

124. *See, e.g.*, KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERV., *PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES* 8–10 (2013) (explaining that “both federal and state courts have ruled that the exercise of prosecutorial discretion is an executive function necessary to the proper administration of justice”); MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 29–39 (2010) (discussing the relationship between administrative discretion and the allocation of enforcement resources).

125. *See* Cox & Rodríguez, *supra* note 8, at 518–19.

the amendments wrote to the Attorney General expressing surprise and urging the agency to employ prosecutorial discretion more systematically in order to avoid “unjustifiable hardship.”¹²⁶ The legislators’ letter cited examples of “unfair” deportations, including LPRs “who came to the United States when they were very young, and many years ago committed a single crime at the lower end of the ‘aggravated felony’ spectrum, but have been law-abiding ever since, obtained and held jobs and remained self-sufficient, and started families in the United States.”¹²⁷ The letter prompted the INS to issue its first comprehensive directive on the implementation of prosecutorial discretion.¹²⁸

Congress’s consent to the current system of prosecutorial-based equity may also be inferred for other reasons. As previously noted, at present an estimated eleven million persons live in the United States without lawful immigration status.¹²⁹ Additionally, the rise of the criminal history proxy made millions of lawfully present residents deportable on the basis of criminal convictions. Immigration scholar Hiroshi Motomura has traced the political and historical factors that suggest longstanding congressional acquiescence in the large undocumented population, including nearly a century of economic reliance on Mexican migrants for cheap labor, facilitated in large part by failure to meaningfully enforce restrictions on both unlawful entry across the border or the employment of undocumented workers.¹³⁰ Even as attitudes about undocumented workers specifically and immigration enforcement generally have become more stringent, Congress’s funding allocations to the Executive’s immigration agencies permit enforcement against only a very small fraction of both groups of deportable persons. Indeed, the government frequently notes it has the resources only to remove a maximum of about 400,000 persons each year.¹³¹ Furthermore, these appropriations must be divided between interior and border removals.¹³² This underfunding strongly suggests that Congress depends on the Executive to set priorities in choosing which tiny fraction of the removable population to target.¹³³ Indeed, statutory

126. Letter from Henry J. Hyde et al., Representatives, U.S. Cong., to Janet Reno, Attorney Gen., Dep’t of Justice & Doris M. Meissner, Comm’r, Immigration and Naturalization Serv. (Nov. 4, 1999), www.ice.gov/doclib/foia/prosecutorial-discretion/991104congress-letter.pdf. (signed by twenty-eight members of the House of Representatives) [<http://perma.cc/B85V-GT6F>].

127. *Id.*

128. See Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., to Reg’l Dirs., Dist. Dirs., Chief Patrol Agents & Reg’l & Dist. Counsel (Nov. 17, 2000), <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf> [<http://perma.cc/Y6H5-DPLR>].

129. See *supra* note 10 and accompanying text.

130. MOTOMURA, *supra* note 9, at 19–55; see also MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 93–95, 265–66 (2004).

131. See *supra* note 12 and accompanying text.

132. See, e.g., SIMANSKI, *supra* note 68, at 5 tbl.6 (showing breakdowns between interior and border enforcement for 2011 through 2013).

133. See Cox & Rodríguez, *supra* note 8, at 464 (“The President’s power to decide which and how many noncitizens should live in the United States operates principally at the back

provisions specifically delegate broad authority to the Secretary of Homeland Security to set “enforcement policies and priorities.”¹³⁴

It is also important to recognize that the statutory amendments elevating the role of criminal history in deportation law transferred immigration screening power to a different set of law enforcement actors. Because the immigration code attaches immigration consequences to a large number of criminal offenses, local police, prosecutors, defense attorneys, and sentencing judges wield wide-ranging influence over the pool of noncitizens deemed undesirable on the basis of criminal history.¹³⁵ Arrest, prosecution, conviction, and sentencing often become definitive markers for purposes of deportation under current law.¹³⁶ As Stephen Lee observes, “[B]y the time [noncitizens] reach removal proceedings, their best chance to avoid removal has already passed.”¹³⁷

State and federal prosecutors exert particular influence on downstream immigration consequences.¹³⁸ They select the criminal charges to be filed, the plea deal to be offered, and the sentence to be recommended in the event of a plea agreement. As is well known, nearly all prosecutions are resolved through plea agreements.¹³⁹ Heidi Altman and others have argued that prosecutors’ ethical duty to see justice done encompasses making an effort to reach a plea deal that takes the proportionality of deportation into account.¹⁴⁰ But criminal prosecutors can and do take very different

end of the system, through the exercise of prosecutorial discretion with respect to whom to deport . . .”).

134. 6 U.S.C. § 202(5) (2012); *see also* 8 U.S.C. § 1103(a) (2012) (conferring broad power to the Secretary of Homeland Security over “the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens”).

135. *See generally* Motomura, *supra* note 52 (explaining that local police can largely determine the pool of potential undesirable noncitizens through investigation and arrest practices).

136. The nature of the criminal conviction may also impact the likelihood of detention, the process afforded the noncitizen, the noncitizen’s ability to lawfully return to the United States in the future, and the severity of criminal sanctions in the event of an unlawful return.

137. Lee, *supra* note 96, at 556.

138. Further, the amplified possibility that immigration consequences will flow from a conviction may even increase a prosecutor’s power in criminal proceedings. *See id.* at 577. *But see* Robert A. Mikos, *Enforcing State Law in Congress’s Shadow*, 90 CORNELL L. REV. 1411, 1422–33 (2005) (predicting the growing shadow of immigration consequences will lead to more criminal trials).

139. *See* STATE UNIV. OF N.Y. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.5.46.2004, www.albany.edu/sourcebook/pdf/t5462004.pdf (last visited Oct. 21, 2015) (reporting that about ninety-five percent of criminal convictions result from pleas) [<http://perma.cc/KJG4-RB8Z>]; *id.* tbl.5.24.2009, www.albany.edu/sourcebook/pdf/t5242009.pdf (last visited Oct. 21, 2015) (reporting that ninety-six percent of non-dismissed federal criminal cases during fiscal year 2009 ended with a guilty plea) [<http://perma.cc/Z378-6938>].

140. *See* Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 5–6 (2012) (arguing that professional responsibility standards and proportionality concerns do or will lead many prosecutors to individually evaluate the justifiability of deportation); Robert M.A. Johnson, *A Prosecutor’s Expanded Responsibilities Under Padilla*, 31 ST. LOUIS U. PUB. L. REV. 129, 130 (2011) (arguing that *Padilla* will directly and indirectly influence prosecutors’ consideration of collateral consequences, presenting an opportunity to both do “justice and improve public safety”).

approaches to this matter due to variations in office policies, local workloads, and beliefs about appropriate types of immigrants and levels of immigration.¹⁴¹

In short, Congress has delegated primary power over implementation of immigration priorities to enforcement actors at the federal and local levels. Back-end adjudicators are reduced to a much-diminished role in immigration courts. Thus, equity enters the deportation system, if at all, primarily through enforcement discretion. These front-end actors have the power to consider whether deportation would be equitable in individual cases and to influence the downstream result through discretionary choices to forego prosecution or, if criminal proceedings are brought, through the negotiation over plea deals.

II. EQUITABLE ENFORCEMENT EFFORTS

Thus far, this Article has explained that statutory amendments to the INA in the late twentieth century, along with underfunding of enforcement resources, functionally shifted equitable balancing in deportation cases to prosecutorial officials. This part will show that the executive branch clearly recognizes—and seeks to protect—its role in keeping the deportation system normatively justifiable. It also outlines the primary ways in which the current Administration has endeavored to implement equitable enforcement.

A. Acknowledgement of the Equitable Role

The Obama Administration appears to understand, and to take seriously, its responsibility to ensure the deportation system operates equitably. The Executive's clearest acknowledgement—and most forceful defense—of this new institutional role came in the context of its preemption lawsuit against the state of Arizona. In 2010, Arizona enacted the “Support Our Law Enforcement and Safe Neighborhoods Act,” better known as SB 1070.¹⁴² Before the law became effective, the federal government sued to enjoin four of its core provisions.¹⁴³

The first and most prominent of a number of similar state laws, SB 1070 gave local law officers a significant role in federal immigration

141. See Altman, *supra* note 140, at 28–32 (presenting data on the range of attitudes in the Brooklyn District Attorney's office regarding appropriateness of taking immigration consequences into account during plea bargaining); Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1400–02 (2011) (arguing that, at least with respect to high-volume drug trafficking cases, “no amount of creative negotiation between well-informed attorneys is likely to yield a disposition that avoids triggering automatic deportation”); Gabriel J. Chin, *Illegal Entry As Crime, Deportation As Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011) (analyzing state criminal process laws that take immigration status into account in ways that sometimes disadvantage noncitizens); Eagly, *supra* note 54, at 1156–96 (discussing three prosecutors' offices where alienage is variously treated as a neutral or negative factor).

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

143. *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).

enforcement.¹⁴⁴ By requiring only that local authorities act to enforce already existing federal immigration laws, the architects of these bills had hoped to withstand a preemption challenge.¹⁴⁵ Their theory was premised on the fact that states commonly help enforce federal law. Accordingly, proponents of such bills argued that state laws that “mirror” federal prohibitions should not run afoul of the Supremacy Clause.¹⁴⁶ In *Arizona v. United States*,¹⁴⁷ however, the Court upheld a preliminary injunction against three of the four challenged statutory provisions.¹⁴⁸

For present purposes, the most interesting aspect of this litigation is the extent to which the federal government grounded its preemption arguments in the need to preserve its ability to exercise equitable discretion without interference from states. The Government argued that it must be able to make discretionary *nonenforcement* choices, free from interference by state law enforcement officers, whose actions pursuant to SB 1070 might unduly burden noncitizens or exert exogenous influence on federal deportation priorities.

Describing the institutional scheme in general, the government’s main brief to the Supreme Court observed that “Congress vested the Executive Branch with the authority and the discretion to make sensitive judgments with respect to aliens, balancing the numerous considerations involved,” which include “national security, law enforcement, foreign policy, [and] humanitarian considerations”¹⁴⁹ The Administration pressed the point that an uninvited state role poses a hazard to discretionary nonenforcement decisions. Discussing SB 1070’s imposition of penalties for noncitizens

144. States to follow Arizona with similar laws include Alabama, Georgia, Indiana, South Carolina, and Utah. *See* MOTOMURA, *supra* note 9, at 64.

145. The principal drafter of SB 1070 and other laws targeting undocumented noncitizens was Kris Kobach, the current Kansas Secretary of State. Kobach was the chief immigration advisor to former Attorney General John Ashcroft and had a temporary stint as a law professor at the University of Missouri-Kansas City before his current position. *See* Anna Gorman, *A Voice for Tough Immigration Laws*, L.A. TIMES, May 13, 2010, at A1; John Hanna, *Kan. Lawyer is Architect of Many Immigration Laws*, SAN DIEGO UNION-TRIB. (May 10, 2010, 11:38 AM), <http://www.sandiegouniontribune.com/news/2010/may/10/kan-lawyer-is-architect-of-many-immigration-laws/> [<http://perma.cc/2DT7-AHVU>].

146. *See* Adam Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 31 (“Enforcement redundancy, as we might call it, is the norm.”); *id.* at 34–43; David A. Martin, *Reading Arizona*, 98 VA. L. REV.: IN BRIEF 41, 42 (2012) (“Arizona argued that its law is different, because it simply mirrors the federal obligation, punishing only those who could be punished by federal authorities”); *see also* Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253. The “mirror image” theory appeared to carry some weight in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011), in which a divided Court upheld a different Arizona law requiring employers to use a federal database to check all employees’ work authorizations, even though federal law does not make the verification system mandatory. Ultimately, however, what mattered most to the majority in *Whiting* was that the federal law at issue, while expressly preempting state employer sanctions, contained an explicit carve-out allowing states to use “licensing and similar laws” to penalize employers who unlawfully hire undocumented workers. *Id.*

147. 132 S. Ct. 2492 (2012).

148. *Id.* at 2507–10.

149. Brief for the United States at 14, *Arizona*, 132 S. Ct. 2492 (No. 11-182) (emphasis added).

who have not complied with the federal registration requirement, for example, the Government argued that

[t]he State cannot, in the name of enforcing a *federal* registration obligation that runs between individual aliens and the National Government, claim the right to punish aliens who are not registered but *who the Executive Branch has decided not to prosecute* based on important considerations consistent with the INA.¹⁵⁰

Throughout its briefs, the Government continued in a similar vein, arguing that uninvited state enforcement of federal immigration laws threatens federal authority to “justly administer[]” the law, including through discretionary authority to consider “humanitarian” or similar factors when deciding whether to remove or detain deportable noncitizens.¹⁵¹ At oral argument, Solicitor General Donald Verrilli likewise reiterated at many points the potential conflict between a federal decision not to enforce the law against a particular noncitizen and the state’s arrest and prosecution of that noncitizen for federal immigration violations.¹⁵²

It is important to recognize that by pressing the need to protect discretionary nonenforcement so concretely, the Government also conveyed its belief that this understanding of the removal system’s institutional design should warrant *constitutional protection*. Despite the unusual nature of this preemption argument,¹⁵³ the Court appears to have agreed. The majority’s analysis in the *Arizona* case frequently connects its preemption rulings to its perception that the Executive’s control over enforcement decisions is critical to the implementation of equity in the removal system.¹⁵⁴

Public statements also reflect the Administration’s awareness of the connection between enforcement discretion and equity in the removal system. Regarding DACA, for example, President Obama has stressed that DHS’s consideration of nonenforcement discretion for noncitizens meeting the criteria is about keeping immigration enforcement “humane” and making equitable distinctions regarding how best to use the agency’s

150. *Id.* at 15 (emphasis added).

151. *Id.* at 15, 18–19, 22, 25, 31–33, 48–50, 53–54; Brief for the United States in Opposition at 25–28, *Arizona*, 132 S. Ct. 2492 (No. 11-182).

152. Transcript of Oral Argument at 36, 38, 41, 43, 45, 49, 57–58, 70–71, *Arizona*, 132 S. Ct. 2492 (No. 11-182).

153. See Cox, *supra* note 146, at 33 (arguing that allowing executive nonenforcement discretion to displace state law represents “a radical departure from conventional approaches to preemption”); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. OF CONST. L. & PUB. POL’Y 81, 87 (2013) (“[N]onbinding executive enforcement policies cannot, and should not, preempt subfederal law.”).

154. See *Arizona*, 132 S. Ct. at 2499 (“A *principal feature* of the removal system is the *broad discretion* exercised by immigration officials.” (emphasis added)); *id.* at 2502–06. See generally Cade, *supra* note 51 (arguing that the Court has taken a number of opportunities in recent years to structurally preserve possibilities for equitable balancing in the enforcement of immigration law).

limited enforcement resources.¹⁵⁵ The Administration frequently characterizes DACA as “the right thing to do” and as in line with “our values as a nation.”¹⁵⁶ In former Secretary of Homeland Security Janet Napolitano’s words, “Our nation’s immigration laws must be enforced in a firm and sensible manner. But they are not designed to be blindly enforced without consideration given to the individual circumstances of each case.”¹⁵⁷

Similarly, when announcing new prosecutorial discretion initiatives in late 2014, President Obama stated that they “will help make our immigration system more fair and more just.”¹⁵⁸ Internal agency memos also acknowledge the critical link between prosecutorial discretion and the “fairness of the removal process.”¹⁵⁹

155. President Barack Obama, Remarks by the President on Immigration (June 15, 2012), www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration (arguing that DACA will make the immigration system “more fair, more efficient, and more just”) [<http://perma.cc/7S66-PAUR>].

156. *See, e.g.*, Jay Carney, White House Press Sec’y, Statement on the First Anniversary of Deferred Action for Childhood Arrivals Process (June 15, 2013), www.whitehouse.gov/the-press-office/2013/06/15/statement-press-secretary-first-anniversary-deferred-action-childhood-ar (“A year ago today, the Administration took up the cause of ‘Dreamers’ and took action to make our immigration system more representative of our values as a nation.”) [<http://perma.cc/7KXR-KG7W>]; Jay Carney, White House Press Sec’y, Press Briefing (June 21, 2012), www.whitehouse.gov/the-press-office/2012/06/21/press-briefing-press-secretary-jay-carney-62112 (stating that immigration prosecutorial discretion is aimed at “ensuring that we are enforcing the law in a way that makes the right decisions in terms of priorities, and does not unfairly and unnecessarily punish people”) [<http://perma.cc/8BD2-HSVE>]; Press Release, Jeh Johnson, U.S. Sec’y of Homeland Sec., Secretary Johnson Announces Process for DACA Renewal (June 5, 2014), www.uscis.gov/news/secretary-johnson-announces-process-daca-renewal (“By the renewal of DACA, we act in accord with our values and the code of this great Nation.”) [<http://perma.cc/SX33-X53T>]; Obama, *supra* note 155 (repeatedly describing DACA as “the right thing to do”); *see also Transcript: President Obama’s Full NPR Interview*, NPR (Dec. 29, 2014), <http://www.npr.org/2014/12/29/372485968/transcript-president-obamas-full-npr-interview> (“If your view is that immigrants are either fundamentally bad to the country or that we actually have the option of deporting 11 million immigrants, regardless of the disruptions, regardless of the cost, and that that is who we are as Americans, I reject that.”) [<http://perma.cc/6W8M-8DG6>].

157. Press Release, Janet Napolitano, U.S. Sec’y of Homeland Sec., (June 15, 2012), www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low [<http://perma.cc/84UZ-MD7N>].

158. President Barack Obama, Remarks by the President on Immigration (Nov. 25, 2014), www.whitehouse.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il (“[T]here have been times where families got broken apart—while I’ve been President. And it’s heartbreaking. That’s not right.”) [<http://perma.cc/K5UV-MYMG>]; *see also* Senator Charles Schumer, *Attorney General Confirmation Hearing, Day 1, Part 1, C-SPAN* (Jan. 28, 2015), www.c-span.org/video/?323993-1/us-attorney-general-nominee-confirmation-hearing (“Doesn’t it make sense to have a general rule . . . in an office with limited resources to go after bank robbers before you go after shoplifters?”) [<http://perma.cc/Y5V3-DJMU>]; Appellant’s Emergency Motion for Stay Pending Appeal at 2, *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238) (“In short, the preliminary injunction is a sweeping order that extends beyond the parties before the court and irreparably harms the Government and the public interest by preventing DHS from marshalling its resources to protect border security, public safety and national security, while also addressing humanitarian interests.”).

159. Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enf’t, to All Office of the Principal Legal Advisor Chief Counsel 8 (Oct. 24, 2005), <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/>

B. Implementation

This section outlines three ways that the current Administration has endeavored to implement equitable immigration enforcement: distribution of resources to high priority targets, more systematic prosecutorial discretion in individual cases, and initiatives that allow noncitizens meeting particular criteria to affirmatively apply for a temporary deferral of removal.

1. Shifting Resources

Targeted resource distribution can work as a means of increasing the likelihood of equitable enforcement. Whereas the immigration agencies under President George W. Bush focused on workplace and home raids,¹⁶⁰ the current Administration has directed most of its enforcement resources toward the apprehension and removal of recent or repeat immigration violators and noncitizens with criminal history, in keeping with the agency's expressed enforcement priorities.¹⁶¹ While not all deportations of noncitizens in these groups will be justifiable, targeted resource choices lessen the probability of enforcement against individuals in non-targeted groups, whom the government reasonably may believe are most likely to present significant equitable claims.

Agency data show that over the last decade, and particularly in the last few years, the percentage of total removals deemed "border removals" has dramatically increased.¹⁶² In 2011, for example, there were 387,134 total recorded removals,¹⁶³ with just over half coded as border removals.¹⁶⁴ In

enforcement-detention-and-criminal-justice/government-documents/22092975-ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05.pdf/view ("Prosecutorial discretion is a very significant tool that sometimes enables you to deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship.") [<http://perma.cc/6WVK-BDZ7>]; see also Memorandum from Jeh Johnson, U.S. Sec'y of Homeland Sec., to Thomas S. Winkowski et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014) [hereinafter Johnson Policies Memo], http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<http://perma.cc/47CA-UYQG>]; Morton Priorities Memo, *supra* note 12; Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't, to Field Office Dirs., Special Agents in Charge & Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention & Removal of Aliens 4-5 (June 17, 2011) [hereinafter Morton Discretion Memo], <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<http://perma.cc/293E-CVA8>].

160. See Cox & Rodríguez, *supra* note 8, at 511-21.

161. See, e.g., Johnson Policies Memo, *supra* note 159, at 1; Morton Priorities Memo, *supra* note 12, at 1-3; Morton Discretion Memo, *supra* note 159, at 4-5.

162. See DEP'T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2010 4, <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> (setting forth data on expedited and reinstated removal proceedings from 2001 to 2010) [<http://perma.cc/2KFE-J5KW>]; SIMANSKI, *supra* note 68, at 5-6 (setting forth data on expedited and reinstated removal proceedings from 2011 to 2013).

163. SIMANSKI, *supra* note 68, at 6.

164. Alex Nowrasteh, *Updates on President Obama's Immigration Enforcement Record*, CATO INST. (Oct. 17, 2014, 10:48 AM), <http://www.cato.org/blog/updates-president-obamas->

2012, there were 418,397 total removals,¹⁶⁵ of which 61 percent were border removals and 39 percent were interior removals.¹⁶⁶ As a portion of the record-setting 438,421 total removals in 2013,¹⁶⁷ border removals climbed to 70 percent.¹⁶⁸ These numbers show a clear trend toward increased emphasis on removals at the border. Unsurprisingly, then, in recent years over 20 percent of DHS's total budget has gone to the Customs and Border Patrol (CBP)—twice the amount apportioned to ICE.¹⁶⁹ Furthermore, in November 2014, DHS Secretary Jeh Johnson indicated that the DHS will direct even more resources to the border in the future.¹⁷⁰

Prioritizing border enforcement recognizes that, generally speaking, noncitizens who have already been living inside the United States are more likely to have developed ties and relationships that militate against removal. While not all noncitizens already living in the U.S. interior will have a strong normative claim to remain despite clear deportability, many will have developed connections that at least should be considered. By focusing a significant percentage of its enforcement resources on recent immigration violators, the current Administration takes what might be considered a probabilistic approach to equitable deportations.

immigration-enforcement-record-0 (noting that 51 percent of removals in FY 2011 were border removals, while 48 percent were deemed interior removals) [<http://perma.cc/U7ST-BK5C>]; *see also* SIMANSKI, *supra* note 68, at 3, 5, 7 (noting that in FY 2011, CBP was responsible for 50.1 percent of all Apprehensions, 18.8 percent of all Removals, and 76.1 percent of all Returns).

165. SIMANSKI, *supra* note 68, at 6.

166. Nowrasteh, *supra* note 164; *see also* SIMANSKI, *supra* note 68, at 3, 5, 6 (noting that in FY 2012, CBP was responsible for 54.3 percent of all Apprehensions, 17.4 percent of all Removals, and 72.8 percent of all Returns).

167. SIMANSKI, *supra* note 68, at 6.

168. Nowrasteh, *supra* note 164 (noting that approximately 70 percent of Removals in FY 2013 were border removals, while approximately 30 percent were deemed interior removals); *see also* SIMANSKI, *supra* note 68, at 5, 6 (noting that in FY 2013, CPB was responsible for 63.5 percent of all Apprehensions, 24.6 percent of all Removals, and 80.2 percent of all Returns).

169. *See* DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2016 9 (2015), www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf (noting that for FY 2016, 21 percent of DHS's total budget of \$64,858,484,000 is to be allocated to CBP, while 10 percent will go to ICE and 6 percent to USCIS) [<http://perma.cc/VHX5-K2TQ>]; DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2015 5 (2014), <http://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf> (noting that for FY 2015, 21 percent of DHS's total budget of \$60,918,787,000 was allocated to CBP, while 9 percent went to ICE and 5 percent to USCIS) [<http://perma.cc/XN6S-CBDA>]; DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2014 5 (2013), <http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf> (noting that for FY 2014, 22 percent of DHS's total budget of \$59,959,337,000 was allocated to CBP, while 9 percent went to ICE and 5 percent to USCIS) [<http://perma.cc/3VHA-STBC>]; DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2013 23 (2012), <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf> (noting that in FY 2013, 21 percent of DHS's total budget of \$59,032,346,000 was allocated to CBP, while 10 percent went to ICE and 5 percent to USCIS) [<http://perma.cc/6GT7-TMBE>].

170. *See* Memorandum from Jeh Johnson, U.S. Sec'y of Homeland Sec., to R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., et al., Southern Border and Approaches Campaign (Nov. 20, 2014).

With respect to interior removals, the Obama Administration has committed itself to the detection, apprehension, and removal of noncitizens who encounter criminal justice systems.¹⁷¹ The immigration agency currently operates multiple enforcement initiatives to identify noncitizens who encounter state and local criminal justice systems. The most important are the Priority Enforcement Program (PEP) (formerly known as Secure Communities), the Criminal Alien Program (CAP), and the so-called “287(g) programs.” Since 2008, federal funding for these interior enforcement programs has far exceeded half a billion dollars per year.¹⁷²

The largest and most integrated program is PEP.¹⁷³ PEP ensures that when local police submit arrestees’ fingerprints to the Federal Bureau of Investigation to check for criminal background and outstanding warrants, the prints automatically get forwarded to DHS to facilitate identification of persons who might be deportable.¹⁷⁴ Although DHS Secretary Jeh Johnson announced in November 2014 that certain aspects of PEP would be retooled, along with dropping the program’s former name, its key feature of screening every arrested noncitizen for potential enforcement remains in place in almost every jurisdiction in the country.¹⁷⁵

Meanwhile, CAP’s 8000 officers supplement PEP by checking inmate roster data provided by correctional departments against immigration databases.¹⁷⁶ These officers also use in-person and virtual interviews to detect deportable foreign-born detainees in prisons and jails throughout the country.¹⁷⁷ Similarly, section 287(g) agreements deputize local criminal

171. See, e.g., Sam Dolnick, *In Change, Mayor Backs Obstacle to Deportation*, N.Y. TIMES, Oct. 1, 2011, at A19 (“[T]he Obama administration has placed a priority on deporting noncitizen criminals who pose a threat to the public, while focusing less on illegal immigrants who do not pose a threat.”); Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Data Shows*, N.Y. TIMES, Apr. 7, 2014, at A1 (quoting President Obama as saying that immigration authorities are going after “criminals, gang bangers, people who are hurting the community, not after students, not after folks who are here just because they’re trying to figure out how to feed their families”); Press Release, Dep’t of Homeland Sec., Secretary Napolitano’s Remarks on Smart Effective Border Security & Immigration Enforcement (Oct. 5, 2011), <http://www.dhs.gov/news/2011/10/05/secretary-napolitanos-remarks-smart-effective-border-security-and-immigration> (“We established, as a top priority, the identification and removal of public safety and national security threats. To execute on this, we expanded the use and frequency of investigations and programs, like Secure Communities, that track down criminals and gang members on our streets and in our jails.”) [<http://perma.cc/P7RG-5RE6>].

172. See MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 24 (2013).

173. See Memorandum from Jeh Johnson, U.S. Sec’y of Homeland Sec., Secure Communities (Nov. 20, 2014) [hereinafter Johnson Secure Communities Memo]; Cade, *supra* note 58, at 1764–66 (describing the relative size and integration of the Secure Communities Program, PEP’s predecessor).

174. See ROSENBLUM & KANDEL, *supra* note 172, at 15 (discussing the program when it was still called Secure Communities).

175. Johnson Secure Communities Memo, *supra* note 173 (explaining that the program formerly known as Secure Communities will remain in place but with a new name and modifications such as eliminating the detainer program).

176. ROSENBLUM & KANDEL, *supra* note 172, at 14–15.

177. *Id.* at 14; see also Declaration of Jamison Matuszewski ¶¶ 18–22, at 6–8, *Am. Immigration Council v. Dep’t of Homeland Sec.*, No. 12-00355 (D. Conn. July 12, 2012).

justice officials to interview and screen foreign-born inmates or detainees using the same immigration databases as those checked by federal CAP officers.¹⁷⁸ In recent years, the use of 287(g) programs has declined, as other programs have grown in importance. Even so, as of August 2015, ICE has thirty-two 287(g) agreements in place in sixteen states.¹⁷⁹

Together, PEP, CAP, and 287(g) programs allow federal immigration officials to screen virtually every inmate in every jail or prison in the country. Furthermore, a number of states and localities have enacted legislation authorizing or mandating local law enforcement's participation in the deportation scheme.¹⁸⁰ DHS is obligated to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status" of any person, and the agency accordingly maintains a Law Enforcement Support Center that fields calls twenty-four hours a day, seven days a week, from any law enforcement officer.¹⁸¹

If a noncitizen who is identified through one or more of these federal (or state) programs appears to fall within an enforcement priority, ICE makes a discretionary decision whether to initiate removal proceedings.¹⁸² Immigration enforcement priorities are somewhat variable, but generally include prior criminal records, immigration violations, or the seriousness of an arrest charge.¹⁸³ However, no federal law or policy constrains ICE officers from initiating proceedings in cases against noncitizens believed to be deportable where such negative factors are absent.¹⁸⁴

These programs have been highly successful at channeling noncitizens who encounter the criminal justice system into removal proceedings. Not only are the total removal numbers under President Obama the highest in history,¹⁸⁵ but a higher percentage of those deportees are "criminal

178. ROSENBLUM & KANDEL, *supra* note 172, at 16.

179. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, DEP'T OF HOMELAND SEC.: U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/factsheets/287g> (last visited Oct. 21, 2015) [<http://perma.cc/8ASW-GAUQ>].

180. See, e.g., Ala. Code § 31-13-6 (Supp. 2012); Ariz. Rev. Stat. Ann. § 11-1051 (2012); Ga. Code Ann. § 17-5-100(b) (2013); Ind. Code Ann. § 5-2-18.2-4 (LexisNexis 2013); S.C. Code Ann. § 17-13-170 (Supp. 2012); Utah Code Ann. §§ 76-9-100 to -109 (LexisNexis Supp. 2013).

181. See 8 U.S.C. § 1373(c) (2012).

182. Cade, *supra* note 58, at 1763–66; Motomura, *supra* note 52.

183. See Johnson Policies Memo, *supra* note 159, at 3–4; Morton Priorities Memo, *supra* note 12, at 3.

184. *But see* Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U.L. REV. 1259 (2015) (arguing that the PEP memo's requirement that rank-and-file officers obtain permission from supervisors to go outside of the priorities may provide such a constraint).

185. See *Barack Obama, Deportee-in-Chief*, ECONOMIST (Feb. 8, 2014), <http://www.economist.com/node/21595902/> ("America is expelling illegal immigrants at nine times the rate of 20 years ago; nearly [two million] so far under Barack Obama, easily outpacing any previous president.") [<http://perma.cc/R6RZ-8NFZ>]. From 1892 to 2007, the U.S. government deported about two million individuals in total—a figure that has been doubled in the past seven years. Elise Foley, *Obama Deportation Toll Could Pass 2 Million*

aliens.”¹⁸⁶ To put the current regime in perspective, consider that between 1908 and 1980, the United States deported only 56,669 criminal aliens, out of 812,915 total deportations during that seventy-three year period.¹⁸⁷ From 1991 to 1996, criminal alien removals saw a substantial increase, numbering 134,705 criminal removals out of 284,803 total over that period.¹⁸⁸ While the agency under President George W. Bush’s two terms saw steady increases in criminal removal,¹⁸⁹ under President Obama’s Administration the number skyrocketed. In recent years, the deportation of noncitizens with criminal history averages almost 200,000 out of a total of approximately 400,000 removals each year.¹⁹⁰

Notably, these numbers do not distinguish by severity of crime. Closer scrutiny of criminal alien removals shows that traffic offenses, crimes of migration (illegal entry or reentry), and low-level drug possession make up the vast majority of deportations of persons the agency deems criminal.¹⁹¹ Indeed, removals based on traffic convictions have increased ten-fold in the past ten years, accounting for approximately 30 percent of the increased “criminal alien” removals.¹⁹² Nevertheless, by focusing interior enforcement efforts on apprehending noncitizens following convictions or other encounters with the criminal justice system, the Administration has increased the likelihood that those put into the removal system will have negative factors that potentially justify their deportation.

2. Case-By-Case Discretion

While prosecutorial discretion guidance has been in place since the 1970s,¹⁹³ recent policy leaders have established more detailed and transparent enforcement priorities, with the ostensible goal of concentrating

at *Current Rates*, HUFFINGTON POST (Jan. 31, 2013, 7:01 PM), http://www.huffingtonpost.com/2013/01/31/obama-deportation_n_2594012.html [<http://perma.cc/P3P7-CNEB>].

186. See *supra* note 24 (describing DHS’s definition of “criminal aliens”).

187. IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 187 tbl.67, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1997YB.pdf> (indicating that between 1908 and 1980, 48,330 noncitizens were deported for “criminal violations” and another 8339 were deported for “narcotics violations”) [<http://perma.cc/94VP-PN8G>].

188. *Id.* at 178 tbl.63.

189. During President Clinton’s second term and President Bush’s two terms, total criminal removals rose significantly each year, but actually shrank as a percentage of total removals, as noncriminal removals skyrocketed, especially under President Bush. See generally MARC R. ROSENBLUM & DORIS MEISSNER, MIGRATION POLICY INST., THE DEPORTATION DILEMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT 38–39 fig.13 (2014) (discussing removal data from DHS between 1993 and 2012).

190. See SIMANSKI, *supra* note 68, at 6 tbl.8 (showing 198,394 criminal removals out of 438,421 total removals in FY 2013; 200,143 criminal removals out of 418,397 total in FY 2012; and 188,964 criminal removals out of 387,134 total in FY 2011).

191. *Id.*; MARC R. ROSENBLUM & KRISTEN MCCABE, MIGRATION POLICY INST., DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE 20 (2014); Eagly, *supra* note 54, at 1218; Eisha Jain, *Arrests As Regulation*, 67 STAN. L. REV. 809, 833 (2015).

192. Eagly, *supra* note 54, at 1218.

193. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246 (2010); Wildes, *supra* note 50.

DHS's limited enforcement resources on the most important targets.¹⁹⁴ In 2011, then-ICE Director John Morton began rolling out a high-profile initiative to encourage a more systematic use of prosecutorial discretion throughout the agency.¹⁹⁵ Over the next year, agency leaders issued a series of memoranda setting forth positive and negative factors to be balanced in the exercise of discretion, designating categories of persons warranting special consideration and providing for scenario-based training programs.¹⁹⁶ Although the agency has tinkered with the language of the enforcement priorities over time, the consistent focus is on noncitizens with criminal records or indicia of a threat to public safety, as well as those who have recently or egregiously violated the immigration laws.¹⁹⁷

These memos establish that noncitizens who do not fall within a priority for removal should be considered for prosecutorial discretion. The guidelines for discretion are typically in the form of nonexhaustive lists of positive and negative considerations, including "the person's ties and contributions to the community, including family relationships,"¹⁹⁸ the severity and recentness of any convictions, and "compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative."¹⁹⁹

These enforcement discretion guidelines directly hone in on considerations of proportionality and personal mitigation. In so doing, they attempt to compensate for an immigration system in which grounds for

194. See, e.g., Johnson Policies Memo, *supra* note 159 (establishing "new policies for the apprehension, detention, and removal of aliens in this country"); Morton Priorities Memo, *supra* note 12 (stating the agency's tiered removal priorities).

195. See Morton Discretion Memo, *supra* note 159, at 1.

196. See *id.*; Memorandum from Peter S. Vincent to All Chief Counsel, Office of the Principal Legal Advisor, U.S. Immigration and Customs Enf't 2 (Nov. 17, 2011); U.S. IMMIGRATION AND CUSTOMS ENF'T, NEXT STEPS IN THE IMPLEMENTATION OF THE PROSECUTORIAL DISCRETION MEMORANDUM AND THE AUGUST 18TH ANNOUNCEMENT ON IMMIGRATION ENFORCEMENT PRIORITIES, <http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf> [<http://perma.cc/8P7D-AMQ9>].

197. See, e.g., Johnson Policies Memo, *supra* note 159, at 3–4; Morton Priorities Memo, *supra* note 12, at 1–3.

198. Morton Discretion Memo, *supra* note 159, at 4 ("When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to . . . the person's ties and contributions to the community, including family relationships.")

199. Johnson Policies Memo, *supra* note 159, at 5–6 ("DHS personnel should consider factors such as: . . . extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative."); Morton Priorities Memo, *supra* note 12; see also Memorandum from Gary Mead, Exec. Assoc. Dir., Peter S. Vincent, Principal Legal Advisor & James Dinkins, Exec. Assoc. Dir., U.S. Immigration and Customs Enf't, to All Field Office Dirs., Chief Counsel & Special Agents in Charge, Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships (Oct. 5, 2012), <http://www.washingtonblade.com/content/files/2012/10/9-Oct-12-PD-and-Family-Relationships.pdf>. [<http://perma.cc/3JYE-SMYR>]; Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't, to All Employees (June 15, 2012), <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf> [<http://perma.cc/BV7U-YML9>].

removal sweep broadly and retroactively, opportunities to lawfully adjust status are tightly constrained, and immigration judges have little power to set aside deportation on equitable grounds.

However, it remains unclear whether the prosecutorial discretion guidelines will meaningfully impact the equity of the removal system. From the outset, large factions of the agency's rank and file have railed against the initiative.²⁰⁰ In 2012, a group of ICE officers, represented by Kris Kobach,²⁰¹ sued their own agency, arguing that requiring them to consider prosecutorial discretion forced them "to break the law."²⁰² The lead plaintiff in the lawsuit was Chris Crane, the president of the National ICE Council, which represents a union of ICE officers.²⁰³ Although the lawsuit was eventually dismissed, the ICE union refused to allow its 7700 members to engage in any agency training on the use of prosecutorial discretion.²⁰⁴ Crane's public remarks reveal the narrow view of many ICE agents regarding the use of arrest and charging discretion as a means of implementing equity in the deportation system: "[C]harge (the suspect) as being in the United States illegally and let the judge sort it out. . . . That's our place in the universe. . . . We're supposed to make arrests and let the judges and the legal system sort through the details."²⁰⁵

The agency's trial attorneys seem to have haphazardly followed the prosecutorial discretion initiative. Between October 2012 and August 2014, ICE prosecutors closed a total of 38,439 removal cases in the exercise of prosecutorial discretion following Director Morton's guidelines.²⁰⁶ To be sure, that represents a significant increase in the number of closures based, ostensibly, on equitable considerations. However, as a percentage of the total cases pending in immigration court, these closures are only a tiny drop in the bucket. Nationwide, since 2008, the number of persons facing formal

200. See, e.g., Rabin, *supra* note 52, at 233–34.

201. See *supra* note 145 (describing Kris Kobach's professional background).

202. See Alan Gomez, *ICE Agents Sue Own Agency Over Deferred Deportations*, USA TODAY, Aug. 24, 2012, at 8A.

203. *Id.*

204. Julia Preston, *Agents' Union Delays Training on New Policy on Deportation*, N.Y. TIMES, Jan. 8, 2012, at A15. Another 9000 ICE agents are not in Crane's union but rather are represented by the Federal Law Enforcement Officers Association, which has been less confrontational with the Obama Administration over the use of prosecutorial discretion. Julia Preston, *For Deportation Officer, a Single-Minded Mission to Block an Immigration Bill*, N.Y. TIMES, June 2, 2013, at A14. A new lawsuit, however, brought in late 2014 by the supervising attorney of a regional ICE office, reveals the continued tensions within the agency's ranks over the appropriate use of prosecutorial discretion in deportation proceedings. Julia Preston, *Suit Previews Turmoil That Immigration Overhaul May Cause Its Enforcers*, N.Y. TIMES, Dec. 12, 2014, at A21.

205. Todd Starnes, *ICE Agents: Obama Won't Let Us Arrest Illegals*, FOX NEWS RADIO, <http://radio.foxnews.com/toddstarnes/top-stories/exclusive-ice-agent-faces-suspension-for-arresting-illegal-alien.html> (last visited Oct. 21, 2015) [<http://perma.cc/MU3C-FX2D>].

206. See Cade, *supra* note 11, at 31–34. More recently, the use of prosecutorial discretion may be declining slightly; in the period between October 2013 and August 31, 2015, 29,869 cases were closed as an exercise of prosecutorial discretion. See *Immigration Court Cases Closed Based on Prosecutorial Discretion*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, http://trac.syr.edu/immigration/prosdiscretion/compbacklog_latest.html (last visited Oct. 21, 2015) [<http://perma.cc/75S7-W4UW>].

removal proceedings has dramatically climbed each year, reaching more than 400,000 in both 2014 and 2015 (more than double the number of pending cases under any prior administration).²⁰⁷

More critically, as I have shown elsewhere, the use of prosecutorial discretion by ICE attorneys varies wildly throughout the country, with just five out of approximately eighty immigration court jurisdictions representing more than half of all case closures tracked since October 2012.²⁰⁸ Similarly situated jurisdictions have dramatically different discretionary closure rates.²⁰⁹ There is also anecdotal evidence that, even when administrative closure is offered, many ICE attorneys do so “not to buffer overly harsh applications of immigration law in low-priority cases, but rather to avoid having to litigate hearings when the noncitizen may be eligible for more far-reaching relief.”²¹⁰ To the extent this is the case, prosecutorial discretion closures may be less about compensating for equitable deficiencies in the removal system and more about reducing government attorney workload, or, even more cynically, bargaining risk-averse noncitizens who have strong equitable claims down to unfavorable results.²¹¹

3. Categorical Discretion (DACA and DAPA)

President Obama’s announcement of DACA in 2012 represented a shift toward more systematic and categorical implementation of enforcement discretion.²¹² Unlike the reactive, case-by-case evaluation that the Morton initiative asked ICE officers and attorneys to undertake, DACA allows individuals meeting specified criteria to announce themselves to a government unit within the U.S. Citizenship and Immigration Services (USCIS) for a more targeted consideration of their eligibility for equitable balancing.²¹³ If favorable action is warranted, DACA applicants receive “deferred action,” which amounts to a revocable assurance that they are not going to be a priority for deportation for at least two years.²¹⁴ Although deferred action confers only legal presence (not legal status), by preexisting

207. See generally Cade, *supra* note 11, at 31–34.

208. See *id.* at 31.

209. *Id.* at 32–33.

210. *Id.* at 34.

211. *Id.*

212. See Julia Preston & John Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1.

213. See Memorandum from Janet Napolitano, U.S. Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, U.S. Citizenship and Immigration Servs. Dir. & John Morton, U.S. Immigration and Customs Enf’t Dir. 1 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/2V7Q-HYFL>].

214. *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS. [hereinafter *Deferred Action for Childhood Arrivals*], <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Oct. 21, 2015) [<http://perma.cc/7TXE-HE6N>].

regulation deferred action recipients are eligible to apply for work authorization if they can demonstrate economic necessity.²¹⁵

The newer deferred-action initiatives announced in late 2014 would operate in similar fashion.²¹⁶ If implemented, DAPA would allow certain parents of a U.S. citizen or LPR to affirmatively request consideration for favorable discretion by the USCIS special unit.²¹⁷ The 2014 pronouncement also expands DACA to authorize discretionary consideration for a larger group of childhood arrivals.²¹⁸ For now, however, a federal judge has enjoined DAPA and the expanded DACA, and the U.S. Court of Appeals for the Fifth Circuit recently rejected the federal government's bid for a stay of that preliminary injunction.²¹⁹ The litigation will likely reach the Supreme Court. If that injunction does not become permanent, several million unlawfully present noncitizens may be eligible to seek a temporary, discretionary reprieve from removal.²²⁰ Based on application numbers in the DACA program since 2012, the number of noncitizens who actually seek deferred action is likely to be much smaller than stated estimates.²²¹ Even so, these recent steps illustrate the primacy of enforcement-level decision making in our present-day immigration system.

Despite its seemingly categorical nature, DACA incorporates key features that are reflective of prosecutorial discretion. Most important, agency officers who implement the program must first ensure the equitable criteria justifying deferral are present and then must assess the totality of the noncitizen's circumstances on a case-by-case basis. USCIS weighs relevant negative factors, such as suspected gang membership, repeated arrests (even without conviction), document fraud, and so on, against the positive equities when determining whether to defer removal.²²² According to agency data, as of December 31, 2014, the agency had accepted as properly

215. *See id.*; 8 C.F.R. § 274a.12(c)(14) (2015) (allowing agency officials to authorize work permission for noncitizens who have been granted deferred action and can demonstrate economic necessity).

216. David Nakamura, *Obama Acts to Overhaul Immigration*, WASH. POST, Nov. 21, 2014, at A1.

217. *See Johnson, supra* note 2 (inter alia, eliminating the age cap limiting favorable discretion for DACA to those still under thirty-one at the time of the initiative's initial announcement in 2012).

218. *Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Nov. 20, 2014), <http://www.uscis.gov/immigrationaction> [<http://perma.cc/JN95-AXDL>]. The period of reprieve was also expanded from two years to three. *Id.*

219. *Texas v. United States*, 787 F.3d 733, 733 (5th Cir. 2015).

220. Nakamura, *supra* note 216.

221. *See* Declaration of Donald Neufeld ¶ 29, at 12, *Texas v. United States*, 2015 WL 648579 (S.D. Tex. Jan. 30, 2015) (No. 1:14-CV-254) [hereinafter Neufeld Declaration] (relaying the agency's prediction that around 50 percent of those noncitizens potentially eligible to apply for DAPA will apply in the first eighteen months).

222. *Id.* ¶¶ 24, 30 (stating that "the DACA program requires case-by-case consideration of each request and provides for individualized adjudicatory judgment and discretion" and alleging that DACA applicants have been denied on a discretionary basis due to factors like suspicion of gang membership or gang-related activity, a series of arrests without convictions, arrests resulting in pre-trial diversionary programs, ongoing criminal investigations, or suspected document fraud).

filed 727,164 out of 770,338 initial requests for deferred action under the original DACA initiative.²²³ Of those properly filed requests, 638,897 were granted deferred action, while 38,597 were denied because of failure to establish threshold criteria or the presence of negative discretionary factors.²²⁴ As of December 31, 2014, 49,670 initial requests remain pending.²²⁵

To be sure, this is a high approval rate. But that is to be expected in a program that asks deportable noncitizens essentially to turn themselves in for removal unless they can prove significant positive equities. Because the application process for DACA entails the submission of biometric data and identity documents, background checks, and documentary proof, there is a “powerful deterrent against individuals with marginal applications from applying in the first place.”²²⁶ Even eligible youth with strong cases may decline to apply for fear that a later administration would reverse course and use the data collected to identify and seek to remove them.²²⁷

Furthermore, the nature of the equitable criteria required to qualify for DACA—long residence in the United States, earning or demonstrated progress toward a high school diploma or equivalent, no criminal record, being brought to the United States at a young age, et cetera—bring the current deportation system’s potential for disproportionality into sharp relief.²²⁸ The underlying offense triggering the sanction of deportation (and a ten year bar on lawful reentry) is noncitizens’ presence in the United States without authorization, and, in some cases, unlawful entry. Their personal mitigating factors point toward lack of (or significantly diminished) culpability, full acculturation as Americans, strong community ties, high potential for economic productivity, respect for penal laws, lack of indications of dangerousness, and so on.²²⁹ For youth falling within this group, then, concerns about equity loom especially large and discretionary

223. *Id.* ¶ 23. The agency rejected 43,174 initial requests for insufficient documentation or insufficient fees. *Id.*; see also *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012–2015*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Dec. 31, 2014) [hereinafter 2012–2015 USCIS Report], http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2015_qtr1.pdf [http://perma.cc/7VVP-USWG].

224. See Neufeld Declaration, *supra* note 221, ¶¶ 23–24, 30. The remaining 49,670 initial DACA applications accepted for filing were still pending as of December 31, 2014. *Id.* ¶ 23.

225. 2012–2015 USCIS Report, *supra* note 223.

226. Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 70 (2015); see also *id.* at 92 (“[H]igh approval rates cannot by themselves establish that discretion is not being exercised or that meaningful procedures do not exist, since there is no legitimate reason to assume that the universe of DACA applicants constitutes a random or representative sample of all potentially deportable noncitizens.”).

227. *Id.* at 70.

228. See 2012–2015 USCIS Report, *supra* note 223.

229. See generally MOTOMURA, *supra* note 9, at 176; Roberto G. Gonzales & Leo R. Chavez, *Awakening to a Nightmare: Abjectivity and Illegality in the Lives of Undocumented 1.5-Generation Latino Immigrants in the United States*, 53 CURRENT ANTHROPOLOGY 255, 262 (2012).

nonenforcement can be defensibly applied in a more generalized fashion. Indeed, categorical proportionality assessment is no stranger to the law.²³⁰ In a system lacking back-end proportionality review, the executive agency charged with enforcing immigration law might reasonably determine that deporting DACA-eligible persons (or at least those whose cases lack other indicia suggesting undesirability) is by definition going to be categorically inequitable.²³¹ To the extent this is accurate, however, it suggests that DACA cannot justifiably be limited to a one-time program.

That DACA and DAPA bifurcate agency enforcement discretion is also notable. While ICE prosecutors and agents remain free to exercise prosecutorial discretion (or not), in this model another set of institutional actors, housed within a different subagency of DHS, are tasked to look closely at particular categories of cases that are highly likely to involve persuasive equitable factors. This institutional design carries with it at least three significant benefits.

First, by publishing the guidelines and process for allowing deportable noncitizens to present themselves for consideration of deferred action, the administration promotes transparency and consistency, two rule of law values that are often raised as concerns when it comes to agency actions in general and the exercise of prosecutorial discretion in particular.²³² Second, placing responsibility in a unit specifically trained to screen for equities promotes efficiency gains.²³³ ICE attorneys are overburdened with too many removal cases, and there are too few incentives for them to look closely at any case until shortly before a merits hearing—which is likely to come nearly two years after the initiation of proceedings, if the noncitizen can persevere that long.²³⁴ Finally, sharing discretionary duties between two agency bodies adds an extra equitable screen, thereby decreasing the likelihood that noncitizens with significant humanitarian factors will be

230. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). See generally Wishnie, *supra* note 18, 420–22 (discussing the Supreme Court’s categorical proportionality review with respect to certain offenders or certain offenses).

231. Professors Cox and Rodríguez make a related point that in the DACA program, the central discretionary judgment concerning the removal of DACA-eligible noncitizens has simply been relocated from DHS’s front line operatives to the agency’s policy heads. See Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* (forthcoming 2015) (“But rather than eliminating discretion from the system, as critics charge, constraining low-level decision-makers with rules simply relocates discretion to a point higher up in the bureaucracy.”).

232. See, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 103–04 (1985) (explaining that agencies are expected to strive for consistent outcomes); Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 *ADMIN. L. REV.* 203, 262–63 (2002); William J. Stuntz, *Unequal Justice*, 121 *HARV. L. REV.* 1969, 2039 (2008) (arguing that publically accountable enforcement discretion “promotes consistency”).

233. See, e.g., Robert Pauw, *Judicial Review of “Pattern and Practice” Cases: What to Do When the INS Acts Unlawfully*, 70 *WASH. L. REV.* 779, 791 (1995) (explaining that agency efficiency goals include minimizing costs to parties, the government, and taxpayers and reducing wait times for resolution).

234. See Cade, *supra* note 11, at 27, 46–54, 77.

unjustifiably deported.²³⁵ Thus, the deferred action programs move beyond “plenary” delegation of discretionary authority to street-level officers by clarifying priorities and establishing a layered, transparent agency framework for administering certain discretionary decisions.²³⁶

In short, DACA and DAPA represent the Administration’s most ambitious attempt yet to manage the equitable responsibility delegated to it by Congress. Noncitizens who meet the criteria for these programs—law-abiding and productive childhood arrivals or parents of U.S. citizens or LPRs—are likely to be among the portion of the deportable population presenting the greatest normative challenge to the operation of the removal system.²³⁷ As the next part explains, however, reliance on executive discretion alone to ensure that the deportation system remains equitable is likely to come up short.

III. THE DRAWBACKS AND LIMITS OF EQUITY IN ENFORCEMENT

The executive branch has accumulated vast power over the ground-level realities of modern deportation law through the establishment of enforcement priorities and the exercise of prosecutorial discretion. As shown in Part II, DHS in recent years has made an effort to systematize consideration of equitable discretion by enforcement actors, primarily through targeted resource distribution and prosecutorial discretion initiatives. Nevertheless, as this part argues, a removal system that

235. There may also be an internal agency management story to tell with respect to Obama’s large-scale deferred action measures in immigration law, having to do with curbing “insurrection” by the rank-and-file agents who refused to implement prior agency case-by-case prosecutorial discretion directives. *See generally* MOTOMURA, *supra* note 9, at 205 (“Given this resistance in the field, it took the adoption of DACA as a formal program to limit unpredictability and arbitrary decisions and to bring some consistency and predictability to the nationwide pattern of prosecutorial discretion decisions.”); Cade, *supra* note 11 (describing implementation difficulties and huge inconsistencies in the exercise of prosecutorial discretion guidelines by ICE attorneys); Ahilan Arulanantham, *The President’s Relief Program As a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014, 5:00 PM), <http://balkin.blogspot.com/2014/11/the-presidents-relief-program-as.html> [<http://perma.cc/3WD3-EE8Q>]; Michael Kagan, *The Conservative Case for DACA: The Intriguing Legal Theory You Won’t Hear on Fox News*, SALON (Feb. 19, 2015, 8:30 AM), http://www.salon.com/2015/02/19/the_conservative_case_for_daca_the_intriguing_legal_theory_you_wont_hear_on_fox_news/ (“President Obama’s immigration actions should be understood as sensible measures to move power out of the hands of unaccountable civil servants, and return it to democratically elected officials.”) [<http://perma.cc/5UC4-TFRB>]; *supra* notes 194–97, 205.

236. *See* Kalhan, *supra* note 226, at 90; *see also* Cox & Rodríguez, *supra* note 231, at 75 (“The move to a more rule-bound and centralized regime provided the rule of law benefits associated with promoting consistency in official decision-making, amplifying political control and, most importantly, instituting accountability over the enforcement power.”).

237. Of course, as in any regime in which lines of eligibility are drawn, many noncitizens may not be eligible for DACA and yet present equities warranting discretionary forbearance of removal. *Cf.* Elizabeth Keyes, *Defining American: The Dream Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 142–48 (2013) (explaining how immigration advocates’ and policy makers’ focus on the “worthiness” of the DREAMers works to disadvantage noncitizens who fall outside the defined criteria); *see also infra* Part IV (describing reforms that might expand equitable scrutiny in a wider swath of cases).

allocates equitable consideration solely to enforcement actors is likely to fail to ensure normative justifiability.

In prior work, I have explained why ICE prosecutors may be ill-situated to parse both the legal merit and normative equities of removal cases.²³⁸ Even more than criminal prosecutors, ICE attorneys have training, experience, and incentives that orient them toward a professional role as protectors of public safety and national security, largely to the exclusion of distinctly secondary tasks such as evaluating the equitable merit of individual cases (at least until very late in the removal process).²³⁹ This “prosecutor bias” is compounded by intense workload pressures that leave ICE attorneys little choice but to handle their active cases—numbering in the hundreds—in an assembly-line, if not triage, fashion.²⁴⁰ Other institutional features raise additional concerns about ICE trial attorneys’ capacity to look closely at the equities of any particular case until the eve of a hearing. These features include the lack of a right to counsel for indigent noncitizens, weak rules regarding disclosure of evidence that might be helpful to the noncitizen, and the absence of a sound structure for ensuring ICE accountability.²⁴¹ Notably, the use of appropriate prosecutorial discretion does not appear to form any part of ICE attorneys’ performance metrics.²⁴²

The Obama Administration avoided many of these problems when it chose to allocate the responsibility for implementing DACA and DAPA to the specialized unit within USCIS, rather than to ICE. As we have seen, ICE’s strong sense of mission and crushing work burdens complicate its perception and evaluation of normative merits of removal in individual cases.²⁴³ In contrast, USCIS, as the benefits arm of DHS, has extensive experience in evaluating equities; indeed, that is one of its primary functions.²⁴⁴ Distributing equitable assessment duties across administrative

238. See Cade, *supra* note 11, at 46–75.

239. *Id.* at 47–50; Corcoran, *supra* note 52; Rabin, *supra* note 52.

240. Cade, *supra* note 11, at 50–54.

241. *Id.* at 59–75. For an argument for right to appointed counsel in deportation proceedings, see generally Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013). For a detailed analysis of discovery asymmetries in deportation proceedings, see Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Courts*, 79 BROOK. L. REV. 1569 (2014).

242. In response to a FOIA request, in August of 2014 I received a sample of performance evaluation reports for ICE assistant chief counsel. None of the reports measured or asked about efforts to exercise equitable discretion or the implementation of the agency’s prosecutorial guidance. See Dep’t of Homeland Sec., Performance Evaluation Reports, FOIA Response (August, 2014) (on file with author). Additionally, in 2013 I interviewed several ICE trial attorneys who confirmed that prosecutorial discretion plays no direct part in performance evaluations. See, e.g., Interview with ICE trial attorney in small Midwestern office (Dec. 20, 2013) (on file with author); Interview with ICE trial attorney in large urban office (Sept. 10, 2013) (on file with author).

243. See *supra* notes 238–42 and accompanying text.

244. Kalhan, *supra* note 226, at 95 (“[A]ssigning primary responsibility for deferred action decision making to the benefits-oriented USCIS . . . places those decisions in an agency with a different set of institutional responsibilities, incentives, practices, and cultural norms than the enforcement-oriented ICE.”); Rabin, *supra* note 52, at 238 (“DACA requires

bodies (even if both are housed within DHS), at least for particular subsets of removal cases, may avoid the prosecutorial tunnel vision and desensitization to the humanitarian aspects of the job that can come to dominate the culture of law enforcement agencies like ICE.²⁴⁵

Despite this institutional breakthrough, there remain significant drawbacks to a system that relies heavily on enforcement discretion for normative justifiability. The next section focuses primarily on the agency's failure to engage in equitable balancing when it comes to the removal of noncitizens with almost any level of criminal history. It then explains how other factors, such as controversy and lack of finality, also hinder the effectiveness of enforcement discretion as an equitable tool on a systemic level.

A. *The Criminal History Blind Spot*

In one key aspect, the Obama Administration has all but abandoned the exercise of discretion to inject equity into the removal process—namely, in removal cases involving persons with criminal histories. To the contrary, DHS has used criminal history of almost any type as an irrevocable marker of undesirability. To begin with, the agency's prosecutorial discretion guidelines are unavailable to persons with almost any level of conviction.²⁴⁶ So too with the President's deferred action initiatives. Even persons who have only misdemeanors on their records typically fall into one of the agency's priorities for removal, and DACA is specifically unavailable to anyone with a "significant misdemeanor," regardless of other equities or mitigating factors.²⁴⁷

In addition, the immigration enforcement arms of the federal government have consistently pushed for the broadest and most severe interpretations of the criminal removal statutes possible. For example, the government frequently attempts to bring minor drug crimes within the aggravated felony category. These efforts, it turns out, have spawned important Supreme

CIS to perform tasks that are central to its mission: review applications for an immigration benefit, weigh equities, and grant the benefit in accordance with established criteria.”).

245. Bowers, *supra* note 13, at 1688–91 (discussing how professionalism and experience can result in “dulled sense” and indiscriminately categorical processes for prosecutors); Cade, *supra* note 11, at 47–54 (explaining how ICE's law enforcement mission has come to dominate agency culture, coupled with an “unceasing flow of repetitive cases” that may desensitize some ICE prosecutors); Rabin, *supra* note 52, at 238 (arguing that the exercise of “prosecutorial discretion, as administered by ICE, requires the agency to perform an equitable analysis that directly conflicts with the agency's law enforcement mission”).

246. See Johnson Policies Memo, *supra* note 159; Morton Priorities Memo, *supra* note 12; Morton Discretion Memo, *supra* note 159.

247. See *Deferred Action for Childhood Arrivals*, *supra* note 214. Discretionary programs like DACA and DAPA are also going to be underinclusive of persons with no criminal history, leaving out many who deserve equitable forbearance of removal but cannot exactly meet the specified criteria (for example, because they arrived the day after their sixteenth birthday).

Court rulings, and these rulings illustrate the front and center importance of prosecutorial discretion in modern immigration law.²⁴⁸

Carachuri-Rosendo v. Holder,²⁴⁹ decided in 2010, concerned a noncitizen who faced permanent deportation without possibility of equitable discretion despite being a longtime LPR and father of U.S. citizens.²⁵⁰ Jose Carachuri-Rosendo had two convictions: one for simple marijuana possession and one for unlawful possession of a single Xanax pill—both misdemeanors under Texas state law.²⁵¹ On the first charge, he was sentenced to twenty days in jail.²⁵² The second conviction landed Carachuri-Rosendo in jail for ten days, after which the government tried to deport him as an aggravated felon.²⁵³ The Government argued that the two drug crimes would have made Carachuri-Rosendo a felony recidivist drug offender under the Controlled Substances Act (CSA), had he been prosecuted by the federal government.²⁵⁴ But because no court had ever charged or found that Carachuri-Rosendo was a recidivist, the Court unanimously rejected the Government’s slash-and-burn argument.²⁵⁵

In the 2013 case *Moncrieffe v. Holder*,²⁵⁶ ICE alleged that a longtime LPR’s first-offender guilty plea to possession of 1.3 grams of marijuana with intent to distribute was “illicit trafficking in a controlled substance” and therefore an aggravated felony.²⁵⁷ A complex chain of statutes determines whether something constitutes a federal drug trafficking crime, but ultimately it must be “an offense that the [CSA] makes punishable by more than one year’s imprisonment.”²⁵⁸ The problem in Moncrieffe’s case was that the Georgia statute at issue, like those of many other states, could be violated whether there was any kind of remuneration,²⁵⁹ and the CSA treats marijuana distribution as a misdemeanor if the defendant shared a small amount without compensation.²⁶⁰ Nevertheless, the government’s default position was to treat all marijuana distribution convictions as corresponding with the felony distribution offense, regardless of whether

248. See also Cade, *supra* note 51; Jason A. Cade, *Judging Immigration Equity* (work in progress on file with author) (discussing the role of the Supreme Court in regulating the modern deportation system).

249. 560 U.S. 563 (2010).

250. *Id.* at 566, 570–71.

251. *Id.* at 570–71.

252. *Id.* at 566.

253. *Id.* Avoiding the aggravated felony ground would allow Carachuri-Rosendo to seek discretionary relief pursuant to cancellation of removal. See *supra* Part I.A.

254. *Carachuri-Rosendo*, 560 U.S. at 575–78.

255. *Id.* at 576–77. Justice Stevens wrote the majority opinion, joined by six other justices. *Id.* at 566. Justices Scalia and Thomas each filed separate opinions concurring in the judgment. *Id.* at 582, 584.

256. 133 S. Ct. 1678 (2013).

257. *Id.* at 1683 (quoting 8 U.S.C. § 1101(a)(43)(B) (2012)). As discussed previously, aggravated felonies make noncitizens subject to mandatory detention, ineligible for discretionary relief from deportation, and permanently prohibited from lawful return to the United States. See *supra* Part I.A.

258. *Moncrieffe*, 133 S. Ct. at 1683.

259. See GA. CODE ANN. § 16-13-30(j)(1) (2011).

260. *Moncrieffe*, 133 S. Ct. at 1685–86.

there was remuneration, and therefore constitutive of aggravated felonies.²⁶¹ The Supreme Court rejected this approach, seven to two, and took the opportunity to chide the Government for its overzealous tactics in these cases:

This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as “illicit trafficking in a controlled substance,” and thus an “aggravated felony.” Once again we hold that the Government’s approach defies “the commonsense conception” of these terms.²⁶²

As Justice Sotomayor’s admonition indicates, *Moncrieffe* and *Carachuri-Rosendo* are not isolated examples of government overreach in the criminal removal cases to have reached the Supreme Court in recent years.²⁶³ Moreover, just this past Term, the Court handed down *Mellouli v. Lynch*,²⁶⁴ which rejected the Government’s argument that a state drug paraphernalia conviction should be considered a controlled substance removal offense because it relates to “the drug trade in general.”²⁶⁵ The Government’s position was particularly strained in this case, because the state drug law included substances not federally controlled and the “paraphernalia” in question consisted of a sock.²⁶⁶ Again, the Court emphasized the incongruity between the relatively minor conviction at issue and the severe consequence of deportation, noting that under federal law, as well as the law of nineteen states, Mellouli’s conduct would not even be considered a criminal offense.²⁶⁷ These concerns came across clearly during oral argument in the case, which is partly why it was unsurprising to again see seven justices oppose the Government’s position.²⁶⁸

Indiscriminate use of minor criminal history to impose the drastic consequences of detention, deportation, and bars to reentry is especially problematic because of the dire state of our nation’s misdemeanor courts.

261. *Id.*

262. *Id.* at 1693 (quoting *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 573 (2010)).

263. *See, e.g.*, *Lopez v. Gonzales*, 549 U.S. 47 (2006) (rejecting the government’s argument that a drug possession conviction punishable only as a misdemeanor under federal law qualifies as an “illicit trafficking” aggravated felony simply because it is punishable as a felony under state law); *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 (2004) (rejecting the government’s argument that a DUI conviction was a crime of violence and therefore an aggravated felony).

264. 135 S. Ct. 1980 (2015).

265. *Id.* at 1988.

266. *Id.* at 1983.

267. *Id.* at 1985.

268. *See, e.g.*, Transcript of Oral Argument at 29–30, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (No. 13-1034) (Scalia, J.: “He was convicted of having a sock and you think that’s more than tenuously related to these Federal drugs.”); *id.* at 33 (Kagan, J.: “[P]araphernalia offenses are generally extremely minor offenses; they’re not felonies.”); *id.* at 47 (Sotomayor, J.: “[U]nder Federal law, this person can’t be convicted for that drug—that’s not a drug on the Federal list— . . . but can be convicted, under your theory, for possessing the sock and that non-illicit drug in the sock.”); *id.* at 50 (Roberts, J.: “[I]t’s because you give ‘relating to’ such a broad construction that you get . . . the unusual situation . . . that the State thinks it’s a very minor offense and yet it can become so significant that the person’s deported.”).

Following a recent explosion in arrests for low-level offenses, prosecutors now bring approximately ten million misdemeanor prosecutions each year.²⁶⁹ These prosecutions churn through court systems in which adequate representation is scarce, little attention is paid to evidence or individual equities, and bail and other process costs generally outweigh defendants' perceived incentives to fight charges.²⁷⁰ The procedural protections in lower criminal courts are often even more deficient for noncitizens.²⁷¹ Consequently, the severity of deportation not only outweighs the gravity of many minor convictions, but such convictions also frequently result from processes "badly detached from the core legitimating precept of individual fault."²⁷²

DHS aggressively seeks to remove criminal aliens in other ways, too. For example, the government has been increasingly utilizing a provision of the INA that allows the agency to shuffle noncitizens who are not LPRs and who have convictions that it alone deems to be aggravated felonies into fast-track "administrative removal" proceedings, where there are even fewer procedural safeguards available than in regular immigration courts.²⁷³ Meanwhile, ICE regularly trains sympathetic prosecutors on the immigration consequences of criminal convictions in order to help them maximize the likelihood of deportation.²⁷⁴ And where a local justice system's actions are perceived to fall short of the federal government's immigration enforcement process—perhaps by allowing an undocumented noncitizen to bond out of criminal custody during prosecution for a low-level offense—ICE sometimes elects to deport the noncitizen while his or her criminal case is still pending.²⁷⁵

The executive branch also has widely employed detention as part of its enforcement strategy against noncitizens with criminal history.²⁷⁶ As described above, in the 1990s Congress made civil detention mandatory for a wide variety of immigration offenses, and many other persons are subject

269. ROBERT C. BORUCHOWITZ ET AL., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 11 (2009).

270. See, e.g., John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors in the United States*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 20 (Erik Luna & Marianne L. Wade eds., 2012); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

271. See Cade, *supra* note 58; Chin, *supra* note 141.

272. Natapoff, *supra* note 270, at 1319.

273. See SISKIN, *supra* note 68, at 9–10; Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6–9 (2014).

274. See Cade, *supra* note 52, at 186 n.28; Eagly, *supra* note 54, at 1134 (discussing how ICE trains local prosecutors regarding conviction types, record clarifications, defense approaches, and other modifications designed to maximize the chances of removal).

275. See Eagly, *supra* note 54; *supra* Part I.A (discussing agency interpretation of the finality rule).

276. From 1994 to 2011, the number of persons held in civil immigration detention increased an astonishing 430 percent. See Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 127–28 (2013).

to discretionary detention on the basis of the government's immigration charges.²⁷⁷ Indeed, the Obama Administration has easily surpassed Congress's detention expectations, as most persons charged with any criminal grounds of removal are detained in prison-like conditions for part or all of the pendency of their proceedings.²⁷⁸ In fiscal year 2012, DHS put 477,523 persons in civil immigration incarceration at some point during their removal process, at a cost of \$2 billion to taxpayers.²⁷⁹

Additionally, the Administration has dramatically increased federal prosecutions for the immigration offenses of illegal entry and illegal reentry. In fact, federal prosecutions for immigration offenses have increased almost 60 percent over the past decade, and they made up the single largest category of federal prosecutions each year from 2008 to 2012.²⁸⁰ There is more to the story than just the numbers, though, as the government employs criminal immigration prosecutions and civil removal proceedings as alternative or complementary methods of immigration enforcement.²⁸¹

Finally, the Obama Administration relies heavily on increased integration and communication with local law enforcement agencies both (1) to identify noncitizens with convictions and (2) to set priorities for enforcement against the eleven million persons residing in the United States without authorization.²⁸² The vast bulk of the immigration agency's interior enforcement against the undocumented begins with an arrest or other contact with local law enforcement, which then steers detainees into the deportation system through PEP or similar federal programs.²⁸³ The key point is that immigration authorities take little, if any, account of the circumstances of the noncitizen's arrest or whether she has been prosecuted

277. See *supra* Part I.A.

278. See HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 4–12 (2011); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 101, 120–21 (2015).

279. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012 ANNUAL REPORT 5 (2013); DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT SALARIES AND EXPENSES, FY2013 BUDGET JUSTIFICATION 5 (2012).

280. U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2013 2–3 (2014) (“For the last five years, immigration cases have comprised the largest single type of serious federal offenses.”).

281. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010).

282. Eagly, *supra* note 54, at 1139 (“[I]t is clear that it is suspected criminal status, rather than noncitizen status, that triggers deportation. . . . [E]ven just a criminal arrest . . . functions as a selection mechanism for choosing which of the millions of undocumented residents will be deported.”).

283. See *infra* Part II.B.1 (discussing PEP and other integrated immigration enforcement programs). Due to its comparative efficiency, Secure Communities (now called PEP) has been responsible for identifying a significant percentage of interior removals in recent years. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-708, SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED 1 (2012) (attributing 20 percent of ICE removals in 2011 to Secure Communities).

or convicted. More than a quarter of all noncitizens deported after local criminal arrest have never been convicted of *any* crime at all.²⁸⁴

This phenomenon, which Eisha Jain aptly labels “arrests as regulation,”²⁸⁵ reveals the breadth of the Obama Administration’s conception of criminal history as a proxy for undesirability. Suspected or potential criminal status acts as a sorting mechanism, whether or not an actual conviction ever results. As Adam Cox and Eric Posner have suggested, a noncitizen’s mere contact with the criminal justice system raises a red flag for immigration officials and thus represents a rational (or at least highly efficient) approach to making the most of scarce resources.²⁸⁶

The problem is that arrests convey next to nothing about culpability.²⁸⁷ One out of every three persons in the United States can expect to be arrested in his or her life.²⁸⁸ Arrests can be erroneous, and they can be effectuated for reasons other than the expectation of criminal prosecution.²⁸⁹ Indeed, the regular use by police of arrests as a tool of social control is now well understood.²⁹⁰ Even arrest data are often inaccurate.²⁹¹ Thus, arrest alone, especially for traffic, public order, or other low-level offenses, does not reliably indicate anything about dangerousness, assimilability, work productivity, or other components associated with desirable immigrant types.²⁹²

Using local arrests as triggers for federal enforcement also threatens to reward racial profiling and other constitutional violations, at least to the extent that such practices are a part of local law enforcement. Because local

284. Eagly, *supra* note 54, at 1145–46; *see also* ROSENBLUM & MEISSNER, *supra* note 189 (showing that most noncitizens placed in removal proceedings through the jail enforcement programs have no criminal record or only one misdemeanor).

285. *See* Jain, *supra* note 191.

286. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 846 (2007).

287. *See generally* Jain, *supra* note 191.

288. Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012) (“Our primary conclusion is that arrest experiences are common among American youth (most likely on the order of [approximately] 1 out of 3 by age 23).”).

289. *See, e.g.*, Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (arguing that New York City’s “managerial” criminal justice system sorts and regulates a large number of persons through open arrests for low-level and quality of life offenses, rather than through formal prosecution).

290. *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); BERNARD HARCOURT, *THE ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001). Many arrests are legitimate, of course, but even legitimate arrests sometimes go unprosecuted because of prosecutorial priorities and resources, policing mistakes or violations, the unavailability of witnesses or evidence, and any number of other reasons.

291. Jain, *supra* note 191, at 832 (describing how arrests are unreliable as data due to factors like inaccurate or mistaken identification and significant underreporting of disposition information).

292. *See generally* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008) (discussing the disconnect between arrests and moral culpability).

actors are responsible for the vast majority of initial encounters between noncitizens and the government, they have significant influence over the implementation of immigration enforcement.²⁹³ As we have seen, arrested noncitizens, if unauthorized, are very likely to be placed into removal proceedings, regardless of whether they are ever convicted or otherwise fall within a high priority for removal.²⁹⁴ As a result, “sub-federal actors are able to decisively alter the mix of priority levels that characterize the deported population through participation in federal-local partnerships, state criminal law, and ordinary arrest, detention, and charging practices.”²⁹⁵

Of particular importance, police officers making arrests with an eye to enforcement of federal immigration law, whether through cooperative relationships or on their own initiative, may have little incentive to comply with the Fourth Amendment.²⁹⁶ This is largely a consequence of the Supreme Court’s 1984 decision in *INS v. Lopez-Mendoza*²⁹⁷ not to apply the exclusionary rule to civil immigration proceedings, at least absent egregious violations.²⁹⁸ Because many of these low-level criminal arrests resulting in deportation never involve criminal prosecutions, constitutional rights violations go largely unchecked and, therefore, undeterred.²⁹⁹

There is little doubt that modern policing strategies tend to result in disproportionate arrests of people of color, particularly black and Latino persons arrested for traffic and “public order” offenses.³⁰⁰ Studies have

293. As Hiroshi Motomura observed in an influential article, the “discretion that matters” in setting deportation patterns is the discretion to arrest. Motomura, *supra* note 52, at 1837; *see also* MOTOMURA, *supra* note 9, at 128–31.

294. Motomura, *supra* note 52, at 1836; Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 107, 148–49 (2014).

295. Treyger, *supra* note 294, at 149.

296. *See generally* Cade, *supra* note 52.

297. 468 U.S. 1032 (1984).

298. *Id.* at 1050; *see also, e.g.*, David Gray et al., *The Supreme Court’s Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 27–31 (2012); Katie Tinto, *Policing the Immigrant Identity*, 68 FLA. L. REV. (forthcoming 2016) (on file with author).

299. *See* Peter Margulies, *Noncitizens’ Remedies Lost?: Accountability for Overreaching in Immigration Enforcement*, 6 FLA. INT’L U. L. REV. 319, 321–22 (2011) (discussing legislatively and judicially imposed constraints on the availability of civil damages suits in the immigration context); Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 52, 74–76 (Michael W. Dowdle ed., 2006) (explaining generally why civil actions seeking judicial enforcement of rights may have little deterrence value).

300. *See, e.g.*, ACLU OF N. CAL., COSTS AND CONSEQUENCES: THE HIGH PRICE OF POLICING IMMIGRANT COMMUNITIES 16 (2011) (summarizing Ryan Gabrielson’s 2010 report stating that in a number of California counties, police more frequently set up sobriety checkpoints to screen traffic in or near Hispanic neighborhoods); ALEXANDER, *supra* note 290, at 96–106 (arguing that although Latinos and people of color are not actually more likely to be guilty of drug crimes and other offenses than whites, there are huge racial disparities in who gets stopped, searched, and arrested); N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011: NYCLU BRIEFING 2 (2012) (finding that in 2011, blacks and Latinos accounted for more than 50 percent of police stops in almost every precinct in New York City and that in thirty-three out of seventy-six precincts, 90 percent of stops were of people of color); Amanda Geller & Jeffrey Fagan, *Pot As Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 593 (2010) (“Street stops are conducted predominantly in poor neighborhoods with high concentrations of black and Hispanic residents, at levels that exceed even what local disorder and crime

suggested this trend may be exacerbated in locations where local law enforcement officers interact or share overlapping duties with federal immigration officials through state or local initiatives or cooperative enforcement programs.³⁰¹ Both Department of Justice (DOJ) investigations and formal legal proceedings have revealed the potential for racial profiling in the policing of immigrants.³⁰² Suspected immigrants may thus be particularly likely to have been arrested for illegitimate reasons. By using arrests—whether or not they involve unconstitutional policing tactics—to trigger regulatory consequences, immigration law capitalizes on (or at least ignores) racial profiling and other unlawful policing by arresting officers.

There are obvious political reasons for these enforcement choices.³⁰³ As Professor Peter Schuck has observed, “it is hard to imagine a higher enforcement priority” than targeting noncitizens with criminal history.³⁰⁴ To be sure, criminal history provides the government with information about factors relevant to membership choices, such as respect for law, dangerousness, economic productivity, and so on.³⁰⁵ Accordingly, prioritizing noncitizens who have had run-ins with law enforcement is seen as an efficient means of sorting a very large pool of potential enforcement targets.³⁰⁶ But, critically, the Obama Administration’s categorical approach to noncitizens with criminal history means that the INA’s overly broad and severe provisions will fail to be tempered by equity.

conditions would predict, and marijuana arrests are clustered in many of the same neighborhoods” (citations omitted)).

301. See, e.g., EDGAR AGUILASOCHO ET AL., MISPLACED PRIORITIES: THE FAILURE OF SECURE COMMUNITIES IN LOS ANGELES COUNTY 16–18 (2012) (noting increased racial profiling in policing following the implementation of the Secure Communities program); TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1 (2009) (“[I]mmediately after Irving, Texas law enforcement had 24-hour access . . . to ICE in the local jail, discretionary arrests of Hispanics for petty offenses—particularly minor traffic offenses—rose dramatically.”); see also Cade, *supra* note 52; Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1546–50 (2011).

302. See, e.g., *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 825–26 (D. Ariz. 2013); Cade, *supra* note 52, at 181–82 (summarizing DOJ investigations and lawsuits against law enforcement agencies in Maricopa County, Arizona, Alamance County, North Carolina, and New Haven, Connecticut, on the basis of unconstitutional police practices targeting suspected noncitizens).

303. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4 (2007) (“Across all kinds of institutional settings, people are seen as acting legitimately when they act to prevent crimes or other troubling behaviors that can be closely analogized to crimes.”). See generally Hernández, *supra* note 54.

304. Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 72–74 (2007); see also U.S. IMMIGRATION AND CUSTOMS ENF’T, OFFICE OF THE DIR., ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 5 (2012) (stating that enforcement efforts against criminal aliens build on “broad consensus in the nation that persons convicted of serious crimes who are in the United States illegally should be subject to deportation”).

305. Cox & Posner, *supra* note 286, at 826–27, 846.

306. *Id.*

This Article does not take a position here regarding *how* the federal government should evaluate the equities in cases involving noncitizens convicted of, or arrested for, crimes. The point is that *some* balancing should take place in individual cases, even for “criminal noncitizens,” to safeguard against injustice and arbitrary action in the removal system.³⁰⁷ While Congress, and probably most of the public, might want ICE to have broad capacity to seek removal of dangerous individuals, it does not follow that all removals of noncitizens with criminal history are justified.³⁰⁸ An LPR family man running a small business who pleaded guilty to a misdemeanor marijuana offense long ago presents different equitable considerations than a recently convicted rapist with few community ties—yet both might be removed without any opportunity for discretionary relief or lawful opportunity to return. An intoxicated person arrested after driving into a school bus occupies a morally distinct position from an elderly woman arrested for selling tamales in a parking lot; yet, if they are undocumented, both may become priorities for removal through the operation of the deportation machinery.³⁰⁹

In short, not all noncitizens with convictions or arrests are similarly situated. Removal of many noncitizens with criminal history will be appropriate, but for others it will be unjustifiably harsh in light of the relatively minor nature of their conduct and individual mitigating factors like rehabilitation, length of time in the United States, community and family ties, health concerns, age, and so on.³¹⁰ Even unlawfully present noncitizens with criminal history will sometimes present circumstances that warrant forbearance of removal on proportionality grounds.³¹¹ While criminal history may be a reasonable enough way to establish deportation priorities, more than roughshod sorting is required for a system

307. Cf. KANSTROOM, *supra* note 11, at 219 (arguing that because European law requires balancing of private and public interests in deportation cases, the system “preserves an important measure of respect for human rights norms and a powerful safeguard against arbitrary government actions”).

308. In a related context, Professor Liz Keyes has thoughtfully examined how immigration judges rely on facile dichotomies and stock narratives to distinguish between “good” and “bad” immigrants, failing to consider the individual equities of those falling in the latter group. See generally Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012).

309. See Ruben Navarrette, Jr., *Don’t Deport the “Tamale Lady”*, CNN (Aug. 2, 2012), <http://www.cnn.com/2012/08/01/opinion/navarrette-deportation-sacramento/> (describing how the mother of two U.S. citizens who was selling homemade tamales in a Walmart parking lot was arrested for trespassing and then put into immigration proceedings) [<http://perma.cc/DCR2-F9BQ>].

310. See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 64 (reporting that the INS before 1996 understood that noncitizens subject to removal on criminal history grounds included “a vast spectrum of human character and behavior . . . [and that] a large fraction of this class made single mistakes or had shown genuine rehabilitation and remorse”).

311. See Wishnie, *supra* note 18, at 428–31 (arguing that removal orders and bars on reentry must be understood as penalties in many cases and therefore must comport with proportionality in light of the noncitizen’s individual circumstances).

administering such severe penalties to be just. At the center of every deportation case, there is an individual who may have formed deep community bonds of family, faith, employment, and friendship. And where this is true, deportation portends life-altering consequences both for that individual and for the family members, persons, and institutions at the other end of those connections.³¹² For the expansive deportation provisions in the immigration code to remain normatively tolerable, the equities and impact of removal in the individual case must be considered in some way.³¹³

When administrators rigidly apply overly broad and formally inflexible rules, they do “not merely fail to do justice, they may do positive injustice.”³¹⁴ The Executive’s failure to carefully assess the merits of deporting individual noncitizens who may have significant equities on the basis of minor crime raises the specter of injustice. Additionally, the justifiability of deportation becomes dubious when a noncitizen is brought into the system through racial profiling or other constitutional violations.³¹⁵

As this section has explained, the current Administration has failed to take account of individual fairness concerns when it comes to the removal of noncitizens with criminal history. Instead, ICE indiscriminately and aggressively pursues noncitizens with even very minor convictions (or mere arrests). This approach suggests that allocating the bulk of equitable authority to law enforcement actors comes with a significant risk that the deportation system will fail to administer appropriate justice in a large number of cases.

B. Controversy

Another drawback of relying on enforcement discretion to keep the deportation system normatively justifiable is that executive actions in this area tend to arouse significant ire and controversy. States, congresspersons, or members of the public may not approve of the particular manner in which the Executive is managing Congress’s delegation of enforcement power and may attempt to force modifications through legislation or

312. See Banks, *supra* note 55, at 1293–96 (discussing social science literature documenting the collateral consequences of deportation for family members left behind).

313. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 87 (1969) (arguing that “legislation has long been written in reliance on the expectation that law enforcement officers will correct its excesses through administration”); *id.* at 25 (“Discretion is a tool, indispensable for individualization of justice.”); Solum, *supra* note 13, at 205 (arguing that equity is essential to the just application of the law).

314. Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Specialized Case*, 35 N.Y.U. L. REV. 925, 928 (1960); see also DAVIS, *supra* note 313, at 25 (“Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice.”); R. George Wright, *Dreams and Formulas: The Roles of Particularism and Principlism in the Law*, 37 HOFSTRA L. REV. 195, 214, 217–18 (2008) (arguing that law and equity are mutually dependent).

315. See Cade, *supra* note 52 (arguing that ICE trial attorneys have constitutional and normative obligations to exercise favorable discretion where there have been unchecked upstream violations of deportable noncitizens’ rights).

litigation. We have already begun to see this play out in challenges to President Obama's most recent discretionary enforcement initiatives.

Responding to one such challenge brought by twenty-seven states, on February 16, 2015, Judge Hanen of the Southern District of Texas issued a preliminary injunction halting the rollout of DAPA and the expanded version of DACA.³¹⁶ In the district court's view, the affirmative, categorical, and large-scale nature of these programs overcame the substantial case law that typically insulates agency nonenforcement decisions from judicial review.³¹⁷ The court found DACA and DAPA to constitute an agency "rule," which would subject the agency to the Administrative Procedure Act's (APA) formal rulemaking procedures, including the provision of public notice and an opportunity to comment.³¹⁸ On May 26, 2015, a divided panel of the U.S. Court of Appeals for the Fifth Circuit declined to grant the federal government's request for an emergency stay of Judge Hanen's preliminary injunction.³¹⁹

Meanwhile, members of Congress have introduced bills to defund parts of DHS or otherwise block executive action.³²⁰ Some academics have voiced concerns too, objecting that the initiatives' scale, prospective "licensing" of future violations, and grant of the benefit of work authorization makes them unlike prosecutorial discretion and undermines the deterrence goals of immigration law.³²¹ Resolving whether DACA and DAPA are constitutional or consistent with the APA lies beyond the scope

316. *Texas v. United States*, No. B-14-254, 2015 WL 648579, at *62 (S.D. Tex. Feb. 16, 2015) (order granting preliminary injunction).

317. *Id.* at *34.

318. *Id.* at *51. Judge Hanen did not rule on the constitutionality of the executive actions, though dicta throughout the opinion suggests he has significant concerns about the agency's authority to use its discretion in this way. *Id.* at *55.

319. *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015).

320. *See, e.g.*, Immigration Accountability Act, H.R. 206, 114th Cong. § 2 (2015) (prohibiting the use of Congressional funding to implement or enforce certain exercises of prosecutorial discretion); Defund Amnesty Act of 2015, H.R. 155, 114th Cong. § 2 (2015); Prevention of Executive Amnesty Act of 2015, H.R. 31, 114th Cong. § 2 (2015).

321. *See, e.g.*, Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 177 (2014) ("Prosecutorial discretion has a place in immigration law. It has, however, historically involved case-by-case decisions, not the blanket relief that DACA affords."); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1187-92 (2015) (arguing that programs like DAPA create a "moral hazard" for continuing and future violations of immigration law); Rubenstein, *supra* note 153, at 86 (arguing that DACA raises constitutional concerns because "qualifying immigrants are afforded permission to remain in the United States and, by default, permission to reside in the states and cities of their choosing"); McConnell, *supra* note 3 (Judge Hanen's "injunction isn't about prosecutorial discretion. It is about granting illegal aliens benefits not allowed by law"); Zachary Price, *Two Cheers for OLC's Opinion*, BALKINIZATION (Nov. 25, 2014), <http://balkin.blogspot.com/2014/11/two-cheers-for-olcs-opinion.html> (arguing that DACA and DAPA "go beyond either conventional agency priority-setting or ad hoc deferred action by deeming broad categories of immigrants presumptively eligible for a prospective promise of non-enforcement") [<http://perma.cc/E5U3-NDC3>]; Price, *supra* note 120, at 761 (arguing that DACA "removes the risk of enforcement altogether").

of this Article.³²² For now, it is enough to observe that Congress has both functionally and explicitly delegated broad responsibility to the Executive when it comes to setting immigration enforcement priorities,³²³ and DACA as implemented retains key features that characterize prosecutorial discretion.³²⁴ Moreover, DACA and DAPA have only retrospective effect, making their effect on future deterrence highly speculative.³²⁵

The key point for present purposes is that these lawsuits, bills, and criticisms illustrate the distraction and controversy that executive attempts to systematize equitable discretion in the deportation system can and do engender. Because of the politically charged nature of immigration issues, challenges and attacks of this kind are likely to continue and to arise again. The Obama Administration already has had to expend a great deal of effort and resources to defend its discretionary enforcement actions against lawsuits and public criticism, and future administrations likely will take note of what occurred with DACA and DAPA. The end result may be less transparency or, worse yet, less equity. Either outcome is out of step with fundamental values of fairness and proportionality in the American legal system.

C. *Status Quo Equity*

Adjudicative equitable relief from removal typically results in finality. Where the charged noncitizen is unlawfully present, successfully obtaining adjudicative relief means that he or she is able to adjust to a more permanent status, through statutory processes like asylum or cancellation of removal.³²⁶ Cancellation is “a durable form of relief,” in Margaret Taylor’s

322. To be clear, I believe that President Obama’s implementation of his immigration enforcement authority through DACA and DAPA is constitutional. In September 2014, I, along with 135 other immigration law professors and scholars, signed a letter outlining the Executive’s authority to use discretion to protect individuals or groups from deportation. *See* Letter from 136 Law Professors and Scholars to President (Sept. 3, 2014), https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf [http://perma.cc/TZ9H-53WF]. For recent accounts concluding that DACA and DAPA are within the President’s discretionary enforcement authority, see Cox & Rodríguez, *supra* note 231, Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255 (2013), and Kalhan, *supra* note 226. For opposing views, see Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013), Margulies, *supra* note 321, and Rubenstein, *supra* note 153, at 85–86, 137–39.

323. *See* 6 U.S.C. § 202(5) (2012) (giving the Secretary of Homeland Security authority for “establishing national immigration enforcement policies and priorities”); 8 U.S.C. § 1103(a) (2012) (conferring broad power to the Secretary of Homeland Security over “the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens”).

324. *See generally supra* Parts I.B, II.B.3.

325. *See* Cox & Rodríguez, *supra* note 231, at 82–83.

326. *See, e.g.,* INA § 208(c)(1), 8 U.S.C. § 1158(c)(1) (providing that noncitizens granted asylum cannot be removed, must be authorized to work, and may travel abroad with consent of the Attorney General); 8 U.S.C. § 1229b(b)(1) (providing that cancellation of removal for non-LPRs will adjust the recipient’s status to one “lawfully admitted for permanent residence”).

words, amounting to, “essentially, legalization on a case-by-case basis.”³²⁷ Similarly, adjudicative success for lawfully present noncitizens facing deportation generally means that either the government’s removal charges were unfounded or the person was able to obtain discretionary relief, perhaps through (re)adjustment of status with a waiver.³²⁸ In either situation, the noncitizen exits removal proceedings with her legal status intact and faces almost no possibility that charges will be filed again unless a new triggering event, such as a new conviction, arises.

In sharp contrast, the implementation of equity through enforcement discretion can do little more than preserve the status quo. Deferred action, administrative closure, or termination of proceedings typically do not resolve the underlying issue that triggered the initiation of removal proceedings. An LPR with a deportable conviction who is offered administrative closure as a matter of prosecutorial discretion remains perpetually subject to possible removal. An undocumented youth who receives a reprieve under DACA remains without legal status (though she may at least temporarily stop accruing unlawful presence and gain permission to work). Instead, that person, like many other beneficiaries of equitable prosecutorial discretion, occupies what Geoffrey Heeren has called the “status of nonstatus,” which sanctions physical presence without bestowing rights or benefits and does not offer a path to increased stability.³²⁹

In this respect, prosecutorial discretion in deportation proceedings achieves something different than its analogue does in the criminal system. Discretionary decisions not to charge or prosecute are useful in the criminal system because they do not implicate double jeopardy, and the public might want prosecutors to be able to reconsider discretionary decisions if new information arises or priorities change.³³⁰ This also may be a benefit of discretionary forbearance in the deportation system.³³¹ But in the meantime, the uncharged criminal suspect typically enjoys the same liberty as one who is tried and acquitted. Moreover, the uncharged suspect is in a considerably better position than one who has been prosecuted and convicted, even if the person’s circumstances lead to a mitigated sentence of probation, community sentence, or time served. And because most criminal offenses have statutes of limitation, at some point an alleged offender will know she no longer need fear prosecution.

327. Taylor, *supra* note 113, at 532.

328. See, e.g., *Medina-Rosales v. Holder*, 778 F.3d 1140, 1146 (10th Cir. 2015) (holding that a noncitizen who received LPR status after entry and who meets the criteria to readjust status may seek a discretionary waiver under 8 U.S.C. § 1182(h)).

329. Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1129–33 (2015); see also Jennifer Chacón, *Liminal Legality: Developments in Immigration Enforcement Crime Control and Beyond*, 92 DENVER U. L. REV. (forthcoming 2015) (describing the legal ambiguity of DACA and DAPA).

330. See Bowers, *supra* note 13, at 1657, 1685.

331. See Interview with ICE trial attorney in small Midwestern office, *supra* note 242, at 3–4 (describing how, in the exercise of discretion, she sometimes elects not to file a charging document with the immigration court but retains it in the event that new negative information about the noncitizen comes to light).

For deportable noncitizens, on the other hand, the difference between adjudicative discretionary relief from removal and a favorable exercise of enforcement discretion is considerable. Receiving deferred action is better than getting deported (or remaining completely undocumented), but in the end it amounts to “immigration status purgatory.”³³² But because actual equitable adjudicative relief is now so tightly constrained, it may be an impossible (or, at best, perilous) course to pursue in adversarial proceedings. For that reason, even deportable noncitizens with meritorious cases for relief often accept ICE’s offer of administrative closure rather than risk venturing to a hearing.³³³

The bottom line is that even noncitizens who receive a favorable exercise of prosecutorial discretion remain in legal limbo. As a result, they remain at higher risk for discrimination and exploitation than persons who have lawful immigration status. Notwithstanding their contributions to the economy and tax base, noncitizens who receive favorable prosecutorial discretion but lack lawful status also remain excluded from healthcare coverage, social security retirement, and other benefits that are afforded to noncitizens in lawful status.³³⁴ In any system that allowed for a greater measure of adjudicative discretion, many such noncitizens might actually be able to regularize their status and fully enter communities that they have been a part of and contributed to for many years, albeit in the shadows. Under the current system of executive-administered discretion, however, even noncitizens with strong equities can expect little more than to remain in a position of distressing uncertainty and inequality.

IV. IMPROVING IMMIGRATION EQUITY

As this Article has argued, the risk of normative injustice in the removal system increased substantially when Congress all but wrote out of the statute adjudicative equitable consideration for both lawfully present and undocumented noncitizens, while at the same time casting removal grounds so wide that even LPRs with old, minor convictions—or other criminal history not even recognized as a conviction by the criminal system—might find themselves mandatorily detained and then permanently banished.

In recent years, the executive branch has taken some important measures to preserve equity in our new deportation system. Prosecutorial discretion, at least in theory, helps ensure that the extreme sanctions of deportation and bars to lawful reentry are not imposed without individual consideration of proportionality and fairness. In practice, DHS’s push to encourage ICE officers and attorneys to evaluate equitable norms when making enforcement decisions appears to have been somewhat successful in select jurisdictions but thus far fails to achieve anything close to nationwide consistency and efficacy.

332. Kalhan, *supra* note 226, at 68.

333. See Cade, *supra* note 11, at 33–34, 77–78.

334. See Heeren, *supra* note 329, at 1165–79.

DACA represents an important innovation in the use of prosecutorial discretion to implement proportionality and fairness in the immigration system. The program reflects the Obama Administration's reasonable belief that the deportation of undocumented noncitizens who can establish specific criteria will categorically be disproportional, at least barring other indicia of undesirability. The program's design also capitalizes on a division of expertise across immigration agencies by allocating equitable evaluation to specially trained benefits officers in USCIS rather than enforcement officers within ICE. However, DACA has engendered significant controversy, and DHS's efforts to expand the program or identify other groups deserving of categorical discretion have thus far been hampered by federal litigation.

Focusing limited enforcement resources at the border and on noncitizens who encounter criminal justice systems is a defensible, if imperfect, approach to decreasing the likelihood of disproportionate deportations. If, in contrast, the Administration were to put its resources into combing school rosters for undocumented youth, raiding noncitizen's homes or workplaces, or policing emergency rooms, the likely result would be an increased proportion of noncitizens facing removal despite strong bonds, significant hardship, and fewer negative factors.

Nevertheless, these efforts are thus far inadequate to ensure the system's normative justifiability. In particular, recent administrations' overreliance on the criminal history proxy means that noncitizens with even minor convictions and strong equities are unlikely to receive much individualized consideration regarding the merits of their removal. The following sections outline a range of legislative and executive reforms that would help restore (or at least improve) considerations of proportionality and fairness in the deportation system.

A. Legislative Reforms

Congress bears primary responsibility for the shift in equitable discretion from adjudicators to enforcers in the modern immigration scheme. The most direct possibilities for redress also lie with Congress. If federal lawmakers were to roll back the breadth and severity of the removal grounds, and restore mechanisms for adjudicative relief from removal for both lawfully present and undocumented noncitizens, the pressure on the Executive to adopt measures that ensure that individual deportations remain proportional and justified would decrease. Toward this end, Congress should consider implementing the following reforms.

Critically, Congress should narrow the criminal history removal grounds, which make many lawfully present noncitizens deportable on the basis of minor offenses, despite deep connections and contributions in this country and substantial hardships faced abroad. One important step would be to revise the aggravated felony ground to exclude offenses that do not reliably indicate that the noncitizen poses a threat to public safety. For example, offenses designated as misdemeanors under the applicable penal code should never qualify as aggravated felonies. This would help ensure that

the severe sanctions associated with aggravated felonies—including removal without the possibility of discretionary relief and permanent bar on lawful reentry—are a proportional response, which Congress recognized when a narrower version of the aggravated felony category was originally enacted in 1988.³³⁵

In general, misdemeanors are insufficiently reliable indicators of wrongdoing to justify the imposition of severe immigration consequences. Misdemeanor marijuana possession offenses in particular have become an increasingly problematic ground on which to base deportation.³³⁶ Recently, several states have legalized the use of marijuana for medical or recreational purposes, and numerous other states are considering similar measures.³³⁷ Even in states where marijuana possession remains prohibited, violations typically are lightly sanctioned and often categorized only as civil infractions.³³⁸ At least one in three persons in the United States has tried marijuana, including our three most recent Presidents.³³⁹ Accordingly, Congress should scrutinize this deportation ground and either expand the limited petty offense exception or do away with removal on the basis of marijuana possession all together.

Additionally, Congress should consider enacting statutory limitations that would prohibit removal of lawfully present noncitizens on the basis of very old convictions. Limiting the possibility of removal to a statutorily determined period following the date of conviction would account for youthfulness, redemption, and the accumulation or strengthening of social bonds in this country over time.³⁴⁰ One route would be to enact a generally applicable statute of limitation, such as fifteen years, for all removal offenses. This approach would have the benefit of administrative ease. Alternatively, Congress might want to calibrate the length of time appropriate for response based on the underlying seriousness of the applicable removal offense. (Perhaps the most egregious removal offenses—for example, murder, rape, and human trafficking—should not have a statute of limitations.) Either way, this kind of reform would decrease the number of lawfully present noncitizens subject to disproportionate removal in light of the nature of their underlying offenses and the mitigating factors that typically accrue through significant periods of time spent living, working, and raising families in this country.

335. See *supra* note 69 and accompanying text.

336. See generally Cunnings, *supra* note 55.

337. *Id.* at 522–24 (discussing legalization of recreational marijuana use in Colorado, Washington, Oregon, Alaska, and Washington D.C., and similar legislation likely to be proposed in 2016 in Arizona, California, Maine, Massachusetts, and Nevada).

338. *Id.* at 526–28; see also Cade, *supra* note 58, at 1773.

339. Lydia Saad, *In U.S., 38 Percent Have Tried Marijuana, Little Changed Since '80s*, GALLUP (Aug. 2, 2013), <http://www.gallup.com/poll/163835/tried-marijuana-little-changed-80s.aspx> [<http://perma.cc/7LVY-TKUQ>].

340. See Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1747 (2011) (“Tying the statute of limitations to the date of conviction has the advantage of making time for and recognizing redemption, and of accounting for youthfulness at the time of the crime.”).

An alternative approach that would address the same concerns would be to set probationary periods for the applicability of each removable offense. Congress has long done this with crimes classified as involving moral turpitude, which can only form the basis for removal of a lawfully present noncitizen if the offense is committed within the first five years after admission.³⁴¹ All criminal history removal offenses could be made contingent on the same probationary period, or, again, Congress might wish to calibrate the applicable period based on the egregiousness of the underlying conviction category. It would be reasonable, for example, to assign a short probationary period for removal based on minor controlled substance offenses and a longer period for those convicted of felony drug trafficking crimes. Like a statute of limitations, this approach would recognize that after a substantial period of time living in this country, noncitizens will develop bonds of family, community, faith, and so on that will generally outweigh the justifiability of imposing deportation in addition to whatever punishment already has been imposed through the criminal justice system.

Federal lawmakers should also restore power to adjudicators to determine whether removal is appropriate in a wider swath of cases than allowed under current law. First, given today's extensive connections between the criminal and immigration systems, it makes sense to reboot the JRAD mechanism repealed in 1990, which allowed criminal court sentencing judges to determine whether the additional sanction of deportation would be unwarranted in an individual noncitizen defendant's case.³⁴² Similarly, Congress should enact legislation clarifying that "convictions" that have been expunged or set aside—whether through diversionary programs, judicial expungements, or pardons—will not trigger removal grounds. These changes would help ensure that noncitizens are not deported on the basis of criminal history that the criminal justice system no longer treats as a conviction or that a sentencing judge has determined would not warrant the additional sanction of removal.³⁴³

At the federal immigration court level, Congress should reallocate broad power to immigration judges to balance the equitable fairness of deportation in individual cases. Cancellation of removal, as defined under current law, is far too limited to adequately ensure proportionality for both LPRs and undocumented noncitizens. Here, too, Congress might reasonably determine that a range of discretionary relief is appropriate, depending on factors like the nature of the underlying removal category and the immigration status of the noncitizen. It might be appropriate to make discretionary relief from removal somewhat more stringent for

341. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2012) (providing for the deportation of a lawfully present noncitizen if he or she is (1) convicted of one crime involving moral turpitude within five years after the date of admission and (2) a sentence of one year or longer may be imposed). Noncitizens who have been convicted of more than one crime involving moral turpitude are deportable regardless of the dates of the offenses. 8 U.S.C. § 1227(a)(2)(A)(ii).

342. See *supra* notes 95–98 and accompanying text.

343. See Cade, *supra* note 88, at 380–81; Cade, *supra* note 58, at 1758.

undocumented noncitizens than for those who are lawfully resident, as under current law. Similarly, Congress might reasonably determine that noncitizens with egregious criminal histories or other evidence of significant bad acts have a very high burden to demonstrate that the pain of deportation outweighs their positive equities. The bottom line, though, is that a justice system committed to proportionality requires immigration judges to have adequate power to ensure that removal and corresponding bars to reentry are normatively justified in all individual immigration cases. If Congress wishes to ensure that *all* noncitizens who commit immigration violations or criminal offenses are penalized in some fashion—in addition to the sanctions already administered by the criminal justice system—these concerns could be more appropriately addressed through the enactment of a graduated system of sanctions (e.g., civil penalties, delays in immigration benefits, et cetera), which could be calibrated to the specifics of the individual case.³⁴⁴ In any event, the statutory annual limit on cancellation grants for non-LPRs should be repealed, as this cap constrains the availability of relief for many individuals who can meet even the very high hardship threshold required under current law.³⁴⁵

There is also much Congress should do to improve the procedural protections currently afforded noncitizens in removal proceedings. Procedural mechanisms work to help ensure that adjudicators or other agency decision makers (including prosecutors) have an incentive and opportunity to consider the merits and equities of individual cases. For example, lawmakers could give noncitizens facing removal a right to appointed counsel if they cannot afford an attorney. Recent studies have shown strong correlations between the assistance of counsel and success in removal proceedings,³⁴⁶ suggesting that in the modern system, attorneys play a critical role in helping noncitizens avoid inappropriate removals. Additionally, Congress could increase statutory obligations on the government to turn over any evidence in its possession bearing on the noncitizen's right to remain.³⁴⁷ Various commentators have argued that these and other procedural reforms are needed to “see justice done” in

344. Professor Juliet Stumpf has thoughtfully analyzed what such a system might look like. See Stumpf, *supra* note 55, at 1728–40.

345. See *supra* Part I.A; see also Taylor, *supra* note 113, at 548.

346. See, e.g., Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, CARDOZO L. REV. DE NOVO (Dec. 2011), http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf [<http://perma.cc/56W5-XPCK>]; Andrea Saenz, *The Power of 1000: Updates from the Nation's First Immigration Public Defender*, CRIMMIGRATION (July 14, 2015), <http://crimmigration.com/2015/07/14/the-power-of-1000-updates-from-the-nations-first-immigration-public-defender/> (“The early data indicate that the presence of NYIFUP counsel increases a detained client’s chance of success in their removal case ten times over, or by as much as 1000%.”) [<http://perma.cc/8V5E-SC8Q>]; *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court “Women with Children” Cases*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (July 15, 2015), <http://trac.syr.edu/immigration/reports/396/> [<http://perma.cc/G448-METJ>].

347. See generally Cade, *supra* note 11; Heeren, *supra* note 241.

removal proceedings.³⁴⁸ While procedural reforms would not directly remediate the current system's reliance on executive discretion to ensure proportionality, they would at least improve the likelihood that noncitizens who do qualify for the limited forms of discretionary relief still available will prevail in highly adversarial, deeply backlogged immigration proceedings.

Finally, legislation providing a path to lawful status for certain groups of undocumented noncitizens in the United States would alleviate the burden on executive branch officials to sort among approximately eleven million deportable persons, many of whom have developed substantial ties in this country.³⁴⁹ Reform might target specific groups, such as those who have temporarily benefited from President Obama's DACA program. Indeed, the Development, Relief, and Education for Alien Minors Act ("the DREAM Act"), which Congress has considered several times in recent years and which passed the Senate in 2013, would have done just that.³⁵⁰ If enacted, the DREAM Act would provide a lawful status for noncitizens who came to the United States before age sixteen, lived here continuously, earned a high school diploma or equivalent, attended college or served in the military for at least two years, and did not have disqualifying convictions.³⁵¹ The DREAM Act would thus remove the threat of deportation for a portion of the noncitizen population with especially strong equities and little or no personal responsibility for the immigration violations that make them removable.

Lawmakers should consider other categories of deportable noncitizens for legalization, as well. For example, Congress may wish to provide a path to lawful immigration status for law-abiding, productive noncitizens with U.S. citizen children—another group for whom the sanction and collateral consequences of deportation often will be excessively harsh. Perhaps Congress could take an even broader legalization approach and focus primarily on length of residence in the United States to establish a path to lawful status for currently present unauthorized noncitizens, as it did with the Immigration Reform and Control Act of 1986.³⁵²

348. See CTR. FOR IMMIGRANTS' RIGHTS, PA. STATE UNIV. DICKINSON SCH. OF LAW, TO FILE OR NOT TO FILE A NOTICE TO APPEAR: IMPROVING THE GOVERNMENT'S USE OF PROSECUTORIAL DISCRETION 56–60 (2013); Cade, *supra* note 11, at 77; Betsy Cavendish & Steven Schulman, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System*, APPLSEED 17–19, 63–67 (2012); Corcoran, *supra* note 52, at 166–73; Heeren, *supra* note 241, at 1573.

349. More than half of the eleven million undocumented persons currently living in the United States have been here for over ten years. See, e.g., *Oversight of the U.S. Department of Homeland Security: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015) (written testimony of Jeh Johnson, Secretary of Homeland Security), <http://www.dhs.gov/news/2015/07/14/written-testimony-dhs-secretary-johnson-house-committee-judiciary-hearing-titled-> [<http://perma.cc/JND9-64JZ>].

350. See DREAM Act, S. 744, 113th Cong. § 2103 (2013); see also DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. §§ 621–32 (2006).

351. See DREAM Act, S. 744, 113th Cong. § 2103.

352. The Immigration Reform and Control Act of 1986 contained two legalization programs. One was based on residence in the United States since at least January 1, 1982,

Reforms such as these would help restore proportionality to the deportation system, decrease pressure on severely overburdened immigration courts, and eschew much of the controversy and inefficiency endemic in a system that relies so heavily on executive discretion to ensure normative justifiability. However, because any categorical legalization legislation is likely to (1) be retrospective in application, and (2) reflect line drawing that on some level will be arbitrary, such efforts alone will fail to ensure that noncitizens with strong humanitarian factors who fall outside the program's eligibility requirements can avoid unfair deportations. Accordingly, Congress should consider enacting the entire panoply of reforms proposed here, including both legalization for particularly sympathetic groups and measures that create the structures necessary for individuation in removal decisions.

It must be acknowledged, however, that such reforms face an uphill battle. Year after year—for over a decade now—multiple bipartisan efforts to engineer comprehensive immigration reform have failed.³⁵³ Legalization programs are especially controversial, but even less ambitious immigration reforms raise political firestorms.³⁵⁴ Even if a future Congress is able to pass immigration legislation of some sort, it may fail to bring changes that substantially soften the indiscriminate harshness of the current deportation laws, instead continuing to rely on prosecutorial discretion to address proportionality concerns. The following section discusses steps that the executive branch might take to further improve the removal system in the absence of legislative action.

B. Improving Executive Discretion

As I have argued, the primary deficiencies in the Obama Administration's implementation of fairness through enforcement discretion are (1) inconsistency in evaluating the normative merits of individual removal cases across and within jurisdictions and (2) failure to balance equities in cases involving noncitizens with almost any kind of criminal history.³⁵⁵

With respect to lack of consistency, DHS must do more than issue guidelines on the importance of prosecutorial discretion in the removal system. Guidelines and trainings are important, but ground-level ICE operatives also need real incentives to exercise equitable discretion in

while the other focused on certain agricultural workers. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); INA §§ 210(a)(2)(A), 245A(a)–(b) (2002). *See generally* RUTH ELLEN WASEM, CONG. RESEARCH SERV., RS22111, ALIEN LEGALIZATION AND ADJUSTMENT OF STATUS: A PRIMER 5 (2010).

353. *See generally* MARC R. ROSENBLUM, MIGRATION POLICY INST., U.S. IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM (2011); Ryan Lizza, *Getting to Maybe: Inside the Gang of Eight's Immigration Deal*, NEW YORKER (June 24, 2013), <http://www.newyorker.com/magazine/2013/06/24/getting-to-maybe> [<http://perma.cc/Y78B-2LPT>].

354. *See generally* MOTOMURA, *supra* note 9, at 172–207. A political skirmish early in 2015 nearly resulted in the failure to fund DHS at all. *See* Everett & Kim, *supra* note 48.

355. *See supra* Part III.A.

consistent and effective ways. I have suggested how the immigration agencies might create such incentives in more detail elsewhere and briefly reiterate some of those points here.³⁵⁶ First, each individual noncitizen facing removal should have his or her case assigned to an individual ICE attorney prosecutor—or, as a second best option in the initial stages of proceedings, a small unit—who ultimately will be responsible for litigating the hearing. Ideally this assignment should be made before charges are filed with the immigration court, and, at the least, case-handling responsibility should be designated before the first calendar hearing in proceedings. This vertical prosecution design would elevate ICE attorneys' incentive to scrutinize individual cases for both merit and possible favorable discretion because they would know from the outset that they would bear ultimate responsibility for litigating the matter.³⁵⁷ It would also provide a clear channel of communication for a noncitizen facing removal who wants to make a case that he or she warrants favorable discretion.³⁵⁸ Relatedly, ICE officials' appropriate exercise of discretion should become part of their regular performance evaluations, for which it apparently plays no role at present.³⁵⁹ This change would similarly increase the incentives for early, individualized examination of the merits and equities of noncitizens' deportation cases.

Another important procedural reform would require ICE attorneys to turn over the noncitizen's "A-file" (excepting confidential information) in any case in which the individual intends to contest removability, seek relief, or obtain the assistance of counsel.³⁶⁰ I suggested above that Congress mandate this responsibility through statute, but in the absence of legislation, the Executive could implement the reform through rulemaking or administrative policy. This obligation would give noncitizens access to documents that might bear on their ability to rebut the government's charges of deportability or to establish eligibility for discretionary relief from the immigration judge. It would also lead trial attorneys to scrutinize cases earlier in the process than they currently do, making it more likely that low-priority cases would be screened out.³⁶¹

The government might take a number of steps to address its failure to adequately engage in normative balancing before the deportation of noncitizens with criminal history. First, an enforcement policy that aims to

356. See generally Cade, *supra* note 11.

357. *Id.* Even if vertical prosecution assignments are not made before removal proceedings are begun, an attorney should review every charging document before it is filed in immigration court, as others and I have suggested. See CTR. FOR IMMIGRANTS' RIGHTS, *supra* note 348; Cade, *supra* note 11.

358. Under current agency guidance, noncitizens in detention or facing removal proceedings who believe they merit favorable discretion are instructed to submit their request to a general mailbox or telephone number for the relevant agency subdivision. See *Frequently Asked Questions Relating to Executive Action on Immigration*, DEP'T OF HOMELAND SEC.: U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/immigrationAction/faqs> (last visited Oct. 21, 2015) [<http://perma.cc/T2CP-6GCZ>].

359. See *supra* note 242 and accompanying text.

360. See Cade, *supra* note 11, at 62.

361. *Id.* at 70–74.

ensure that removals are not unjustified would prioritize among offenders, focusing on those whose convictions suggest a threat to public safety. Recent policy revisions under DHS Secretary Johnson take a small step in this direction, but do not go far enough.³⁶² Barring other negative factors, the government generally should not seek to deport noncitizens whose only criminal history consists of low-level offenses (let alone mere arrests). This approach would recognize that the gravity of minor convictions is generally not proportional to the severity of deportation. Misdemeanor convictions, it is increasingly recognized, are particularly unreliable indicators of culpability or wrongdoing.³⁶³ At a minimum, federal enforcers should stop filing and zealously litigating removal cases that seek the most egregious immigration outcomes possible for nonserious offenders.³⁶⁴

Second, ICE could implement a general policy of declining to seek the removal of noncitizens on the basis of criminal history that is not considered a continuing conviction under the applicable penal law. Noncitizens whose convictions have been deferred, expunged, pardoned, or set aside cannot easily be considered out of step with the social norms of the communities in which they live. To the contrary, in such cases the criminal justice system has formally recognized that the noncitizen's rehabilitation, remorse, reintegration, or other mitigating factors warrant removing (or avoiding altogether) the specter of continuing direct or collateral consequences. Seen in this light, these ameliorating criminal justice processes can serve as a valuable surrogate for the equitable balancing that should take place in removal proceedings.³⁶⁵ Pardons, expungements, and similar events signify to enforcement officials that banishing the noncitizen on the basis of the underlying criminal history would not be proportional, absent other indicia of undesirability or threat to public safety. Thus, these actions could function as "disproportionality rules of thumb," counseling against deportation in the usual case but not binding the agency when a case presents factors that warrant overcoming the presumption. To be sure, pardons and judicial expungements may be easier to obtain in some jurisdictions than others, resulting in

362. See Johnson Policies Memo, *supra* note 159, at 3–4 (noncitizens with one or more felonies are a top priority for enforcement, while noncitizens convicted of one "significant misdemeanor" or any three misdemeanors (other than traffic violations) remain the agency's second-highest priority).

363. See Cade, *supra* note 58, at 1808–11; *supra* text accompanying note 283. The government should also exercise discretion not to pursue removal in situations where the noncitizen was brought to immigration proceedings through racial profiling or other constitutional violations. While such situations may not raise proportionality concerns, they do implicate another aspect of the removal system's normative justifiability. See Cade, *supra* note 52, at 198–203.

364. See *supra* text accompanying notes 249–68 (discussing the government's losses before the Supreme Court in cases such as *Mellouli*, *Carachuri*, *Moncrieffe*, and *Lopez*).

365. I develop this potential administrative reform further in a forthcoming essay that takes as its launching point an August 2015 sentencing order by Federal District Court Judge Jack B. Weinstein, in which Judge Weinstein made a judicial recommendation against deportation despite the absence of statutory authority to do so. See Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE (forthcoming 2015).

inconsistencies.³⁶⁶ That fact does not present a persuasive reason not to adopt this proposal, however, because inconsistencies are already endemic in the criminal deportation system. Not all prosecutors have the same priorities or resources. Similar offenses can result in disparate immigration consequences, depending on how the state defines the crime.³⁶⁷ Indeed, a deportation system that deferred to these disproportionality rules of thumb might actually promote consistency by reducing the impact of disparate outcomes for noncitizens caught up in the criminal justice systems of different jurisdictions.

Finally, the Executive should generally not seek to remove lawfully present noncitizens on the basis of criminal history from the distant past. A noncitizen whose conviction was obtained long ago is unlikely to pose a continuing threat to public safety or social mores.³⁶⁸ To this end, the government should direct immigration prosecutors to exercise (or at least seriously consider) favorable discretion where the conviction is sufficiently attenuated by time and no other negative factors are present.³⁶⁹ This “administrative laches” policy would help compensate for the absence of limitations periods in the deportation statutory scheme.³⁷⁰ Undoubtedly, DHS would instruct ICE attorneys to continue to prosecute cases that raise

366. See Barkow, *supra* note 123, at 1349; MARGARET COLGATE LOVE, NAT’L ASSOC. OF CRIMINAL DEF. LAWYERS, NACDL RESTORATION OF RIGHTS RESOURCE PROJECT, CHART # 4—JUDICIAL EXPUNGEMENT, SEALING, AND SET-ASIDE (2015), http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Judicial_Expungement_Sealing_and_Set-Aside.pdf [<http://perma.cc/R3MN-BY96>]; MARGARET COLGATE LOVE, NAT’L ASSOC. OF CRIMINAL DEF. LAWYERS, NACDL RESTORATION OF RIGHTS RESOURCE PROJECT, CHART # 3—CHARACTERISTICS OF PARDON AUTHORITIES (2015), https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Characteristics_of_Pardon_Authorities.pdf [<http://perma.cc/MB2U-N85P>].

367. See, e.g., Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1735 (2011) (“Under a categorical analysis, two people who commit the same offense but are able to secure different plea deals or are prosecuted in jurisdictions that define the offense differently will face different immigration consequences.”).

368. See Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1627–28 (2012) (discussing sociological research indicating that the risk of recidivism decreases over time and age, including recent studies suggesting that individuals who stay arrest-free for seven years following prior contact with the criminal justice system “pose very little risk of future crime”).

369. DHS’s November 2014 memo on the agency’s enforcement priorities hints at the possibility of discretion for persons with criminal history, but requires supervisory approval and lacks the sharpness necessary to ensure that agents engage in balancing to ensure proportionality in every individual case. See Johnson Priorities Memo, *supra* note 159, at 5–6 (indicating that noncitizens falling within the agency’s top priority should be removed unless, “in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority”); *id.* at 5 (“Likewise, aliens in Priority 2 should be removed . . . unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.”).

370. See *supra* notes 340–41 and accompanying text (arguing that Congress should adopt statutes of limitations or probationary periods for the criminal removal grounds).

other indicia of danger or undesirability, regardless of the passage of time since a conviction. Likely, too, egregious offenses (e.g., rape and murder) would be exempted from this policy, and reasonably so.

Executive reforms such as these would help further justice in removal proceedings. If ICE attorneys and agents are not up to the job of exercising discretion in these ways or for these groups of noncitizens, the Executive should expand upon the insights gleaned from DACA by outsourcing discretionary consideration in a wider swath of cases to specialized units within USCIS.³⁷¹ For example, as Margaret Taylor has suggested, the Executive might implement a policy allowing noncitizens to proactively file affirmative non-LPR cancellation of removal applications with USCIS.³⁷² Additionally, as Shoba Sivaprasad Wadhia has argued, DHS could use the APA to issue administrative rules governing prosecutorial discretion and deferred action.³⁷³ This approach would open up the possibility of judicial review, provide greater clarity and uniformity, and possibly avoid some of the controversy that attends to executive-based equity. The general lack of finality, institutional discomfort, and other endemic drawbacks will remain, however, relegating such administrative approaches to a second-best solution to a deeply systemic problem.³⁷⁴

CONCLUSION

Congressional amendments to the immigration code in the 1980s and 1990s set in motion a radical transformation of immigration law, the full implications of which are still being realized. The decline of formal channels for ensuring that individual deportations are proportional and equitable has shifted responsibility to the Executive to implement rigid immigration rules in a normatively defensible way. In recent years, the Obama Administration has endeavored to promote fairness through targeted use of resources and prosecutorial discretion, and by and large these efforts have been laudable. Nevertheless, relying solely on law enforcement actors to keep the system equitable has thus far come up short. In particular, the administration of the current removal system inadequately addresses the need to assess individualized equities in deportation cases, especially in cases that concern noncitizens who have criminal history.

If Congress or the Executive do not take further steps to make the deportation system proportional, the responsibility to promote the value of individualized equity-based decision making in regard to life-defining legal choices about deportation will fall to federal courts. Indeed, this is the

371. See *supra* Part II.B.3 (explaining the benefits of DACA's institutional design).

372. Taylor, *supra* note 113, at 549–50.

373. See Wadhia, *supra* note 193, at 282–86, 294–95.

374. See Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 526 (2012) (“No matter how much discretion becomes inculcated into the immigration enforcement mechanisms, it will always appear to be too much and too generous for restrictionists, especially those in Congress, and those same policies will appear to be too little for accommodationists and immigrant advocates.”).

theme of a number of the Supreme Court's recent decisions in this field. As I have suggested elsewhere, a majority of justices appear uncomfortable with—and motivated to regulate—the modern immigration regime's lack of adjudicative equity.³⁷⁵ Underlying this emerging jurisprudence is the principle that severe penalties imposed on the basis of criminal convictions must be predicated on considerations of individualized justice, a topic I take up more fully in another project.³⁷⁶

375. See Cade, *supra* note 51.

376. See Jason A. Cade, *Judging Immigration Equity* (work in progress on file with author).