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Immigration Blame

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ARTICLES

IMMIGRATION BLAME

*David S. Rubenstein**

This Article provides the first comprehensive study of blame in the U.S. immigration system. Beyond blaming migrants, we blame politicians, bureaucrats, and judges. Meanwhile, these players routinely blame each other, all while trying to avoid being blamed. As modeled here, these dynamics of “immigration blame” have catalyzing effects on the politics, policies, and structures of immigration law. Yoking key insights from a range of social sciences, this Article offers unique perspectives on the operation and design choices of the immigration system. Moreover, through a blame lens, the terms of debate over amnesty, immigration enforcement, the travel ban, sanctuary cities, and the U.S. Supreme Court’s plenary power doctrine come into sharper focus.

In turn, this Article’s descriptive portrayal of immigration blame prompts some vexing normative questions: Is immigration blame desirable? Can its inputs and outputs be controlled? If so, how and toward what ends? In immigration, as elsewhere, blame is a paradox: both functional and dysfunctional, socially cohering and corrosive. That being so, we should not aim for a blame-free immigration system. Rather, we should seek ways to promote the values of immigration blame, while minimizing its more unsavory manifestations. Toward those ends, this Article prescribes an “ethics of immigration blame” and suggests ways that law might be harnessed to mediate some of blame’s pathologies. Today’s sociopolitical conditions crystallize the need for this work.

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INTRODUCTION

No single theory explains what makes our immigration system tick. But one idea—blame—has significant untapped potential. Common in our daily lives, blame registers disapproval of wrongful behavior.¹ On a broader scale, blame is a tool for maintaining social and legal order.² Indeed, the anticipation of being blamed causes most people, most of the time, to hew close to behavioral norms.³ This Article provides the first comprehensive study of blame in the U.S. immigration system. I will argue that, for better and worse, blame systemically transfigures the politics, policies, and structures of immigration law.

At ground level, blame pervades public discourse about migrants. The nation’s general antipathy toward “criminal aliens,” for instance, is based on perceptions of their blameworthiness.⁴ Even lawfully present migrants are blamed for stealing jobs, harming the environment, not assimilating, and more.⁵ Meanwhile, the “Dreamers” who were unlawfully brought to the country as children are frontrunners for amnesty, in large part, because they are blameless.⁶

1. See Angela M. Smith, *Moral Blame and Moral Protest*, in *BLAME: ITS NATURE AND NORMS* 29, 29 (D. Justin Coates & Neal A. Tognazzini eds., 2013); Lawrence M. Solan, *Cognitive Foundations of the Impulse to Blame*, 68 *BROOK. L. REV.* 1003, 1006–11 (2003) (offering a psychological explanation for the human impulse to blame); *infra* notes 42–46 and accompanying text.

2. See STEPHEN FINEMAN, *THE BLAME BUSINESS: THE USES AND MISUSES OF ACCOUNTABILITY* 8 (2015) (arguing that, without blame, moral codes and legal structures would be unsustainable).

3. See Mark Bovens et al., *Public Accountability*, in *THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY* 1, 15 (Mark Bovens et al. eds., 2014) (“As people seek approval . . . they will adjust their actions and decisions to societal norms and expectations of appropriate conduct.”); Christopher Hood, *Blame Avoidance and Accountability: Positive, Negative, or Neutral?*, in *ACCOUNTABLE GOVERNANCE: PROBLEMS AND PROMISES* 167, 170 (Melvin J. Dubnick & H. George Frederickson eds., 2011).

4. See Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 *UCLA L. REV.* 594, 599 (2016) (discussing “narratives that pit worthy (hardworking, family-oriented) immigrants against unworthy (criminal alien) immigrants”); Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 *STAN. L. REV.* 809, 811–12 (2007) (explaining that the United States immigration enforcement model uses criminality as a proxy for unbelonging and undesirability); Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 *WAYNE L. REV.* 1599, 1607 (2009) (“[T]he ‘criminal alien’ continues to be one of the most reviled characters of all of U.S. law, with many enemies and extremely few political friends (even among immigrant rights advocates).”); *infra* Part I.A.

5. See *infra* Part I.A (discussing a range of perceived social harms attributed to migrants).

6. See Matthew La Corte & Melanie Huettman, *Congress Needs to Provide Dreamers with Permanent Protection*, HILL (July 20, 2017, 1:20 PM), <http://thehill.com/blogs/pundits-blog/civil-rights/342953-congress-needs-to-provide-dreamers-with-permanent-protection> [<https://perma.cc/UX8R-BLEW>] (noting that “Dreamers are a blameless population and constitute productive members of society”). The innocence of children was also a key theme in *Plyler v. Doe*, a landmark decision that constitutionally protected undocumented children against state and local restrictions on K–12 education. 457 U.S. 202, 223–24 (1982); see also MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN* 10–18 (2012) (explaining that the legal

Why migrants get blamed, and which ones, are important subjects of concern.⁷ Missing from the literature, however, is a theoretical model of how blame dynamics interface with immigration governance writ large. This Article initiates that project, yoking key insights from political science, psychology, sociology, anthropology, and philosophy.

As conceived here, “immigration blame” is a sprawling phenomenon. Beyond blaming migrants, we blame politicians, bureaucrats, and judges. Meanwhile, these players routinely blame each other, all while trying to avoid being blamed.⁸ The results are messy and the implications vast. After examining the immigration system through the optics of blame, however, it may be hard to see it any other way.

To start, consider two stylized scenarios. In Scenario One, a legislator’s key constituents believe that a category of migrants is *blameworthy*. In Scenario Two, a legislator’s key constituents believe that a different category of migrants is *blameless*. In both scenarios, the legislator has a choice to make: take favorable action, unfavorable action, or no action toward the migrants at issue. Intuitively, a legislator’s political risk of upsetting constituents is higher for granting favorable treatment to the blameworthy migrants (Scenario One) and lower for granting favorable treatment to the blameless migrants (Scenario Two).

For reasons explicated below, matters are far more nuanced and complex in practice. Even in sketch form, however, this introductory salvo has much to offer. First, it captures two discrete streams of blame: one focused on blaming migrants, the other focused on blaming public officials. Second, this opening portrait suggests a relational quality between the blame directed at migrants and public officials. Namely, as the degree of the migrants’ blameworthiness increases, so does the public official’s risk of political blame for taking favorable action toward the migrants at issue.

Third, and most important, this thought experiment primes how immigration blame can have real-world consequences. In the stylized framing above, one group of migrants was labeled blameworthy (Scenario One) and the other blameless (Scenario Two). In practice, however, those judgments are often hotly contested precisely because perceptions of blame can shape legal and political outcomes.

Specifically, if public officials are averse to being blamed, then policy victories for blameworthy migrants will be harder to achieve. Meanwhile, as

team behind *Plyler* had community support, which attracted resources and enabled them to tell the story of the innocent schoolchildren).

7. See, e.g., GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 36–38 (Anchor Books abr. ed. 1958) (analyzing use of migrants and other minorities as scapegoats by “in-groups”); KEVIN JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* 3–5 (2003) (arguing that racial undertones in immigration law are a window for racial undertones in U.S. society more generally); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 121–32 (2006) (discussing the history of racial restrictions in immigration law).

8. See *infra* Part III (cataloging and illustrating a range of blame-avoidance tactics employed by migrants and public officials pertaining to immigration law).

public perceptions about a category of migrants improve, officials may be more inclined to give favorable legal treatment to the migrants at issue.⁹ Indeed, as the putative blame of a category of migrants approaches zero, public officials may be blamed for not taking favorable action. These blame dynamics can also manifest in more dubious ways. For example, public officials or pundits might concoct false narratives about migrants, hoping to justify or rally troops around restrictionist immigration policies.

So construed, immigration “blame games” are high-stakes affairs for public officials and migrants alike.¹⁰ For migrants, their societal membership may depend on public perceptions of their relative blameworthiness. For government officials, their reputations, careers, and legacies may be on the line. Migrants and public officials thus have coterminous and oft-competing incentives to blame others and avoid being blamed.

As detailed herein, the most common blame-avoiding tactics are rhetorical: narratives, excuses, justifications, blaming others, and framing techniques. These tactics are utilized by all players in the system, including migrants, their advocates, public officials, and their spokespersons.¹¹ Meanwhile, public officials often have additional blame-avoiding tactics available. For example, officials may select immigration policies with an eye toward avoiding or minimizing blame from their constituents, principals, or peers. Moreover, officials may renounce their own authority over an issue, delegate authority to others, or enter governmental partnership arrangements. Then, if things go wrong, blame can be diffused or lodged elsewhere.¹²

Welcome to the understudied world of immigration blame. As modeled here, immigration blame operates along two related dimensions, each with two prongs. The first dimension is substantive and captures different channels of blame: the blame directed at migrants (“migrant blame”) and the blame directed at public officials (“institutional blame”). The second dimension is process oriented, capturing the sociopolitical dynamics of placing blame (“blame attribution”) and avoiding, refuting, and mitigating blame (“blame avoidance”).¹³ These blame dynamics operate in cycling

9. Whereas migrant blameworthiness may be a reason for taking unfavorable political action, migrant blamelessness is generally a weaker prompt for favorable action. A reason for this asymmetry is that the absence of blame is generally neutral, whereas the presence of blame indicates a negative departure from behavioral norms. *See infra* Part IV.C (elaborating on this point in the context of current debates over amnesty and immigration enforcement).

10. *See* CHRISTOPHER HOOD, *THE BLAME GAME: SPIN, BUREAUCRACY, AND SELF-PRESERVATION IN GOVERNMENT* 7 (2011) (describing the “blame game” as a process in which “multiple players are trying to pin the responsibility on one another for some adverse event, acting as blamers to avoid being blamees”).

11. *See infra* Part II.D (describing these rhetorical devices); Part III.A (describing how these devices are employed as blame-avoidance tactics).

12. *See infra* Part III.B–C.

13. The terms “blame attribution” and “blame avoidance” are borrowed from social sciences. *See, e.g.*, KELLY G. SHAVER, *THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS* 174 (1985); R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL’Y 371, 380 (1986).

feedback, with catalyzing effects on the operation and design choices of the immigration system.¹⁴

To anchor and illustrate these points, this Article surveys today's headline immigration disputes—from amnesty to immigration enforcement, from sanctuary cities¹⁵ to “crimmigration” trends,¹⁶ from the Trump administration's travel bans¹⁷ to its zero-tolerance border policy,¹⁸ from the U.S. Supreme Court's special immigration doctrines¹⁹ to lower courts' frontline decisions. Examining these subjects through a blame lens offers a unique perspective, which both complicates and complements more conventional accounts.

Of course, blame cannot explain everything about our immigration system. No conceptual model can. Blame is a particularly useful frame, however, because it connects a diverse set of academic theories and disciplines.

Public-choice theory, for instance, depicts government officials and institutions as support-maximizing actors.²⁰ Avoiding blame from peers, principals, and constituents—through delegation or otherwise—is a key ingredient of that strategic modeling.²¹ Behavioral-economic theories

14. See *infra* Part IV.

15. The term “sanctuary” generally connotes a local jurisdiction's policies that restrain local law enforcement from initiating or voluntarily cooperating with federal immigration enforcement efforts. For recent and incisive work on the “sanctuary movement,” see generally Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. (forthcoming 2018); Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245 (2016); Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Networks*, 103 MINN. L. REV. (forthcoming 2019); Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 58 B.C. L. REV. 1703 (2018).

16. Professor Juliet Stumpf coined the term “crimmigration” in her seminal article on the subject. See generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006). There are many dimensions of crimmigration, but it generally refers to the intersections and conflation of criminal law and civil immigration law. For an extended treatment, see generally CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* (2015). For some more specific applications, see also Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) and Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010).

17. As of this writing, the travel ban is in its third iteration. See Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); see also *Trump v. Hawaii*, No. 17-965, slip op. at 12–13 (U.S. June 26, 2018); *infra* notes 90–105, 402–07 and accompanying text (discussing the travel bans and related litigation).

18. See Memorandum from Jefferson Sessions, U.S. Attorney Gen., to Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download> [<https://perma.cc/9DNM-G9F2>] [hereinafter *Zero-Tolerance Memo*]; see also *infra* notes 370–82 and accompanying text (discussing the “zero-tolerance” policy and the still-unfolding crisis of family separations causally linked to the policy).

19. See generally David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (charting the literature and doctrines of “immigration exceptionalism”).

20. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 1 (1991).

21. See *Public Choice*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS (2d ed. 1987) (explaining that public-choice theory models government as made up of officials who, besides pursuing the public interest, might act to benefit themselves, possibly at the cost of efficiency or majoritarian preferences). Through a public-choice lens, one way that blame is avoided is

explain how cognitive heuristics and biases can lead to irrational judgments, including blaming attitudes that can distort immigration-related decisions.²² Critical-legal theory posits how race and other social constructs trigger blaming attitudes toward certain groups of migrants.²³ Research in cognitive and social psychology explains how our emotions, such as anger and sympathy, affect judgments of blame.²⁴ Building on those ideas, the burgeoning law-and-emotions literature explains how our emotion-laden perceptions may be expressed (or mediated) through law and government institutions.²⁵ Cultural theory, and its extensions, model how variations in cultural “worldviews” can influence perceptions of harm and responsibility, and thus whom and what to blame.²⁶ Studies in moral philosophy offer probing reflections on what blame is and ought to be.²⁷ Of equal importance are our own life experiences, which teach us much about blame. This Article’s interdisciplinary approach connects and draws inspiration from these scattered insights in ways that none alone captures.

Beyond its descriptive appeal, the study of immigration blame prompts some vexing normative questions. Foremost, is immigration blame desirable? Can its dynamic levers be harnessed and controlled? If so, how and toward what ends? This Article grapples with these and related questions. Despite its ubiquity (or perhaps because of it), blame is generally derided in the immigration literature. Scholars have been understandably

through delegating decisions. See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56–57 (1982); see also *infra* Part III.B.

22. See *infra* Part II (extending key insights from behavioral economics to the immigration context).

23. See, e.g., Mary D. Fan, *Post-Racial Proxy Battles over Immigration*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 229 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 15–22 (2009) (explaining racial dimensions of immigration law); see also *infra* notes 156–60 and accompanying text.

24. See, e.g., Neal Feigenson, *Emotional Influences on Judgments of Legal Blame: How They Happen, Whether They Should, and What to Do About It*, in EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES 45, 45 (Brian H. Bornstein & Richard L. Wiener eds., 2010); see also *infra* Part II (discussing the dynamic relationships between heuristics and biases, emotions, and blame).

25. For an excellent overview of the descriptive and normative dimensions of law-and-emotions scholarship, see generally THE PASSIONS OF LAW (Susan A. Bandes ed., 1999) (offering an early landmark collection of law-and-emotions scholarship); Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions*, 94 MINN. L. REV. 1997 (2010); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006).

26. According to cultural theory, people hold different preferences about how society should be organized. See generally MICHAEL THOMPSON ET AL., CULTURAL THEORY (1990). In turn, these “worldviews” can significantly shape judgments about whom to blame, for what, and why. See MARY DOUGLAS, *Risk and Blame*, in RISK AND BLAME: ESSAYS IN CULTURAL THEORY 3, 8, 15–16 (2003). The related “cultural cognition” model connects cultural theory to cognitive and social psychology. For an overview of these related theories, see generally Dan M. Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk*, in HANDBOOK OF RISK THEORY (S. Roeser et al. eds., 2012). See also *infra* Part II.C (discussing and extending these theories to immigration blame).

27. See generally BLAME: ITS NATURE AND NORMS, *supra* note 1 (collecting philosophical essays on the nature and norms of blame).

preoccupied with blame directed at migrants, which can be nefarious, misdirected, and disproportionate.²⁸ More generally, the emotive force behind blame can skew rational judgment and impede social progress.²⁹ This Article gives voice to these very serious concerns.³⁰ As importantly, however, this Article offers a partial rehabilitation—immigration blame has upsides too.³¹

Broadly speaking, the problems are with unjustified blame, not with blame *per se*. When attributed fairly, blame can be a rational sorting device in the social, legal, and political contexts at issue.³² Choices about which noncitizens to include, exclude, and remove from the country are the foundations of any immigration system, which justified blame can rightly inform. Likewise, choices about which public officials to include, exclude, and remove from office are the foundations of representative democracy. When justified, blame can sanction poor government performance and motivate better outcomes. Moreover, in some contexts, the iterative dynamics of placing and avoiding blame can promote government transparency and sharpen lines of accountability. In addition, higher-ups hoping to avoid blame may delegate authority to public officials who are better equipped to make the decisions. In these and other ways, blame dynamics may result in good governance—directly and indirectly, wittingly and unwittingly.³³

To be clear, none of this denies the hazards of immigration blame. But to make theoretical headway, it is crucial to appreciate that blame is a paradox: both functional and dysfunctional, socially cohering and corrosive. That being so, we should not aspire to a blame-free immigration system. Rather, we should seek ways to promote the values of immigration blame, while minimizing its more unsavory manifestations. Toward those ends, this Article prescribes an “ethics of immigration blame” and suggests ways that law might be harnessed to mediate some of blame’s pathologies.³⁴

At a minimum, we must learn to live with immigration blame. In a very real sense, immigration debates are sites of contestation about who we are and wish to be as a nation.³⁵ Especially in a hyperpolarized and “post-truth”

28. See *infra* Part I.A (discussing what migrants get blamed for and why they get blamed); see also *supra* notes 4–7 and accompanying text.

29. See Derk Pereboom, *Free Will Skepticism, Blame, and Obligation*, in *BLAME: ITS NATURE AND NORMS*, *supra* note 1, at 189, 204 (“[B]lame fueled by moral anger arguably renders it particularly susceptible to errors that threaten to undermine the integrity and effectiveness of the moral conversation.”); *infra* Part II (explaining how perceptions can be systemically wrong and lead to irrational decisions).

30. See *infra* Part V.C (arguing for an “ethics of immigration blame,” in part to counter misattributed and pernicious blame).

31. See *infra* Part V.A (discussing the instrumental values of blame).

32. See *infra* Part V.A.

33. See *infra* Parts IV–V (providing a descriptive and normative account of these dynamics).

34. See *infra* Part V.C–D (offering a framework and prescriptions for doing so).

35. See generally JOHNSON, *supra* note 7; DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007) (providing a rich historical account of communal self-idealization and self-protection through American deportation policies).

world, the dynamics of immigration blame will increasingly matter to the complexion of our political and social communities.³⁶ This cultural context lends some urgency to the project ahead. Yet there is a more enduring point, which is also more fundamental: we have never had a blame-free society. For better and worse, blame is hardwired to the human condition.³⁷ And, for better and worse, blame is hardwired to the immigration system too.

This Article proceeds in five parts. Part I provides an overview of what migrants and public officials get blamed for. Part II explains the cognitive and social processes of blame attribution and misattribution. Part III pivots to blame avoidance. It describes a range of tactics utilized by migrants and public officials to refuse, diffuse, and deflect blame. Part IV connects these dynamics, modeling the inputs and outputs of immigration blame, with case studies drawn from current events. Part V turns to the normative and prescriptive dimensions of immigration blame. It begins with a discussion of the values and trade-offs of immigration blame. It then scaffolds an ethics of immigration blame, and suggests how legalistic nudges may help to curb some of blame's deleterious effects.

Before proceeding, I should note that many of the ideas and themes developed here can be extended to other regulatory contexts, wherever blame is found. Readers are encouraged to make those connections. For several reasons, however, this Article fastens on the U.S. immigration system. Ingroup-outgroup dynamics are breeding grounds for blame, both in immigration and beyond.³⁸ But immigration, by its very nature, is keyed to who is “in” and “out”—socially, legally, politically, and physically.³⁹ Immigration thus offers an especially intriguing platform for studying the intersection of blame and public law.

Moreover, immigration is a subject where passions run high. Especially in recent years, the saliency of immigration has mobilized voters and contributed to key electoral outcomes. The historic presidential election of

36. See *Post-Truth*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/post-truth> [<https://perma.cc/3U59-MY97>] (last visited Aug. 24, 2018) (defining post-truth as “[r]elating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief”); see also SHAVER, *supra* note 13, at 174 (“One person’s judgments of causality, responsibility, and blameworthiness may or may not agree with the judgments that would have been made by a different perceiver.”).

37. See, e.g., TOM DOUGLAS, *SCAPEGOATS: TRANSFERRING BLAME* 60, 107–08 (1995) (describing blame attribution and blame avoidance as “basic human” needs).

38. See *id.* at 135–48; cf. Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U. CHI. L. REV. 289, 291 (2013) (asserting that U.S. immigration law is concerned with the “maximization of the well-being of Americans” without consideration for the interests of noncitizens).

39. See, e.g., T. Alexander Aleinikoff & Rubén G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 2–3 (1998); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1163 (“Immigrants, often viewed as outsiders to the community, periodically have been one of the groups singled out for blame in the political process.”); see also note 7 and accompanying text.

Donald Trump is a case in point.⁴⁰ Now, leading up to the 2018 midterm elections, a recent poll found that immigration tops the list of important issues among voters.⁴¹ If immigration blame is affecting the composition of our government representatives and institutions, then, by extension, the stakes of immigration blame spill across regulatory lines—and indeed, beyond American borders.

I. BLAME ATTRIBUTION

Studies in social science generally describe blame attribution as hinging on two perceptions: (1) avoidable harm and (2) responsibility.⁴² Thus, we generally blame those whom we think are responsible for causing harm that could have been avoided if the person being blamed had acted differently.⁴³ Beyond mere judgment, blame is an emotionally charged reaction.⁴⁴ Unlike other negative reactions, such as sadness and disappointment, blame is usually linked to anger, indignation, or resentment.⁴⁵ Blame thus carries a certain sting, or normative force, that distinguishes it from other kinds of negative judgment.⁴⁶

40. In his bid for the presidency, Trump first shouldered his way through a crowded pack of Republican primary contenders by blaming Mexican migrants and pledging to build a wall along the U.S.-Mexico border. *See Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015) [hereinafter *Trump Announces Presidential Bid*], <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/> [https://perma.cc/XND4-MGVD] (transcribing Trump's statement, "When Mexico sends its people, they're not sending their best. . . . They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."); cf. Seth McLaughlin, *Donald Trump's Comments Spark Poll Surge, Put 2016 Republican Hopefuls on the Spot*, WASH. TIMES (July 2, 2015), <http://www.washingtontimes.com/news/2015/jul/2/donald-trump-comments-spark-poll-surge-put-2016-re/> [https://perma.cc/NJ8F-7UBN] (noting rising poll numbers). Encouraged by his rise in the primary polls, Trump later proclaimed that the United States should ban Muslim immigrants from entering the country. *See* Russell Berman, *Donald Trump's Call to Ban Muslim Immigrants*, ATLANTIC (Dec. 7, 2015), <http://www.theatlantic.com/politics/archive/2015/12/donald-trumps-call-to-ban-muslim-immigrants/419298/> [https://perma.cc/B3BN-WBJ9]. That generated a second spike in Trump's primary ratings. Pema Levy, *Trump Soars to New Heights in Poll After Proposing Muslim Ban*, MOTHER JONES (Dec. 14, 2015), <http://www.motherjones.com/mojo/2015/12/donald-trump-proposes-ban-muslims-soars-new-heights-poll> [https://perma.cc/RWY3-DMET].

41. *See* Maria Caspani, *Immigration Top Issue for US Voters, Economy a Close Second: Reuters/Ipsos Poll*, AOL (July 8, 2018, 12:00 AM), <https://www.aol.com/article/news/2018/07/08/immigration-top-issue-for-us-voters-economy-a-close-second-reutersipsos-poll/23476262/> [https://perma.cc/AV5Q-794T].

42. *See* HOOD, *supra* note 10, at 6–7; SHAVER, *supra* note 13, at vii (noting that blame is “the outcome of a process that begins with an event having negative consequences, involves judgments about causality, personal responsibility, and possible mitigation”).

43. *See* HOOD, *supra* note 10, at 6–7.

44. *See* Smith, *supra* note 1, at 31 (describing blame as “a way of responding emotionally”). For a discussion of how emotions can influence whether to blame, and whom (or what) to blame, see *infra* Part II.B.

45. *See* Michael McKenna, *Directed Blame and Conversation*, in *BLAME: ITS NATURE AND NORMS*, *supra* note 1, at 119, 122.

46. *See* Martha C. Nussbaum, “*Secret Sewers of Vice*”: *Disgust, Bodies, and the Law*, in *THE PASSIONS OF LAW*, *supra* note 25, at 19, 26–29 (explaining how anger and indignation can function as an expression of collective moral judgment); Smith, *supra* note 1, at 29 (explaining

This Part describes two types of blame that feed the broader phenomenon of immigration blame. The first is “migrant blame,” which is the assignment of blame to migrants.⁴⁷ The second is “institutional blame,” which is the assignment of blame to public officials.⁴⁸ To be clear, these types of blame are not hermeneutically sealed or mutually exclusive. Quite the contrary, one of this Article’s main contributions is to theorize how migrant blame and institutional blame dynamically relate.⁴⁹ Before turning to those complexities, however, it will be useful to elaborate on them separately.⁵⁰

A. Migrant Blame

Migrants get blamed for a range of perceived harms and wrongs, which fluctuate and evolve over time depending on economic, social, and political conditions.⁵¹ While a legal violation is often deemed sufficient for migrant blame to attach, it is not a necessary condition. Rightly or wrongly, even lawfully present migrants get blamed for societal ills. Today, the most common tropes of migrant-related harm pertain to crime,⁵² the economy,⁵³

that blame has a certain “‘force’ or ‘depth’ that goes beyond a mere description of causal responsibility for a bad result”). *But cf.* GEORGE SHER, IN PRAISE OF BLAME 88–89 (2006) (arguing that while indignation and resentment are commonly associated with blame, they are not essential or necessary, and thus people can blame in more emotionally detached ways).

47. *See infra* Part I.A.

48. *See infra* Part I.B.

49. *See infra* Part IV.

50. While my model is primarily concerned with the blaming of people and institutions, the targets of blame are often events and situations. For example, we might blame social and economic disparities, or political dysfunction, or global conditions for perceived harms in our immigration system. And, indeed, the blaming of events and situations can be highly relevant to immigration blame. But in most instances, such blame attribution comes in lieu of the blame that might otherwise be directed at individuals and groups and is captured by my model to that extent. For further discussion, see *infra* notes 181–82 and accompanying text.

51. *See* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 31–55 (2014) (drawing similar connections); *see also* Johnson, *supra* note 39, at 1156 (“[T]he average citizen’s only exposure to the subject of immigration may be hearing immigrants blamed in times of societal stress for the social ills of the day.”).

52. Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 318–19 (examining the “flawed but lurid contemporary accounts of the criminality of the immigrant population and the general presumption of group dangerousness”); Cházaro, *supra* note 4, at 606–08.

53. In his interview with Kate Snow, former congressman Tom DeLay argued that immigrants have a “monumental” economic impact: “most of these illegals are drawing welfare benefits, they’re sending their kids to school, they’re using public services.” *Border States at Forefront of Immigration Debate*, MSNBC (Sept. 1, 2016), <http://www.msnbc.com/kate-snow/watch/border-states-at-forefront-of-immigration-debate-756174915913> [<https://perma.cc/76AC-QHM3>]. The economic impact of undocumented immigration, in particular, is complicated by how economic boons and losses are disparately felt at the federal, state, and local levels. *See* PETER SCHUCK & JAMES Q. WILSON, UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION 350 (2008).

terrorism,⁵⁴ and cultural threats (for not assimilating, or for just being different).⁵⁵

Fear and loathing of migrant outsiders trace to the early Republic, with Chinese and other Asian migrants among the first blamed for contaminating American society.⁵⁶ Ever since, the cultural-threat narrative has weaved through American history mostly unabated; what changes is the primary targets of this opprobrium.⁵⁷ In the early twentieth century, for example, it was migrant Jews, eastern Europeans, and socialists whom were most disparaged.⁵⁸ From the Great Depression, and continuing today, Latinos have borne the brunt of migrant blame.⁵⁹ Following the 9/11 terrorist attacks, Muslims and Arabs have been branded as threats to American values and national security.⁶⁰

54. Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 326 (2002).

55. For an extended account of how migrants have been blamed on cultural and racial grounds, throughout history, see generally JOHNSON, *supra* note 7. See also *infra* notes 56–60 and accompanying text.

56. See, e.g., *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 595 (1889) (upholding a federal ban on the admission of Chinese migrants and remarking that Chinese migrants “remained strangers in the [United States]” and that a “portion of our country would be overrun by them unless prompt action was taken to restrict their immigration”); see also MOTOMURA, *supra* note 51, at 35–37 (discussing anti-Asian sociopolitical fervor at the turn of the nineteenth century).

57. See Leo R. Chavez, “Illegality” Across Generations: Public Discourse and the Children of Undocumented Immigrants, in CONSTRUCTING IMMIGRANT “ILLEGALITY”: CRITIQUES, EXPERIENCES, AND RESPONSES 84, 86 (Cecilia Menjivar & Daniel Kanstroom eds., 2014); see also MOTOMURA, *supra* note 51, at 31–41 (summarizing some of the trends).

58. In 1924, Congress passed the National Origins Act. National Origins (Johnson-Reed) Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159, *repealed by* Immigration & Nationality Act of 1952, ch. 477, § 201(a), 66 Stat. 163, 175 (codified as amended at 8 U.S.C. § 1151). The National Origins Act adopted a quota system that drastically capped the number of people who could immigrate to this country from southern and eastern Europe, including Russia. *Id.*; see also Galvan v. Press, 347 U.S. 522, 530–31 (1954) (upholding deportation on the basis of Communist Party membership); Deborah Sweet Eyler, *The Early Female Jewish Members of the Maryland Bar: 1920–29*, 74 MD. L. REV. 545, 546 n.5 (2015) (noting that Congress’s 1924 quota system had the effect of limiting, and was likely intended to limit, the number of immigrant Jews in America).

59. See Loebardo F. Estrada et al., *Chicanos in the United States: A History of Exploitation and Resistance*, in LATINOS AND THE POLITICAL SYSTEM 28, 45–52 (F. Chris Garcia ed., 1988) (describing how Latinos were blamed and scapegoated during the Great Depression and “Operation Wetback” in the mid-twentieth century); see also MOTOMURA, *supra* note 51, at 37–52 (mapping how the opprobrium directed at Latino migrants has ebbed and flowed throughout U.S. history, depending on economic and social conditions). For a notorious example of overt anti-Latino sentiment in more recent times, see Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POL’Y (Oct. 28, 2009, 8:39 PM), <https://foreignpolicy.com/2009/10/28/the-hispanic-challenge/> [https://perma.cc/SND2-42RH], which argues that the failure of Latino migrants to assimilate into American culture will lead to America’s “eventual transformation into two peoples with two cultures (Anglo and Hispanic) and two languages (English and Spanish).”

60. See ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., ANXIETY, NOSTALGIA, AND MISTRUST: FINDINGS FROM THE 2015 AMERICAN VALUES SURVEY 4 (2017), <https://www.prii.org/wp-content/uploads/2015/11/PRRI-AVS-2015-1.pdf> [https://perma.cc/4Q9C-APZN] (“Today, a majority (56%) of Americans agree that the values of Islam are at

Moreover, it is important to emphasize that blame is not evenly spread across migrant subpopulations.⁶¹ Generally speaking, undocumented migrants attract more blame than lawfully present ones;⁶² migrants who commit crimes tend to attract more blame than law-abiding migrants;⁶³ and migrants of color tend to attract more blame than their Caucasian counterparts.⁶⁴ As will later be explained, these and other blame stratifications can have dramatic effects on immigration politics and policies.

B. Institutional Blame

Meanwhile, public officials are blamed for innumerable harms relating to our immigration system. Itemizing all such harms is unnecessary, and mercifully beyond this Article's scope. For present purposes, some generalizations will suffice, which I will elaborate on more fully throughout.

First, public officials may be blamed for their action or inaction. Regarding inaction, for example, the federal government's failure to pass comprehensive immigration reform over the past decade (and counting) is arguably a blameworthy harm.⁶⁵ Second, public officials may be blamed for how they blame others. For example, immigrant advocates commonly blame public officials for concocting false and pernicious narratives about migrants.⁶⁶ Third, public officials may be blamed for case-specific decisions

odds with American values and way of life . . ."); Akram & Johnson, *supra* note 54, at 295–98.

61. See, e.g., Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality,"* 52 HARV. J. LEGIS. 355, 356–61 (2015) (explaining how the harm and treatment of undocumented migrants are “disproportionately distributed along lines of race and class”).

62. The act of entering or being in the country unlawfully is, itself, sometimes an independently sufficient reason to blame undocumented migrants. Whether and to what extent unlawful entry is a blameworthy harm are issues at the heart of today's amnesty debates. See *infra* Parts III.A.1, IV.C.1.

63. See Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing,* 49 AM. CRIM. L. REV. 105, 109 (2012).

64. Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness,* 79 FORDHAM L. REV. 1545, 1577 (2011) (“In contemporary legal discourse, references to ‘illegal aliens’ facilitate a coded discussion on immigration that . . . focuses on Mexicans in particular.”); see also JOHNSON, *supra* note 7, at 161–62 (“The persistent surfacing of racist statements in the immigration debate, however, clearly demonstrates that, at some level, racial concerns influence restrictionist sentiments.”).

65. Efforts at comprehensive immigration reform have been percolating in Congress since at least 2006 and have faltered each time. See, e.g., RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS (2013); Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan,* N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html> [<https://perma.cc/W45X-FRGF>].

66. S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism,* 44 ARIZ. ST. L.J. 1431, 1448–63 (2012) (discussing how migrant blame narratives are manufactured by politicians and pundits). Recently, a group of immigration scholars published a critical study of President Trump's anti-immigrant narrative and called it “a complete fiction.” *Our Findings,* PRESIDENT'S INTENT, <https://www.thepresidentsintent.com/our-findings> [<https://perma.cc/TZ4V-ZEML>] (last visited Aug. 24, 2018) (“Trump's story about immigrants boils down to just one narrative. It is a complete fiction, a dystopic view of a nation under siege.”).

at the microlevel or for policies and regulations at the macrolevel. This Article is primarily focused on the latter. But some of the most stirring blame episodes begin with government decisions at the microlevel, which then explode into national frenzies.

Take, for example, the brouhaha over sanctuary cities. Although the sanctuary movement remains ill-defined, it generally connotes a set of state and local policies that limit or prevent cooperation with federal immigration enforcement.⁶⁷ The sanctuary movement is decades old, but it was recently thrust into the national spotlight after local jailors in San Francisco released an undocumented migrant from custody without first alerting federal immigration authorities.⁶⁸ The released migrant subsequently shot and killed an innocent woman (by accident, it turned out).⁶⁹ Within days, *all* sanctuary cities were accused of endangering the welfare and security of the nation.⁷⁰

Then-candidate Donald Trump seized the moment: he blamed the Obama administration for lax immigration enforcement, states and cities for interfering with immigration controls, and Mexico for sending us the worst of their worst.⁷¹ Later, in one of his first acts as president, Trump issued an executive order proclaiming that sanctuary jurisdictions would be ineligible to receive federal funding.⁷² Thus, what began as a local decision to release an undocumented migrant from jail was catapulted onto the national agenda. The results of these institutional blame episodes are still playing out in federal court,⁷³ the court of public opinion,⁷⁴ and legislatures across the country.⁷⁵

67. See generally Gulasekaram & Villazor, *supra* note 15 (canvassing the range of sanctuary policies across the country); Lasch et al., *supra* note 15 (same).

68. Brian Bennett, *Republicans Blame San Francisco Pier Killing on Obama's 'Reckless' Immigration Policies*, L.A. TIMES (July 14, 2015, 2:46 PM), <http://www.latimes.com/nation/la-na-deport-shooting-20150714-story.html> [https://perma.cc/9URL-AE4K].

69. See Zusha Elinson & Alicia A. Caldwell, *Illegal Immigrant Found Not Guilty in San Francisco Killing*, WALL ST. J. (Nov. 30, 2017, 10:58 PM), <https://www.wsj.com/articles/illegal-immigrant-found-not-guilty-in-san-francisco-killing-1512091618> [https://perma.cc/ML5Y-QDZS].

70. See Bennett, *supra* note 68.

71. See, e.g., Doug Stanglin, *Trump: San Francisco Shooting Case for Securing the Border*, USA TODAY (July 4, 2015, 3:39 PM), <https://www.usatoday.com/story/news/nation/2015/07/04/donald-trump-san-francisco-killing-whipping-post/29694403/> [https://perma.cc/BYG2-ZV3D]; see also *Trump Announces Presidential Bid*, *supra* note 40.

72. See Exec. Order No. 13,768 § 9(a), 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

73. See generally, e.g., *City & County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018); *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018).

74. Despite a jury verdict that the shooting was accidental, see *supra* note 69 and accompanying text, blame continues to flow unabated. Reacting to the jury's verdict, President Trump tweeted: "The Kate Steinle killer came back and back over the weakly protected Obama border, always committing crimes and being violent, and yet this info was not used in court. His exoneration is a complete travesty of justice. BUILD THE WALL!" Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 1, 2017, 3:03 AM), <https://twitter.com/realDonaldTrump/status/936551346299338752> [https://perma.cc/6WQK-2EBY].

75. See, e.g., Kate's Law, H.R. 3004, 115th Cong. § 2 (2017) (proposing an amendment to section 276 of the Immigration and Nationality Act to increase penalties for reentry of removed aliens); COOK COUNTY, ILL. § 46-37 (2018) (allowing detainer compliance where target of detainer is convicted of a serious or violent felony offense for which he or she is

The foregoing example, concerning sanctuary cities, also illustrates how laws and legal structures factor into attributions of institutional blame.⁷⁶ Recall here that blame generally turns on attributions of (1) avoidable harm and (2) responsibility. The law can inform each of these subsidiary judgments. For example, President Obama's and President Trump's respective immigration policies have been heavily critiqued on legal grounds.⁷⁷ Those legal violations, or their effects, may be perceived as *avoidable harm*. In general, there is no preset amount of institutional blame that attaches when public officials violate the law. It depends on the circumstances, including which public official violated which law, in what way, and to what effect.

Moreover, the law can be highly relevant to *institutional responsibility*. That is because laws and legal structures can rule in, or rule out, which public officials are responsible for which perceived harms. Pinning down lines of responsibility can be challenging in many areas of law. Immigration law is somewhat unique in this regard, however, because the Supreme Court's normal constitutional doctrines do not always apply.⁷⁸ Some familiarity with the Court's exceptional immigration doctrines will thus be useful here and important to later parts of the discussion.⁷⁹

To start, the Constitution does not explicitly vest a federal immigration power.⁸⁰ Indeed, for the first century of the Republic, immigration was regulated primarily by the states and not by the federal government.⁸¹ In the mid-1800s, however, the Supreme Court effectively flipped the script. In a series of federalism cases, the Court interpreted the Constitution to vest the nation's immigration power *exclusively* in the federal government.⁸² Still

currently in custody); N.Y.C., N.Y., ADMINISTRATIVE CODE § 9-131 (2018) (including numerous crime-based exceptions to noncompliance with detainers); *see also* CAL. GOV'T CODE §§ 7282.5(a), 7284.6(a)(4) (West 2018) (same); *infra* Part IV.C.4 (discussing state and local sanctuary laws).

76. *See infra* Part IV.B–C (elaborating on how law is both an input and output of institutional blame).

77. *See generally* Trump v. Hawaii, No. 17-965 (U.S. June 26, 2018); United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam) (affirming, without opinion, the Fifth Circuit's preliminary injunction of DAPA in *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015)).

78. *See* Rubenstein & Gulasekaram, *supra* note 19, at 584 (“Immigration law is famously exceptional.”).

79. *See infra* Parts III.C, IV.C.3, V.D.

80. The Constitution expressly vests Congress with the power to establish uniform naturalization laws. *See* U.S. CONST. art. I, § 8. Whereas naturalization involves questions of *citizenship*, immigration law mostly concerns the admission, expulsion, and treatment of noncitizens in the country and is arguably a much more expansive power. That is not to say that Congress does not have immigration power; only that the Constitution does not expressly grant that power to Congress.

81. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–80 (1993).

82. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275, 280–81 (1875) (striking down a state regulation that imposed a bond for arriving alien passengers deemed to be “lewd and debauched”); Henderson v. Mayor of N.Y., 92 U.S. 259, 273–75 (1875) (striking down a requirement that a bond be posted by shipmasters for arriving alien passengers); *see also* Rubenstein & Gulasekaram, *supra* note 19, at 600, 603–06 (discussing the origins and import

today, states are generally prohibited under the “exclusivity doctrine” from directly regulating the admission and expulsion of migrants to and from the United States.⁸³

While the exclusivity doctrine restricts state immigration laws, it says nothing about the scope or division of immigration power among the three federal branches. In the late 1800s, the Supreme Court ruled that the federal political branches had plenary (i.e., complete) authority to regulate the admission and expulsion of migrants.⁸⁴ Under this so-called plenary power doctrine, the Court deemed itself powerless to review Congress’s or the Executive’s immigration decisions for alleged constitutional violations.⁸⁵

To a surprising extent, the plenary power doctrine is still good law today.⁸⁶ Indeed, that is what makes it special: instead of receiving heightened judicial scrutiny, constitutional challenges to federal immigration policies remain “largely immune” from judicial review.⁸⁷ Thus, federal immigration laws that allegedly violate equal protection, substantive due process, and First Amendment rights, garner very little scrutiny from the Court.⁸⁸ More generally, the plenary power doctrine results in a regulatory regime that, in the Court’s own words, “would be unacceptable if applied to citizens.”⁸⁹

For those wondering how President Trump’s travel ban survived Supreme Court review,⁹⁰ the plenary power doctrine is at least partly the reason why.⁹¹ As of this writing, the travel ban is in its third iteration, in the form of

of the exclusivity doctrine); *id.* at 618–20 (canvassing and contrasting a number of academic treatments of the exclusivity doctrine).

83. See *DeCanas v. Bica*, 424 U.S. 351, 363–65 (1976) (delineating the contours of the modern exclusivity doctrine). There are some exceptions to the exclusivity doctrine’s general prohibition. See *infra* notes 110–17 and accompanying text (discussing the delegated and residual authority states have to pass laws pertaining to noncitizens).

84. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (upholding the Chinese Exclusion Act of 1882 on the ground that the federal government had complete authority to exclude immigrants on any basis, including race or nationality); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 705–08, 713 (1893) (extending this reasoning to the federal political branches’ deportation laws).

85. See, e.g., *The Chinese Exclusion Case*, 130 U.S. at 604–09; see also Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (coining the term “plenary power doctrine”); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

86. See Rubenstein & Gulasekaram, *supra* note 19, at 594–99 (discussing the contours of the modern plenary power doctrine, including recent cracks in its facade).

87. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’” (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953))).

88. See, e.g., *id.*; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (reifying Congress’s virtually impenetrable discretion, stating: “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”).

89. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

90. See generally *Trump v. Hawaii*, No. 17-965 (U.S. June 26, 2018).

91. See David S. Rubenstein, *Immigration Symposium: The Future of Immigration Exceptionalism*, SCOTUSBLOG (June 29, 2017), <http://www.scotusblog.com/2017/06/immigration-symposium-future-immigration-exceptionalism/> [https://perma.cc/CT6Z-6ESV]; see also *infra* notes 92–94, 405–07 and accompanying text.

Proclamation No. 9645 (“the Proclamation”).⁹² Relying on a broadly worded delegation of power from Congress to the president,⁹³ and citing national-security concerns, the Proclamation restricts entry of nationals from certain countries, most of which have Muslim-majority populations.⁹⁴

The Proclamation was challenged on a number of legal grounds, including alleged violation of the Establishment Clause.⁹⁵ Generally speaking, the Establishment Clause forbids the government from disfavoring or favoring one religion over another.⁹⁶ In *Trump v. Hawaii*,⁹⁷ the crux of the plaintiffs’ claim was that the Proclamation was motivated by animus toward Muslims.⁹⁸ In support, plaintiffs cited many examples of public statements made by Donald Trump, both while campaigning for the presidency and after taking office.⁹⁹ In much of the rhetoric at issue, Trump blamed Muslims for endangering the safety and welfare of the American people.¹⁰⁰

The plaintiffs *might* have prevailed under the Court’s “reasonable observer” standard, which is the test normally employed by the Court in Establishment Clause cases.¹⁰¹ Tellingly, however, the Court declined to apply that standard. The Court began by explaining that “[t]he case before us differs in numerous respects from the conventional Establishment Clause claim.”¹⁰² Reifying the plenary power doctrine, the Court stressed: “For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”¹⁰³ At most, the Court explained, “rational-basis” review applied.¹⁰⁴ And, under that highly deferential standard, the plaintiffs’ Establishment Clause claim fell short.¹⁰⁵

Considered separately, or together, the Court’s plenary power and exclusivity doctrines can inform *which* public officials to blame for immigration-related harms. For instance, if the federal government has a monopoly over immigration regulation (per the exclusivity doctrine), the

92. See Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

93. 8 U.S.C. § 1182(f) (2012) (granting the president authority to restrict the entry of aliens whenever he finds that their entry “would be detrimental to the interests of the United States”); *Trump*, slip op. at 16 (remarking that the statutory text “exudes” deference to the president, and holding that the Proclamation fell within statutory bounds).

94. See *Trump*, slip op. at 12–13 (discussing the Proclamation and its prior iterations); Proclamation No. 9645, 82 Fed. Reg. at 45,165–67.

95. See *Trump*, slip op. at 12; see also U.S. CONST. amend. I.

96. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993) (“[T]he First Amendment forbids an official purpose to disapprove of a particular religion . . .”); *Larson v. Valente*, 456 U.S. 228, 244 (1982).

97. No. 17-965 (U.S. June 26, 2018).

98. *Id.* at 15.

99. *Id.* at 37–39 (Sotomayor, J., dissenting).

100. See *id.*

101. Cf. *id.* at 36 (citing *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862, 866 (2005)).

102. *Id.* at 24 (majority opinion).

103. *Id.* (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

104. *Id.* at 25.

105. *Id.* at 25–28.

polity might be less apt to hold state officials responsible for perceived immigration-related harms. Meanwhile, if immigration power is lodged almost exclusively in the federal political branches (per the plenary power doctrine), then the polity might be less apt to blame courts for federal immigration failures. In these ways, the plenary power and exclusivity doctrines could potentially promote more accurate attributions of governmental responsibility, and thus more accurate assignments of institutional blame.

In important respects, however, the Court's exceptional immigration doctrines never fully closed the loop on where the constitutional buck stops.¹⁰⁶ Regarding federal immigration authority, the existence of two potentially accountable institutions—Congress and the Executive—suffices for a blame-game quorum, as each may claim the other is responsible for faults in the immigration system.¹⁰⁷ What is more, Congress delegates considerable amounts of immigration authority and discretion to various federal agencies,¹⁰⁸ which compound the possibilities for blame attribution (and blame avoidance) among Congress, the president, and administrative officials.

Further complicating matters, the exclusivity doctrine is not as tight as it once was or could be.¹⁰⁹ Of significance, the Court has not employed the doctrine to preclude the federal government from devolving its immigration authority to state and local jurisdictions.¹¹⁰ For example, Congress has given states the option to deny state-administered welfare benefits to certain categories of noncitizens.¹¹¹ Further, Congress has allowed for the deputation of state and local officials to enforce federal immigration laws.¹¹²

106. One line of the Court's plenary-power cases suggests that the Executive has inherent and broad immigration power. *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). Meanwhile, another line of cases suggests that the Executive's power over immigration is generally no different than in other areas of law, with Congress as the fount of lawmaking authority and delegation serving as the primary mechanism for allocating power elsewhere. *See, e.g., INS v. Chadha*, 462 U.S. 919, 953 (1983).

107. *Cf. HOOD, supra* note 10, at 43 (“[S]ystems of divided government and complex multi-level government structures may offer more opportunities for blame-shifting in the sideways and up-and-down directions than simpler structures”).

108. *See* Mariano-Florentino Cuéllar, *The Political Economics of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 45–50 (2012) (describing the fragmentation of immigration authority within the executive branch).

109. *See infra* notes 110–17 and accompanying text.

110. This practice is not without its critics. *See generally* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (lamenting and criticizing the federal government's devolution of immigration authority to state and local officials); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

111. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, §§ 400–51, 110 Stat. 2105, 2260–77.

112. *See* 8 U.S.C. § 1357(g) (2012); *infra* notes 287–89 and accompanying text (discussing federal-state enforcement arrangements).

How subfederal officials use, or do not use, their conferred authority can attract institutional blame.¹¹³

Moreover, states have a residue of inherent power to enact laws that pertain to migrants.¹¹⁴ As interpreted and applied by the Supreme Court, the exclusivity doctrine forbids state laws that *directly* govern the admission and expulsion of migrants, but does not prohibit state laws that otherwise pertain to noncitizens residing in their jurisdiction.¹¹⁵ Thus, unless federally preempted, states and localities have some leeway to pass laws that pertain to migrants (e.g., regarding in-state tuition, driver's licenses, and public-sector jobs).¹¹⁶ Consequently, state and local officials are key players in the immigration federalism landscape. Especially over the past decade, subfederal officials have been targets of institutional blame for their actions and omissions in the immigration arena.¹¹⁷ The imbroglio over sanctuary cities is just one of many flare-ups.¹¹⁸

In sum, there is plenty of institutional blame to go around and plenty of public officials to share in it. These structural conditions are very consequential. As the number of potential targets of institutional blame expands, the opportunities for attributing, deflecting, and avoiding blame multiply exponentially.

II. PERCEPTIONS AND MISPERCEPTIONS

This Part explains the psychology and sociology of blame. Key insights from these disciplines explain how perceptions are formed and, as importantly, how perceptions can be systemically wrong.

Leading theories in psychology posit that judgment formation is the product of a “dual-process” structure: “System One,” which is a fast, instinctive, intuitive, and emotional system; and “System Two,” which is a slow, reflective, controlled, and effortful system.¹¹⁹ Important for present

113. See *supra* notes 73–75 and accompanying text; *infra* notes 414–15 and accompanying text.

114. The government's official position on immigration enforcement is that it is both devolvable to subfederal actors and, moreover, that unless preempted, states have some inherent authority to enforce at least certain aspects of immigration law. See Memorandum from Jay S. Bybee, Assistant Attorney Gen. of the U.S., to Attorney Gen. of the U.S. 13 (Apr. 3, 2002), <https://www.aclu.org/sites/default/files/FilesPDFs/ACF27DA.pdf> [<https://perma.cc/K33G-YVA5>].

115. See *DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976).

116. See Kerry L. Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1644 (2007) (“[T]he Supreme Court has made a sharp distinction between immigration law, which regulates the exclusion and deportation of aliens, and alienage law, which regulates their presence here”); Cristina M. Rodriguez, *The Significance of the Local in Immigration*, 106 MICH. L. REV. 567, 576 (2008).

117. See PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* 57–86 (2015) (surveying the unprecedented uptick in state and local laws pertaining to noncitizens); Rodriguez, *supra* note 116, at 576.

118. See *supra* notes 67–75 and accompanying text; *infra* Part IV.C.4.

119. See generally DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY (Shelly Chaiken & Yaacov Trope eds., 1999) (providing a collection of articles on dual-process theories); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 14, 24, 28 (2011).

purposes, studies in cognitive and social psychology have shown that judgments relating to blame are generally dominated by System One's intuitive and reflexive pathways.¹²⁰ System Two's slower and more reflective pathways are available as a mental check. But owing to certain individual and group tendencies, our first impressions about whether and whom to blame generally stick.¹²¹

These insights, which I elaborate on further below, are essential for understanding how blame can have transformative effects—and not always rational ones—on the immigration system's operation and design. Just as blame can be misattributed to migrants, blame can be misattributed to public officials: for instance, if the general polity fails to link policymakers to choices they have made or, conversely, if the polity makes a causal link between harm and responsibility where none exists.

A. Heuristics and Biases

Studies in cognitive psychology have long shown how humans use heuristics and biases to digest complex questions.¹²² Whereas heuristics are instinctual strategies for processing information, biases reflect those tendencies in predictable ways.¹²³ Heuristics and biases, which operate in System One, can be valuable for making efficient decisions.¹²⁴ In some cases, however, these cognitive tools can lead to severe and systemic errors in judgment, which in turn can lead to irrational decisions.¹²⁵ Moreover, at the group level, heuristics and biases can “fuel mass delusions that have large consequences for regulatory policy.”¹²⁶

120. See, e.g., Feigenson, *supra* note 24, at 45–46; see also *infra* Part II.B (discussing how emotions, which are System One cognitions, relate to blame attribution).

121. See, e.g., Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556, 556–74 (2000); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814, 817 (2001) (offering a “social intuitionist model” of moral judgment, and arguing that fast-track moral intuitions—rather than slow-track deductive moral reasoning—are generally what dictate social moral judgments); see also Neal Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 LAW HUM. BEHAV. 143, 145–48 (2006).

122. See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) (presenting early studies about human judgment in the face of uncertainty). For an updated account, see generally KAHNEMAN, *supra* note 119.

123. See Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531, 532 (2005) (“The use of heuristics gives rise to intuitions about what is true, and these intuitions sometimes are biased, in the sense that they produce errors in a predictable direction.”).

124. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 704 (1999).

125. See *id.*

126. See *id.* at 704–05. For applications of these ideas to immigration, see, for example, Mary De Ming Fan, *The Immigration-Terrorism Illusory Correlation and Heuristic Mistake*, 10 HARV. LATINO L. REV. 33, 37–40 (2007); Ramakrishnan & Gulasekaram, *supra* note 66, at 1444–46. For nonimmigration examples, see, for example, Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1313–14 (2003) and Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 751 n.4, 752 n.9 (2003).

1. Heuristics

Three heuristics, in particular, are central to perceptions relating to immigration blame. First, through the *availability heuristic*, people assess the frequency and probability of events with reference to how easily instances of the occurrence come to mind.¹²⁷ Statistically, for example, it is quite rare for undocumented migrants to commit violent crimes.¹²⁸ However, if people can readily recall media accounts of those events, the availability heuristic might cause audiences to believe that such crimes occur, or will occur, more often than statistical base rates suggest. The availability heuristic can lead to erroneous judgments because the ease of recalling an event need not have any correlation to the event's actual propensity.¹²⁹

Second, under the *representativeness heuristic*, people draw conclusions about the probability of events or things with reference to how similar (or not) the tested subject is compared to a reference subject.¹³⁰ Put otherwise, judgments of probability are influenced by assessments of resemblance. Under the representativeness heuristic, preexisting stereotypes may guide a person's judgment insofar as the person compares the known features of the target subject with what stereotypes make salient about the reference group.¹³¹ Like other mental shortcuts, the representativeness heuristic does not always lead to false correlations. But it can make such errors more likely.¹³²

Third, the *affect heuristic* is a mental shortcut through which judgments are influenced by moods and emotions, such as anger, fear, and happiness.¹³³ Under this heuristic, information about stimuli in the perceiver's environment is tagged with a mood or emotion, which in turn influences how perceptions and judgments are formed.¹³⁴ One of many iterations of the

127. See JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 122, at 3, 11–14 (discussing the availability heuristic).

128. See Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 592 (2010) (“Although immigrants are often blamed for crime, ample evidence demonstrates that the crime rates among immigrants are no greater—and often less—than among the general population.”); *From Anecdotes to Evidence: Setting the Record Straight on Immigrants and Crime*, IMMIGR. POL'Y CTR. (July 25, 2013), <http://www.immigrationpolicy.org/just-facts/anecdotes-evidence-setting-record-straight-immigrants-and-crime-0> [<http://perma.cc/JH8M-6E4C>] (presenting evidence that immigrants are no more likely to engage in criminal conduct than nonimmigrants).

129. See Kuran & Sunstein, *supra* note 124, at 707.

130. See Sunstein, *supra* note 126, at 752.

131. KAHNEMAN, *supra* note 119, at 148–51.

132. See *id.*

133. See Paul Slovic et al., *The Affect Heuristic*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 397, 397 (Thomas Gilovich et al. eds., 2002).

134. *Id.* at 409–15; see also MARTHA NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 41–51 (2001) (discussing how emotional judgments and impressions may be false or mistaken); Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959, 971–72 (2003) (discussing “affect-as-information” as one of several ways that emotions inform judgments of blame).

affect heuristic, relevant to immigration blame, is the *outrage heuristic*.¹³⁵ Under this heuristic, punishment judgments are made to turn on the outrageousness of the act at issue.¹³⁶ The difficult question, “what should the appropriate punishment be?” is subconsciously answered by a simpler question—to wit, “how outraged am I by the conduct in question?”¹³⁷ I will return to the affect heuristic and the significance of blame-related emotions in more detail below.¹³⁸

2. Biases

In tandem with heuristics, biases are System One tendencies that can lead to misjudgments. *Negativity bias* is perhaps the most important because it makes “bad stronger than good” across a range of political and social contexts relevant here.¹³⁹ One manifestation of negativity bias makes people more prone to find fault than to give credit, with important implications for how and when people vote.¹⁴⁰ Another well-known manifestation of negativity bias is “loss aversion,” which causes people to feel losses more intensely than gains.¹⁴¹ Further, negativity bias has recently been linked to political affiliation.¹⁴² Those with higher degrees of negativity bias are more sensitive to negative stimuli and social change, and thus tend to favor more conservative policies.¹⁴³ Meanwhile, individuals with lower negativity bias are less wary of change, which can make them feel more comfortable with progressive policies.¹⁴⁴

Negativity bias has wide implications for immigration blame. As just one of many examples, negativity bias may cause people to feel more dissatisfaction with the size of our enormous undocumented population than satisfaction with record-breaking deportations.¹⁴⁵ If so, negativity bias can

135. See Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT*, *supra* note 133, at 49, 63.

136. See *id.*; Sunstein, *supra* note 123, at 538.

137. Sunstein, *supra* note 123, at 538. This sort of substitution—of a hard question with an easier one—is the general way that System One heuristics operate. See *id.* at 532–33, 538.

138. See *infra* Part II.B.

139. See Roy F. Baumeister et al., *Bad is Stronger than Good*, 5 *REV. GEN. PSYCHOL.* 323, 354–55 (2001); Paul Rozin & Edward B. Royzman, *Negativity Bias, Negativity Dominance, and Contagion*, 5 *PERSONALITY & SOC. PSYCHOL. REV.* 296, 298–99 (2001).

140. HOOD, *supra* note 10, at 10; Weaver, *supra* note 13, at 371.

141. See *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES*, *supra* note 122, at 300–05; Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 *AM. PSYCHOLOGIST* 341, 346–47 (1984).

142. See generally J. R. Hibbing et al., *Differences in Negativity Bias Underlie Variations in Political Ideology*, 37 *BEHAV. & BRAIN SCI.* 297 (2014).

143. Shalom H. Schwartz, *Negativity Bias and Basic Values*, 37 *BEHAV. & BRAIN SCI.* 328, 328 (2014).

144. See Gian Vittorio Caprara et al., *Personality and Politics: Values, Traits, and Political Choice*, 27 *POL. PSYCHOL.* 1, 25 (2006).

145. See Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/> [https://perma.cc/98ZX-W2AC] (estimating the unauthorized immigrant population at 11.3 million); Serena Marshall, *Obama Has Deported More People*

have a one-way ratcheting effect on public perceptions about the government's ability to control immigration flows. In turn, public officials may be more inclined to take blame-avoiding action than credit-claiming action, with downstream effects on immigration structures and policy.¹⁴⁶

Another cognitive hiccup central to immigration blame is *confirmation bias*.¹⁴⁷ When presented with conflicting information, people tend to foreground information that comports with their preexisting beliefs.¹⁴⁸ Thus, owing to confirmation bias, people who already think that migrants steal American jobs are more likely to internalize cohering reports and reject nonconforming information.

Confirmation bias has also been linked to two additional phenomena relevant to immigration blame. Specifically, confirmation bias can lead people to engage in “blame validation,” whereby blamers exaggerate supporting information to lock in their preexisting judgments and, in the process, subconsciously avoid blaming themselves or third parties who may be more deserving of that opprobrium.¹⁴⁹ In a partly overlapping phenomenon, “cognitive dissonance” theory posits that when a person's self-worth or belief system is threatened, they may release the psychological tension through the cathartic act of blaming others.¹⁵⁰ Those at the fringe of society—especially undocumented migrants of color—tend to be easy outlets.¹⁵¹ As put by Dean Kevin Johnson: “generation after generation, the United States has turned to the cure-all of blaming the ‘foreigner’ for domestic troubles.”¹⁵²

Racial bias can also infect perceptions relating to blame.¹⁵³ In the immigration context, racial bias is most commonly associated with the blame

than Any Other President, ABC NEWS (Aug. 29, 2016, 2:05 PM), <http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> [https://perma.cc/U958-KE6Z] (“Between 2009 and 2015 [the Obama] administration . . . removed more than 2.5 million people through immigration orders . . .”).

146. Cf. Weaver, *supra* note 13, at 393–95.

147. See, e.g., Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 101, 107 (2007) (“[R]ather than update their prior beliefs based on new information, [people] tend to evaluate the persuasiveness of new information based on its conformity to their experience.”); Jonathan J. Koehler, *The Influence of Prior Beliefs on Scientific Judgments of Evidence Quality*, 56 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 28, 47 (1993).

148. See Koehler, *supra* note 147, at 47; Sunstein, *supra* note 126, at 762.

149. Experimental studies by Mark Alicke and associates indicate that subjects who spontaneously evaluate agents' behavior unfavorably are apt to exaggerate agents' causal control and any evidence that might favor it while de-emphasizing counterevidence. See Mark D. Alicke et al., *Causation, Norm Violation, and Culpable Control*, 108 J. PHIL. 670, 697 (2011); Alicke, *supra* note 121, at 556–74.

150. For the classic work on cognitive dissonance, see generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957). The idea has often been extended to explain scapegoating of putatively innocent groups, including migrants. See DOUGLAS, *supra* note 37, at 115–17; JOHNSON, *supra* note 7, at 50–52; McLeod, *supra* note 63, at 164–68.

151. See DOUGLAS, *supra* note 37, at 132–40.

152. See JOHNSON, *supra* note 7, at 87.

153. Stereotyping occurs when we overestimate the prevalence of a trait or characteristic in other people and assume that more members of the group possess the trait or characteristic than really do. See JONATHAN BARON, *THINKING AND DECIDING* 204–08 (1988).

attributed to migrants of color.¹⁵⁴ But such bias can also distort public perceptions of government officials, as arguably occurred, for example, against President Obama.¹⁵⁵ Like other biases, racial bias can occur subconsciously and without ill intent.¹⁵⁶ Understandably, most immigration restrictionists—including our sitting president—vehemently deny that their anti-immigration ideology is based on race.¹⁵⁷ Instead, they cite to race-neutral reasons, such as crime, the economy, and national security.¹⁵⁸ These race-neutral reasons may be sincerely held.¹⁵⁹ Through a critical-race lens, however, these other reasons are proxies for conscious or subconscious bias.¹⁶⁰

Importantly, racial bias can merge with other mental shortcuts, with compounding effects. For instance, if audiences can easily recall accounts of Latino migrants committing drug crimes, then the availability heuristic might lead those audiences to believe that Latinos are more prone to commit such crimes than statistical base rates show.¹⁶¹ And, if people are already predisposed to think so, confirmation bias might lead audiences to accept (and maybe even seek) conforming reports.¹⁶² Meanwhile, owing to

154. See *supra* note 7 and accompanying text; *infra* note 160 and accompanying text.

155. Although President Obama “didn’t view racism as a major component of mainstream Republican opposition to his policies,” those that worked in the Obama White House “do identify race as a factor in consistent Republican efforts to stymie Obama’s agenda in Washington.” Kevin Liptak, *Obama’s Candid Reflections on Race*, CNN (Dec. 7, 2016, 1:28 PM), <http://www.cnn.com/2016/12/07/politics/obama-race-legacy/index.html> [<https://perma.cc/HXQ8-EFLY>]; see also Terence Samuel, *The Racist Backlash Obama Has Faced During His Presidency*, WASH. POST (Apr. 22, 2016), <https://www.washingtonpost.com/graphics/national/obama-legacy/racial-backlash-against-the-president.html> [<https://perma.cc/3FTF-JTZ4>].

156. See Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 1, 75 (2009) (“Xenophobia can be a cover for cruder forms of either conscious or unconscious bigotry, and all too often it is Latinos or Latinas who are singled out.”).

157. Making headlines, President Trump questioned proposed immigration protections for people from Haiti and some African nations, asking in a White House meeting “why he should accept immigrants from ‘shithole countries’ rather than from places like Norway.” Julie Hirschfeld Davis et al., *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html> [<https://perma.cc/YJ6C-4YXD>]. When asked days later whether he is racist, President Trump said, “No, I’m not a racist. I am the least racist person you have ever interviewed.” Aileen Graef, *Trump: ‘I Am Not a Racist,’* CNN (Jan. 15, 2018, 12:13 AM), <https://www.cnn.com/2018/01/14/politics/donald-trump-racist/index.html> [<https://perma.cc/KA9N-2C7L>].

158. See *supra* Part I.A.

159. Cf. D. C. McAllister, *No, Trump’s Immigration Order Isn’t Racist or Reminiscent of the Holocaust*, FEDERALIST (Jan. 30, 2017), <http://thefederalist.com/2017/01/30/no-trumps-immigration-order-isnt-racist-reminiscent-holocaust/> [<https://perma.cc/WC49-B53G>] (“Just because a racist is skeptical of refugees from terrorism-exporting countries for his own twisted reasons doesn’t mean all Republicans who support the policy are racist.”).

160. See JOHNSON, *supra* note 7, at 7 (“The use of proxies to discriminate obscures the true inequality of the law and allows for the plausible denial of a discriminatory intent while ensuring discriminatory results.”); Legomsky, *supra* note 156, at 75 (“Bigotry often drives people to take positions on illegal immigration that they know would be socially unacceptable if articulated in explicit racial terms.”).

161. See *supra* notes 127–29 and accompanying text (discussing the availability heuristic).

162. See *supra* notes 147–49 and accompanying text (discussing confirmation bias).

negativity bias, audiences are likely to feel exponentially more displeasure with “bad” Latino migrants than satisfaction with the “good” ones.¹⁶³ Consider, in this light, Trump’s stirring remarks during his presidential bid: “When Mexico sends its people, they’re not sending their best. . . . They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”¹⁶⁴

B. Emotions

A growing body of psychological research explains how emotions are integral to information processing and judgment formation. The definition of “emotion” is not entirely settled, in part because scientists’ understanding of how the human brain works is constantly evolving.¹⁶⁵ For present purposes, I use the term emotion in a conventional sense, to mean instinctive or intuitive feelings that assist people in appraising and reacting to stimuli in their surrounding environment.¹⁶⁶ Emotions influence human thinking in at least four ways that pertain to blame attribution and misattribution.

First, as already mentioned, emotional states offer information about the targets of our judgment through the affect heuristic.¹⁶⁷ Thus, for example, people who feel angry use that emotion as an informational cue, or signal, that something bad has happened for which someone is responsible.¹⁶⁸ Just as we might intuit that where there is smoke there is fire, so too might we intuit that when we feel angry (the emotion) there is someone to blame (the emotional cause). In this cognitive pathway, anger is prior to blame.

Second, anger can follow or cognitively mesh with blame.¹⁶⁹ Suppose, for example, that a blamer perceives that a blamee is responsible for some avoidable harm. Whatever led the blamer to those judgments can also lead to or merge with the structural predicates of anger.¹⁷⁰ To be clear, anger and blame do not always coincide—we can blame without being angry and feel angry without blaming. But the relationship between anger and blame is

163. See *supra* notes 139–46 and accompanying text (discussing negativity bias).

164. *Trump Announces Presidential Bid*, *supra* note 40.

165. See Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 163 (2012).

166. *Id.*; see also Feigenson, *supra* note 134, at 962 (explaining how emotions signal changes in the environment that are important to the person experiencing the emotion and can “help that person choose among and coordinate competing goals and values”).

167. See *supra* notes 133–34 and accompanying text (discussing the affect heuristic).

168. See generally Gerald L. Clore et al., *Affective Causes and Consequences of Social Information Processing*, in 1 HANDBOOK OF SOCIAL COGNITION 323 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 2d ed. 1994) (explaining how affects that are external to the judgment target can be extended and mistakenly attributed to the target judgment); Feigenson, *supra* note 134, at 964, 968.

169. See BERNARD WEINER, JUDGMENTS OF RESPONSIBILITY: A FOUNDATION FOR A THEORY OF SOCIAL CONDUCT 186–98 (1995) (capturing decades of research showing that judgments of responsibility mattered to the perceiver’s emotional response); Brian M. Quigley & James T. Tedeschi, *Mediating Effects of Blame Attributions on Feelings of Anger*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 1280, 1281–82 (1996).

170. See Solan, *supra* note 1, at 1009 (“What triggers blame and what triggers such emotions as anger seem very similar.”).

often fluid, reciprocal, and mutually reinforcing because the triggers of anger and blame substantially overlap.¹⁷¹ To wit, both anger and blame are consistent with perceptions that the target of judgment is responsible for some avoidable harm.¹⁷² By contrast, if the perceiver believes that someone has been harmed for reasons beyond that person's control, the perceiver may emerge with a different emotion, such as sympathy or sadness. Compared to anger, these other negative emotions tend to correlate with different attitudes and behaviors, such as forgiveness or aiding the victim.¹⁷³

Third, emotions can influence how we process information through System One and System Two. Some emotions, like anxiety and sadness, cause people to feel uncertain about a situation.¹⁷⁴ That uncertainty, in turn, tends to trigger deliberative and effortful System Two thinking.¹⁷⁵ By contrast, anger makes a person feel more certain about a situation.¹⁷⁶ In turn, that certainty makes System One processes more salient because there is no self-felt need for System Two's mental check.¹⁷⁷

To be sure, people can (and often do) have rational reasons available to support System One emotional judgments. Research shows, however, that such rationalization is often arrived at post hoc.¹⁷⁸ Thus, even when we think that our System Two processes did the evaluative work, our System One pathways may have predetermined the outcome.¹⁷⁹

Also worth emphasizing here is the relationship between emotions in general and the affect heuristic in particular.¹⁸⁰ As earlier discussed, the affect heuristic is a System One mechanism that uses emotions as a source of information about the target of judgment (e.g., whether the target is responsible for harm). But more generally, emotions can also affect *how we process* information (e.g., fast or slow). If so, then all of the heuristics and biases—not only the affect heuristic—may be triggered by emotions.

Fourth, emotions can mediate a person's decisions of whether, whom, or what to blame. People who feel angry are more inclined to perceive harm

171. See Quigley & Tedeschi, *supra* note 169, at 1281–82 (modeling the potential for feedback loops between anger and blame).

172. *Id.*

173. See Dacher Keltner et al., *Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception*, 64 J. PERSONALITY & SOC. PSYCHOL. 740, 741 (1993).

174. *See id.*

175. See Jennifer Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 563, 563 (1998); Larissa Z. Tiedens & Susan Linton, *Judgment Under Emotional Certainty and Uncertainty: The Effects of Specific Emotions on Information Processing*, 81 J. PERSONALITY & SOC. PSYCHOL. 973, 985 (2001).

176. Tiedens & Linton, *supra* note 175, at 974.

177. *Id.*

178. See Haidt, *supra* note 121, at 814. For a critique of this view, see generally David A. Pizzaro & Paul Bloom, *The Intelligence of the Moral Intuitions: Comment on Haidt (2001)*, 110 PSYCHOL. REV. 193 (2003). And, for a response, see generally Jonathan Haidt, *The Emotional Dog Does Learn New Tricks: A Reply to Pizarro and Bloom (2003)*, 110 PSYCHOL. REV. 197 (2003).

179. See Haidt, *supra* note 121, at 814.

180. See *supra* notes 133–34 and accompanying text (discussing the affect heuristic).

because the emotion's negative valence makes their surroundings appear more negative.¹⁸¹ Further, when harm is detected, anger can skew perceptions of causal responsibility toward *individuals* rather than toward *situations*.¹⁸² Thus, for example, an angry person may blame undocumented migrants for crossing the U.S. border or blame the president for taking unilateral action (i.e., blame individuals). Meanwhile, a person who feels sad or sympathetic might blame our unjustified immigration system or political dysfunction (i.e., blame situations).¹⁸³

Relatedly, emotions can affect assessments of risk and probability.¹⁸⁴ For present purposes, risk perceptions are important insofar as immigration is (or is made to be) a type of risk regulation. What is the risk that migrants will steal American jobs? What is the risk that migrants are or will become terrorists, gang members, or criminals? What is the risk that granting amnesty will lead to new waves of undocumented migration? What is the risk that an asylum seeker will be turned away and tortured or killed upon repatriation? What is the risk of political backlash against a legislator who casts a vote in favor of funding a border wall?

In Part II.A, this Article discussed how non-emotional heuristics and biases might influence judgments and choices about risk in the face of uncertainty. Likewise, emotions such as anger, fear, and anxiety will influence how the polity and public officials answer risk-related questions. In general, fearful people are prone to think that bad things will happen to them; as a consequence, they are prone to make pessimistic risk assessments.¹⁸⁵ By contrast, angry people are less likely to think that bad things will happen, in part because angry people have an inflated sense of certainty and control over their environment.¹⁸⁶ As a consequence, people experiencing anger tend to make optimistic risk assessments. Thus, whether from anger, fear, or both, estimates of the likelihood and seriousness of various risks often diverge from the objective probability and severity of those risks.¹⁸⁷

181. See Gordon H. Bower & Joseph P. Forgas, *Mood and Social Memory*, in HANDBOOK OF THE AFFECT AND SOCIAL COGNITION 95, 115 (Joseph P. Forgas ed., 2001) (explaining that experiencing an emotion makes features of that emotion's cognitive or appraisal structure more accessible and thus more likely to be utilized in subsequent perceptions and judgments).

182. See Keltner et al., *supra* note 173, at 741–42, 751–52 (finding that angry participants tended to attribute more responsibility to the person than to the situation regarding ambiguous social mishaps); Jennifer S. Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCHOL. 146, 156 (2001) (finding that people feeling sad tended to attribute causation to situational factors; whereas angry people tended to attribute causation to individuals).

183. Cf. Keltner et al., *supra* note 173, at 741–42, 751–52.

184. Eric J. Johnson & Amos Tversky, *Affect, Generalization, and the Perception of Risk*, 45 J. PERSONALITY & SOC. PSYCHOL. 20, 29 (1983).

185. *Id.*

186. Lerner & Keltner, *supra* note 182, at 154–55; see also Feigenson, *supra* note 134, at 980–81 (extending these insights to 9/11 litigation).

187. Paul Slovic et al., *Behavioral Decision Theory Perspectives on Protective Behavior*, in TAKING CARE: UNDERSTANDING AND ENCOURAGING SELF-PROTECTIVE BEHAVIOR 14, 28–34 (Neil D. Weinstein ed., 1987); Paul Slovic et al., *Facts Versus Fears: Understanding*

Finally, as we all know from experience, emotions can influence not only how we think, but also how we behave.¹⁸⁸ For example, when we feel angry, happy, fearful, or sympathetic, we may act in ways that we otherwise might not if we felt differently. Moreover, the intensity of our emotions can mediate our motivations to act.¹⁸⁹ If we are feeling only a little angry, a little happy, a little afraid, or a little sympathetic, we might not act on those emotions. Yet we might be more inclined to do so if we are outraged, ecstatic, terrified, or highly sympathetic. Thus, emotions can have significant implications for whether and how people vote, whether and how people publicly protest or support government policies, and so on. Likewise, the type and intensity of emotions can bear on the actions of public officials, directly or indirectly.¹⁹⁰

C. Cultural Influences

A dominant strand of cultural theory posits that people hold “worldviews,” which are latent preferences about how society should be organized.¹⁹¹ Pertinent here, cultural theory suggests that a person’s worldview will influence his or her judgments of blame.¹⁹² More specifically, an event or policy may register (or not) as an avoidable harm depending on the perceiver’s worldview; likewise, causal attributions of responsibility may hinge on the perceiver’s worldview.

For example, under a “hierarchical” worldview, blame should attach to those who do not follow the rules or respect authority.¹⁹³ Under an “egalitarian” worldview, blame should attach to those who flout popular

Perceived Risk, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 122, at 463–78.

188. This is one of the key insights of the behavioral-economics and law-and-emotions literatures. See Abrams & Keren, *supra* note 25, at 2003–21 (comparing and situating the behavioral-economics and law-and-emotions literatures, with citations to leading work in the respective fields).

189. See Joep Sonnemans & Nico H. Frijda, *The Structure of Subjective Emotional Intensity*, 8 COGNITION & EMOTION 329, 342 (1994).

190. For an extended treatment of these tendencies, see generally DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* (2007).

191. See MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS* 2–4 (1982); THOMPSON ET AL., *supra* note 26, at 1–2. In cultural theory, worldviews are generally classified along two dimensions: “group” (which “refers to the extent to which an individual is incorporated into bounded units”) and “grid” (which “denotes the degree to which an individual’s life is circumscribed by externally imposed prescriptions”). THOMPSON ET AL., *supra* note 26, at 5–8 (elaborating on this model); see also Mary Douglas, *Being Fair to Hierarchists*, 151 U. PA. L. REV. 1349, 1352–57 (2003) (same).

192. DOUGLAS, *supra* note 26, at 6 (employing cultural theory to explain the human need to transfer blame for disaster onto unpopular groups or classes); SHAVER, *supra* note 13, at 2 (explaining that “judgments of causality, responsibility, and culpability made in a particular case are affected by more widely held cultural values”); KAHAN, *supra* note 26, at 738 (“Each culture must have its notions of dirt and defilement which are contrasted with its notion of the positive structure which must not be negated.”).

193. See Christopher Hood, *Accountability and Blame-Avoidance, in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 603, 613 (Marc Bovens et al. eds., 2014) (discussing blame through the lens of cultural theory).

opinion or who act without group support.¹⁹⁴ Under an “individualist” worldview, blame should attach to those who are considered personally inept or maladroit, which raises the prospect of blaming the victim.¹⁹⁵

Related research in “cultural cognition” adds psychological insights.¹⁹⁶ According to this nascent branch of cultural theory, “*culture is prior to facts.*”¹⁹⁷ Thus, people’s worldviews will anchor their perceptions of risk and harm, operate as a screen through which heuristics and biases work, and mediate emotional responses.¹⁹⁸

Recall that under the availability heuristic, people make judgments about the propensity of an event based on how easily (or not) similar events come to mind.¹⁹⁹ But which events will leave an impression and be remembered when the availability heuristic is triggered? Cultural-cognition theory offers an answer: a person’s worldview will influence the saliency and recall of events in a person’s mind.²⁰⁰ People tend to take note of and assign significance to instances of harm associated with behavior they despise—a tendency reinforced by negativity bias.²⁰¹

Relatedly, cultural-cognition theory provides a gloss on confirmation bias. Recall that under that bias, people tend to seek out and believe information that coheres with their preexisting beliefs.²⁰² But what is the source and nature of those preexisting beliefs? Here again, cultural worldviews are part of the answer—at least in hot-button contexts, such as immigration, where a person’s worldview is likely to feel threatened by competing worldviews.²⁰³

A person’s cultural worldview may also influence their emotional reaction to information and events.²⁰⁴ If an immigration-related activity or policy prompts fear, anger, sympathy, or another emotion, chances are that the emotions elicited, and whom they are directed at, will reflect and reinforce a person’s preferences about how society should be structured.²⁰⁵

Through these and other psychological mechanisms, groups of like-minded individuals polarize, not only around subjective societal *values*, but also around ostensibly objective *facts*.²⁰⁶ As Dan Kahan explains, the fit

194. *See id.* at 613–14.

195. *See id.* at 613.

196. *See* Kahan, *supra* note 26, at 739.

197. Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1083–84 (2006) (book review).

198. Kahan, *supra* note 26, at 742, 747; *see also infra* notes 200–08 and accompanying text (elaborating on these connections).

199. *See supra* notes 127–29 and accompanying text.

200. *See* Kahan, *supra* note 26, at 747.

201. *See id.* at 747–49, 752; *see also supra* notes 139–43 and accompanying text (discussing negativity bias).

202. *See supra* notes 147–48 and accompanying text.

203. *See* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 156–57 (2006); Kahan, *supra* note 26, at 742, 747.

204. *See* Kahan, *supra* note 147, at 117; Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 744–52 (2008) [hereinafter Kahan, *Two Conceptions of Emotion*].

205. *See* Kahan, *Two Conceptions of Emotion*, *supra* note 204, at 748–57.

206. *See* Kahan, *supra* note 26, at 749.

between an expert's position and the one congenial to a person's cultural predisposition is what causes that person "to take note of that expert's view, to assign significance to it, and thereafter recall it."²⁰⁷ What is more, studies in cultural cognition show that people tend to credit or discredit an expert's factual assessments depending on whether the expert shares the perceiver's worldview.²⁰⁸ Thus, cultural-cognition theory predicts that when lay people are faced with conflicting empirical accounts of immigration crime, undocumented employment, and so on, they will gravitate toward the opinions of their trusted, culturally aligned experts.

D. Packaging and Presentation

In light of the foregoing, judgments and behaviors relating to blame can be heavily influenced by how information is packaged and presented. More specifically, the way information is packaged and presented will affect how it is processed, both at the individual and group levels.²⁰⁹ The discussion here focuses on three styles of messaging that saturate immigration blame: narratives, metaphors, and framing.

Narratives generally convey information through qualitative anecdotes.²¹⁰ Whether factual or fictional, narratives are indispensable to how people perceive and understand the world around them.²¹¹ Moreover, narratives hit cognitive chords that pie charts and number-crunching studies miss.²¹² For example, the backstories about a family torn apart by deportation,²¹³ or the gory details of a migrant's violent crime,²¹⁴ invoke different and deeper

207. *Id.*

208. *See id.* at 749–50; *see also* Kahan et al., *supra* note 197, at 1084–85, 1093–94.

209. *See generally, e.g.*, RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (providing a behavioral-economics account); Kahan, *supra* note 147 (providing a cultural-cognition account).

210. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 1020–41 (1991) (arguing that narratives are valuable sources of knowledge through the illuminating quality of their affective charge, and also through the distinctive insights and perspectives their stories convey); Derrick Bell, *The Power of Narrative*, 23 LEGAL STUD. F. 315, 315–17 (1999).

211. On the role of narratives in shaping law and politics, *see generally* ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000) and WESTEN, *supra* note 190.

212. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 830 (1993) (“Vivid examples often influence us more than statistical evidence.”); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2227–28 (1989) (arguing that narrative fits the mind's way of making sense of its experiences).

213. For recent, heart-wrenching accounts, *see* Jonathan Blitzer, *Donald Trump's ICE Is Tearing Families Apart*, NEW YORKER (Feb. 13, 2018), <https://www.newyorker.com/news/news-desk/donald-trump-ice-tearing-families-apart> [<https://perma.cc/P57L-VLCU>]. *See also* Michael Alison Chandler, *Deportations of Parents Can Cast the Lives of U.S.-Citizen Kids into Turmoil*, WASH. POST (Dec. 29, 2013), https://www.washingtonpost.com/local/education/deportations-of-parents-can-cast-the-lives-of-us-citizen-kids-into-turmoil/2013/12/29/abdf23aa-6b4c-11e3-b405-7e360f7e9fd2_story.html [<https://perma.cc/2HTX-HKS6>]; Debbi Nathan, *Hidden Horrors of “Zero Tolerance”—Mass Trials and Children Taken from Their Parents*, INTERCEPT (May 29, 2018, 12:26 PM), <https://theintercept.com/2018/05/29/zero-tolerance-border-policy-immigration-mass-trials-children/> [<https://perma.cc/2HZ5-LWKE>].

214. *Cf.* Lukas Mikelionis, *Illegal Immigrant Found Guilty in Murder of Family of Five in San Francisco*, FOX NEWS (Dec. 12, 2017), <http://www.foxnews.com/us/2017/12/12/illegal->

emotional reactions than phlegmatic statistics about deportation and crime rates.

Metaphors are another way that information can be conveyed and translated into blame.²¹⁵ A metaphor is “a figure of speech in which a word or phrase literally denoting one kind of object or idea is used in place of another to suggest a likeness or analogy between them.”²¹⁶ Research in cognitive linguistics demonstrates that people view the world in metaphoric terms.²¹⁷ For purposes of blame attribution, metaphors can thus affect our perceptions of harm and responsibility.²¹⁸ Take, for instance, the “flood of immigrants” metaphor.²¹⁹ This metaphor conveys an uncontrollable, and perhaps destructive, influx of noncitizens.²²⁰ Statistical reports on the numbers and effects of migrants in the country would come closer to some objective truth. The flood metaphor, however, is catchier, more likely to drive perceptions about harm, and thus more likely to factor into attributions of blame. For an institutional example, consider “congressional gridlock.” This metaphor conveys more than legislative stasis—it conveys a feeling or sense of frustration.²²¹ Of course, the causes of legislative stasis and traffic jams are quite different. But the metaphor connects the two in ways that can alter how we understand congressional inaction.

The manner in which information is framed can also affect how that information is processed and folded into blame-related judgments. Through framing adjustments, the very same thing or event may be cast in two (or more) different lights.²²² For example, does high-volume migration yield “cultural diversity,” as integrationists contend, or “cultural contamination,” as some restrictionists contend? Are migrants “our neighbors” or “invading

immigrant-found-guilty-in-murder-family-five-in-san-francisco.html [https://perma.cc/PV7Z-9UPB].

215. McLeod, *supra* note 63, at 164 n.352 (“[H]ow we *think* metaphorically affects how we *talk* about problems and the *solutions* we formulate in response to those problems.”).

216. *Metaphor*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003); *see also* ZOLTÁN KÓVECSÉS, *METAPHOR: A PRACTICAL INTRODUCTION* viii (2002) (summarizing the “cognitive linguistic view of metaphor”).

217. Hugh G. Petrie & Rebecca S. Oshlag, *Metaphor and Learning*, in *METAPHOR AND THOUGHT* 579, 589 (Andrew Ortony ed., 2d ed. 1993) (“[M]etaphor is what enables one to pass from the more familiar to the unfamiliar . . .”). For extended discussions of how metaphors are used (and abused) in the immigration context, *see*, for example, JOHNSON, *supra* note 7, at 153–57 and Cunningham-Parmeter, *supra* note 64, at 1547. For path-breaking work on the significance of metaphors for the law more generally, *see* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1130–36, 1142–56 (1988).

218. *Cf.* Cunningham-Parmeter, *supra* note 64, at 1549 (“[D]angers of distortion and conflation—risks associated with all metaphors—are heightened in the immigration context.”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1382 (1988) (warning against the uncritical use of metaphors).

219. *See* OTTO SANTA ANA, *BROWN TIDE RISING: METAPHORS OF LATINOS IN CONTEMPORARY AMERICAN PUBLIC DISCOURSE* 65–81 (2002) (analyzing the use of water metaphors in immigration debates).

220. *Id.*

221. *See, e.g.*, Stolberg & Fandos, *supra* note 65.

222. Kurran & Sunstein, *supra* note 124, at 705 (discussing “the *framing effect*, whereby given data are evaluated differently depending on how they are framed”).

strangers”²²³ Are unaccompanied minors seeking refuge at our border victims of gang-related violence in their home countries, or future gang members in ours?²²⁴

Other types of framing adjustments zoom in or out, to capture a different mix of considerations that may bear on attributions of blame. For instance, the Obama administration’s Deferred Action for Childhood Arrivals (DACA) program may strike observers as more or less blameworthy, depending on whether it is viewed in isolation or conjunction with his administration’s subsequent Deferred Action for Parents of Americans (DAPA) program.²²⁵ Likewise, President Trump’s third travel ban may strike observers as more or less blameworthy depending on whether it is viewed in conjunction with his prior travel bans, his campaign rhetoric calling for a “Muslim ban,” and so on.²²⁶ In short, context matters when assigning blame. And the context that matters depends on how information is framed.

More generally, framing effects can also influence how information is mentally processed—that is, through System One (fast and reflexive) and System Two (slow and reflective). For instance, according to prospect

223. KENT A. ONO & JOHN M. SLOOP, *SHIFTING BORDERS: RHETORIC, IMMIGRATION, AND CALIFORNIA’S PROPOSITION 187*, at 40 (2002) (discussing popular media images of a “generalized brown figure encroaching from [the] south”); Cunningham-Parmeter, *supra* note 64, at 1571–72 (“[A]lien metaphors present immigrants not only as invaders from foreign countries, but also as nonhuman aggressors from foreign worlds.”); Editorial, *Street-Corner Immigration Reform*, N.Y. TIMES (Feb. 25, 2006), <http://www.nytimes.com/2006/02/25/opinion/streetcorner-immigration-reform.html> [<https://perma.cc/K2U5-G2Z2>] (rejecting the view of “illegal immigrants” as an “invading army” and depicting them instead as “determined immigrants” who “trim our hedges, prepare our food and care for our children”).

224. Seung Min Kim, *Trump Warns Against Admitting Unaccompanied Migrant Children: They’re Not Innocent*, WASH. POST (May 23, 2018), https://www.washingtonpost.com/politics/trump-warns-against-admitting-unaccompanied-migrant-children-theyre-not-innocent/2018/05/23/e4b24a68-5ec2-11e8-8c93-8cf33c21da8d_story.html [<https://perma.cc/6NEN-JL7H>].

225. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<https://perma.cc/BY5B-E6MP>] [hereinafter DAPA Memo]; Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/XZ8R-FLVK>] [hereinafter DACA Memo]. Under DACA, individuals who arrived in the United States under the age of sixteen and who met other requirements could apply for deferred action and work authorization for renewable periods. See DACA Memo, *supra*. DAPA has a similar structure, except that it extended to parents of U.S. citizens and parents of lawful permanent residents. See DAPA Memo, *supra*. For further discussion of DACA and DAPA, see *infra* Part IV.C.2.

226. Compare Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017), with Levy, *supra* note 40. Indeed, in *Trump v. Hawaii*, the Court had to grapple with this issue of contextual framing. See slip op. at 23 (“At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation.”); *id.* at 35 (Sotomayor, J., dissenting) (“[The Proclamation] masquerades behind a facade of national-security concerns. But this repackaging does little to cleanse [it] of the appearance of discrimination that the President’s words have created.”).

theory, information that is framed as a “loss” will register in System One more intensely than if the same information is presented as a “gain.”²²⁷

E. “Blame Cascades”

At the group level—where psychology and sociology meet—heuristics, biases, emotions, and cultural cognition can have snowballing effects on society or subcommunities within it.²²⁸

Most significantly, *availability cascades* can seriously distort group perceptions about risk and harm.²²⁹ An availability cascade “is a self-reinforcing process . . . by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its rising availability in public discourse.”²³⁰ Thus, for example, the more that people hear narratives of hardworking or criminal migrants, the more easily these narratives come to mind. And the more easily they come to mind, the more readily they may be repeated, retweeted, and recycled in social discourse.

Extending these insights, this Article introduces the idea of *blame cascades*. A blame cascade occurs when avalanching perceptions of avoidable harm and responsibility lead to widespread blame.²³¹ Publicity given to blaming of certain targets for certain harms adds social proof, and reinforces, whom or what to blame. In extreme form, large segments of society may blame migrants or public officials without independently assessing whether blame is warranted. For instance, when enough people blame migrants for such and so, or the president for this and that, more people may jump on those group bandwagons, even though they might not have blamed in their individual capacity.²³²

Blame cascades can occur organically and spontaneously. But they can also be strategically manufactured by politicians, advocates, and social elites, who employ narratives, metaphors, and framing devices to shape and maintain public perceptions.²³³ In a blame cascade, the objectively weaker

227. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 279–80 (1979).

228. See Sunstein, *supra* note 126, at 757–59 (positing the existence of availability cascades, where “media coverage of gripping, unrepresentative incidents” creates durable and empirically invalid social beliefs about social phenomena); see also *supra* Part II.C (discussing how cultural worldviews contribute to tribalism and polarization).

229. See Sunstein, *supra* note 126, at 757–59.

230. Kuran & Sunstein, *supra* note 124, at 683.

231. *Cf. id.* at 761–62 (explaining that, for reputational reasons, people often believe something because others appear to believe it; or they feign conviction to avoid reputational harm); see also Cass R. Sunstein, *Precautions Against What? The Availability Heuristic and Cross-Cultural Risk Perceptions*, 57 *ALA. L. REV.* 75, 94–96 (2005) (describing a social phenomenon whereby information and beliefs are passed along from person to person, each of whom is too busy to apply his or her own analysis).

232. *Cf. Kuran & Sunstein, supra* note 124, at 703 (“[P]eople tended to form their risk judgments largely, if not entirely, on the basis of information produced through a social process, rather than through personal experience or investigation.”).

233. *Id.* at 687–88 (characterizing the activity of policy entrepreneurs); Sunstein, *supra* note 126, at 758–59 (“Many perceived ‘epidemics’ are in reality no such thing, but instead a product of media coverage of gripping, unrepresentative incidents.”); see also FRANK FUREDI,

side of a debate may triumph simply by exploiting audiences' cognitive shortcuts, stoking the right emotions, and reaching targeted audiences at the right times.²³⁴

The twenty-four-hour news cycle exacerbates the potential for blame cascades, both organic and manufactured. Sensationalism sells. Owing to audiences' negativity bias, negative sensationalism sells even better.²³⁵ And with new technologies and social platforms, our exposure to information is seldom more than a few clicks or swipes away.²³⁶

* * *

The foregoing discussion offered an account of how blame is attributed to migrants and public officials in the immigration context; how legal structures may inform or confound those judgments; and how heuristics, biases, emotions, and cultural worldviews factor in. But blame attribution is only part of the story. In life and politics, the impulse to lay blame is often met with the impulse to avoid it.²³⁷ In conjunction with blame attribution, blame avoidance is an essential feature of immigration blame. The discussion below elaborates.

III. BLAME AVOIDANCE

The term "blame avoidance" is used here to describe a range of actions that individuals and groups employ to escape, minimize, or diffuse blame.²³⁸ This Part provides a typology of blame-avoidance strategies, drawn from studies in political science and sociology.²³⁹ Generally speaking, there are three ways to avoid blame. First, blame avoiders can try to refute or mitigate perceptions of *avoidable harm*. Second, blame avoiders can try to shape or reshape perceptions of *responsibility* for the harm at issue. In the absence of

POLITICS OF FEAR 123–41 (2005) (discussing the rise of "fear entrepreneurs" in modern societies); Fan, *supra* note 126, at 45–46 (noting that people can erroneously rely on illusory correlations manufactured by others).

234. See Kuran & Sunstein, *supra* note 124, at 713–14.

235. Cf. KAHNEMAN, *supra* note 119, at 301 ("The brains of humans and other animals contain a mechanism that is designed to give priority to bad news."); Sunstein, *supra* note 126, at 758–59.

236. See CASS R. SUNSTEIN, #REPUBLIC: DIVIDED REPUBLIC IN THE AGE OF SOCIAL MEDIA 98–108 (2017) (describing how the online world creates "cybercascades" and political fragmentation).

237. See D. Justin Coates & Neal A. Tognazzini, *The Contours of Blame*, in BLAME: ITS NATURE AND NORMS, *supra* note 1, at 3, 9 ("Judgments [of blame] are tinged with normativity, and because of this carry a certain *force*: they are the sorts of judgments that we would rather not have made about us."); Hood, *supra* note 3, at 167–71 (discussing the impulse and incentives for public officials to avoid blame).

238. See HOOD, *supra* note 10, at 4–6; Weaver, *supra* note 13, at 375.

239. For some of the key works, see generally RICHARD J. ELLIS, PRESIDENTIAL LIGHTNING RODS: THE POLITICS OF BLAME AVOIDANCE (1994); HOOD, *supra* note 10; BARRY R. SCHLENKER, IMPRESSION MANAGEMENT: THE SELF-CONCEPT, SOCIAL IDENTITY, AND INTERPERSONAL RELATIONS (1980); and Weaver, *supra* note 13.

perceived harm or responsibility, blame generally will not attach.²⁴⁰ Third, an otherwise blameworthy act or omission might be *excused* or *justified*.²⁴¹

In turn, these generic blame-avoiding methods can be pursued in a variety of ways. As captured by political scientist Christopher Hood, blame-avoidance tactics generally fall into one or more of the following categories: (1) presentational strategies; (2) agency strategies; and (3) policy strategies.²⁴² For migrants and public officials alike, blame avoidance can be more or less convincing, more or less obvious, and more or less valuable to public discourse and outcomes.²⁴³

A. Presentational Strategies

Blame avoiders select which information to offer, when to offer it, and how to present it.²⁴⁴ These presentational tactics are generally available to all the relevant players in immigration blame (migrants, public officials, and their respective advocates and spokespersons). Instructively, the same cognitive, social, and political dynamics that feed blame attribution also support presentational blame avoidance.²⁴⁵ Thus, for instance, politicians and immigrant advocates employ narratives, metaphors, and framing techniques to avoid blame. Moreover, these blame-avoiding tactics get amplified, spread, and filtered through policy entrepreneurs and mass-media outlets.

In addition, excuses and justifications are common to presentational blame avoidance. Whereas *excuses* generally try to negate perceptions of harm and responsibility, *justifications* are positive attempts to turn blame into credit.²⁴⁶ When attributions of blame turn on the blamee's motivations (e.g., intentionality), excuses and justifications can negate or mitigate culpability.²⁴⁷ For instance, it is one thing if a public official intended to discriminate against migrants on racial grounds, but another thing if official action unintentionally had a disparate impact on migrants of color. Depending on perspective, and context, the lack of intentionality may mitigate institutional blame. More generally, excuses and justifications play

240. Or, so I argue. See *infra* notes 448–52 and accompanying text (calling for an ethic of blaming only blameworthy action).

241. See SHAVER, *supra* note 13, at vii (“[Blame] is the outcome of a process that begins with an event having negative consequences, involves judgments about causality, personal responsibility, and possible mitigation.”); *infra* Part III.A and accompanying text (discussing excuses and justifications).

242. See generally HOOD, *supra* note 10 (offering a detailed study of these blame-avoidance strategies in public governance).

243. See *infra* Part V (discussing the values and pathologies of immigration blame).

244. See HOOD, *supra* note 10, at 17 (offering a generalized account of presentational tactics in public administration).

245. See *supra* Part II (discussing the psychological and social processes of attributing and misattributing blame).

246. See J. L. Austin, *A Plea for Excuses: The Presidential Address*, 57 PROC. ARISTOTELIAN SOC'Y 1, 2 (1956) (distinguishing excuses from justifications).

247. All else equal, we are more likely to blame a person who deliberately caused harm than we are to blame a person without such intentions. See Alicke, *supra* note 121, at 559–61; Solan, *supra* note 1, at 1019.

important roles in our social and legal ordering. They direct attention to what should (and should not) matter in any given context where blaming judgments loom.²⁴⁸

1. Migrant Blame Avoidance

For purely humanistic reasons, migrants have incentives to avoid being blamed—especially when the blame is misattributed or invidiously concocted. Another reason to avoid blame, however, is more pragmatic: the prospects of a migrant’s legal and social membership may depend on public perceptions about the migrant’s relative blameworthiness.²⁴⁹

At the individual level, perceptions of blame can make the difference of whether a migrant is targeted for deportation or eligible for discretionary relief.²⁵⁰ At the group level, which is my focus, relative degrees of blame can inform how immigration laws are shaped and implemented.²⁵¹

Today’s amnesty debates provide useful illustrations of presentational tactics for avoiding migrant blame at the macrolevel. Broadly defined, amnesty denotes a process through which unauthorized migrants may transition to legal status.²⁵² The very idea of immigration amnesty presupposes an underlying legal violation (most commonly, for unlawful entry or overstaying a visa).²⁵³

All mainstream arguments for amnesty offer excuses. The most common take a “yes-but” form. For example: *yes* the law was broken, *but* undocumented presence is a minor offense.²⁵⁴ Other yes-but excuses provide morally grounded, emotion-provoking explanations for the immigration infraction: *yes* the law was broken, *but* by individuals who were simply trying to provide a better life for their families or to escape social strife in their home countries.²⁵⁵ Another variation works on the time dimension: *yes* the law was broken, *but* the passage of time and the migrant’s resulting ties

248. Erin I. Kelly, *What Is an Excuse?*, in *BLAME: ITS NATURE AND NORMS*, *supra* note 1, at 244, 244–45, 256 (“In evaluating an agent’s blameworthiness, we assess how reasonable it is to expect an agent to act morally in the face of obstacles. . . . [M]orality itself requires that we relax our expectations that [the agent] should have [acted differently].”).

249. *See infra* Part IV (further developing these claims).

250. Some deportable migrants may be entitled to statutory and equitable forms of relief. *See, e.g.*, 8 U.S.C. § 1229b (2012) (cancellation of removal). However, the availability of those discretionary outlets is also heavily informed by perceptions of blame. *See id.* § 1229b(b) (permitting certain deportable noncitizens to avoid removal and adjust to legal status if certain conditions are met, including “good moral character” and a favorable grant of discretion). For an excellent account of how narratives of “good” and “bad” migrants can affect immigration outcomes in immigration court, 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).

251. *See* Keyes, *supra* note 250, at 226–27.

252. Linda Bosniak, *Amnesty in Immigration: Forgetting, Forgiving, Freedom*, in *THE MARGINS OF CITIZENSHIP* 26, 26 (Philip Cook & Jonathan Seglow eds., 2014).

253. *Id.* at 28, 34.

254. *Id.*

255. MOTOMURA, *supra* note 51, at 172–207 (providing a morally based account for a broadscale legalization program).

to the community create a moral claim to stay.²⁵⁶ Under this time-and-ties framing, “the immigrant was once, but is no longer, blameworthy.”²⁵⁷

Other excuses are relativistic. Explicitly or implicitly, distinctions are drawn in amnesty proposals between children and adults,²⁵⁸ criminals and noncriminals,²⁵⁹ violent criminals and nonviolent criminals,²⁶⁰ longtime residents and new arrivals,²⁶¹ and present versus future migrants.²⁶² In each of these examples, one subcategory of migrants is arguably more excusable, and thus less blameworthy, than another subcategory of migrants. Although often unintended, these juxtapositions can result in a type of scapegoating among scapegoats, whereby migrant blame is scaled from most to least deserving.²⁶³ Other forms of relativistic excuses are redirectional in a different sense: they shift attention from one harm (the migrant’s legal

256. Political philosopher Joseph Carens has argued that “[p]eople who live and work and raise their families in a society become members, whatever their legal status.” JOSEPH H. CARENS, *IMMIGRANTS AND THE RIGHT TO STAY* 18 (2010). In effect, Carens proposes, “the passage of time creates a moral claim to stay.” *Id.* at 23. For Ayelet Shachar, rootedness constitutes a basis for membership. Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 *YALE J.L. & HUMAN.* 110, 121 (2011). “[T]he longer the person resides in the polity, the deeper his or her ties to its society, the stronger the claim for inclusion and membership.” *Id.* at 131. According to Hiroshi Motomura, affiliations justify regularized status. MOTOMURA, *supra* note 51, at 176.

257. Bosniak, *supra* note 252, at 39–40 (noting and critiquing this view on the ground that it unnecessarily concedes that the migrants were ever blameworthy for their unlawful presence).

258. For almost two decades, legislative proposals for the DREAM Act have been presented in Congress but for various reasons have failed to clear the legislative gauntlet. *See* Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001); *see also* *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, AM. IMMIGR. COUNCIL (Sept. 6, 2017), <https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers> [<https://perma.cc/4XP4-GG4F>]. Sometimes, these proposals have been offered in combination with comprehensive immigration reform. *See, e.g.*, Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007). But DREAM Act proposals have also been offered in isolation, to set it apart from more inclusive amnesty programs. *See, e.g.*, Dream Act of 2017, S. 1615, 115th Cong. (2017); DREAM Act of 2011, S. 952, 112th Cong. (2011).

259. Cházaro, *supra* note 61, at 374 (arguing that the “[w]e are not criminals, we are workers” pro-amnesty slogan makes migrants who commit crime more vulnerable to harsh immigration treatment).

260. *See, e.g.*, S. 1615 § 3(b)(1)(C)(iii) (disqualifying potential beneficiaries who have been convicted of certain types or numbers of offenses).

261. *See, e.g., id.* § 3(b)(1)(A) (limiting protected status to those who have “been continuously physically present in the United States since the date that is 4 years before the date of the enactment of this Act”).

262. *See* Cházaro, *supra* note 61, at 360–61 (“If a [comprehensive immigration reform] bill passed today, those currently unlikely to benefit from a legalization strategy . . . would face even greater vulnerability . . .”).

263. “In modern times, the term *scapegoat* has been used to describe a relatively powerless innocent who is made to take the blame for something that is not his fault.” DOUGLAS, *supra* note 37, at 109; *see also* Elliot Aronson, *Persuasion Via Self-Justification: Large Commitments for Small Rewards*, in *RETROSPECTIONS ON SOCIAL PSYCHOLOGY* 3, 3 (Leon Festinger ed., 1980); Cházaro, *supra* note 61, at 413 (“In pushing forward narratives about immigrants’ hard-working, law-abiding nature, the politics of respectability hide or ignore the most vulnerable immigrants.”).

transgression) to weightier harms (e.g., a de facto caste system, opportunity costs to the country, and so on).

Moreover, “no-harm-no-foul” excuses are mainstays in the pro-amnesty toolbox. Through statistical proof or otherwise, amnesty advocates work to negate or mitigate allegations that undocumented migrants depress wages, increase net crime, threaten national security, and so on.²⁶⁴

Beyond excuses, some amnesty advocates offer justifications, which try to turn blame into credit.²⁶⁵ To the extent that America’s immigration laws are de facto discriminatory, or otherwise immoral, the justificatory claim is that amnesty can vindicate American values.²⁶⁶ More generally, amnesty advocates try to depict undocumented migrants in a favorable light. These positive accounts are supported and amplified by narratives about hardworking, family-centric, law-abiding undocumented migrants.²⁶⁷ To complement these narratives, metaphors about families “torn apart,” or “living in the shadows” of a “broken” immigration system, are offered as reasons for a “pathway” to citizenship.²⁶⁸

Employing these and other presentational tactics, amnesty advocates try to replace or complicate the space otherwise occupied by retributive attitudes associated with anger and fear.²⁶⁹ System One cognitions are more likely to be mediated and checked by System Two if a person is made to feel emotionally conflicted.²⁷⁰ Thus, presentational tactics that conjure emotions

264. See, e.g., *From Anecdotes to Evidence: Setting the Record Straight on Immigrants and Crime*, *supra* note 128.

265. See Bosniak, *supra* note 252, at 41–43.

266. See generally JOSEPH H. CARENS, ALIENS AND CITIZENS: THE CASE FOR OPEN BORDERS (1987); MOTOMURA, *supra* note 51; Bosniak, *supra* note 252 (championing this view). In a variation of this theme, Daniel Morales argues that undocumented migration is a form of speech, which valuably forces Americans to confront questions about the legitimacy of and need for border controls. See Daniel I. Morales, “Illegal” Migration Is Speech, 92 IND. L.J. 735, 735 (2017). Worth emphasizing here is that arguments for open borders moot the sort of stratification and subcategorization between more and less deserving amnesty beneficiaries. See *supra* notes 258–63 and accompanying text. But most amnesty advocates do not support open borders, either for ideological or pragmatic reasons. See, e.g., Joseph H. Carens, *Realistic and Idealistic Approaches to the Ethics of Migration*, 30 INT’L MIGRATION REV. 156, 158 (1996) (withdrawing from an open-borders position to a more “realistic” approach that recognizes sovereign authority “to admit or exclude aliens as it chooses”).

267. See Cházaro, *supra* note 61, at 357–58.

268. Victoria Balara, *Fox News Poll: 83 Percent Support Pathway to Citizenship for Illegal Immigrants*, FOX NEWS (Sept. 28, 2017), <http://www.foxnews.com/politics/2017/09/28/fox-news-poll-83-percent-support-pathway-to-citizenship-for-illegal-immigrants.html> [<https://perma.cc/Q5KX-8DS8>]; Laurie Fischer, *Allow Peaceful, Law-Abiding Working Immigrants Out of the Shadows*, HILL (Apr. 25, 2017, 9:30 AM), <http://thehill.com/blogs/congress-blog/labor/330287-allow-peaceful-law-abiding-working-immigrants-out-of-the-shadows> [<https://perma.cc/RFE6-92Y4>]; Ricky Walters, *My Experience with the Broken Immigration System*, HUFFINGTON POST (June 22, 2017), https://www.huffingtonpost.com/ricky-walters/my-experience-with-the-br_b_10616646.html [<https://perma.cc/FESS-ZGTF>].

269. See *supra* Part II.B (discussing the role of emotions in judgment formation).

270. See Haidt, *supra* note 178, at 197–98.

such as sadness, sympathy, or mercy, may help to counteract anti-amnesty rhetoric.²⁷¹

2. Institutional Blame Avoidance

Like migrants, public officials utilize a range of presentational tactics to avoid institutional blame. For instance, a public official that is blamed for an immigration policy may argue that it was justified because, even if costly in the short term, the benefits of the policy will more than pay off in the long term.²⁷² In this example, the justification seeks to garner credit for the very thing the public official is being blamed for.

Alternatively, or additionally, the same public official might offer an excuse, like “my hands were tied” or “I voted against the policy.”²⁷³ Notice that these sorts of excuses acknowledge harm, but deny responsibility ex post, when institutional blame comes home to roost. For a recent and prominent example, consider President Trump’s attempt to deflect blame for the separation of children from parents entering the country unlawfully. Between May 5 and June 9, 2018, federal agents separated more than 2300 children from parents who were prosecuted for crimes relating to unlawful entry.²⁷⁴ Facing widespread criticism for these family separations, President Trump and his top administrative officials acknowledged that the underlying “law” was “horrible” and harmful to children.²⁷⁵ What the Trump

271. Cf. Gregory R. Maio et al., *Ambivalence and Persuasion: The Processing of Messages About Immigrant Groups*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 513, 531 (1996) (finding that people who are ambivalent toward a group of migrants are more likely to engage in systematic processing of strong messages about the migrant group).

272. This was President Obama’s approach: he took aggressive enforcement measures in certain respects, and he hoped to justify them in the long run by gaining bipartisan support for comprehensive immigration reform. See David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 420–24 (2015) (describing this political calculus, and offering a partial defense and critique).

273. See, e.g., Scott Detrow, *Why Reaching a DACA Deal Could Be Tough*, NPR (Jan. 11, 2018, 4:16 PM), <https://www.npr.org/2018/01/11/577453475/why-reaching-a-daca-deal-could-be-tough> [<https://perma.cc/AQ6S-LSN7>]. Speaking about a DACA legalization effort, Senator Dick Durbin said, “I am doing my best to get everything I can under the current political circumstances. It’s not what I want. It’s what I’m forced to accept because of the realities.” *Id.*

274. See Philip Rucker et al., *Trump Defiant as Crisis Grows over Family Separation at the Border*, WASH. POST (June 18, 2018), https://www.washingtonpost.com/politics/trump-defiant-as-crisis-grows-over-family-separation-at-the-border/2018/06/18/210c78ca-730f-11e8-805c-4b67019fcfe4_story.html [<https://perma.cc/T2WZ-533V>].

275. See Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2018, 6:59 AM), <https://twitter.com/realDonaldTrump/status/1000375761604370434> [<https://perma.cc/2JWN-Z7C8>] (“Put pressure on the Democrats to end the horrible law that separates children from there [sic] parents once they cross the Border into the U.S.”); see also Seung Min Kim & Mike DeBonis, *White House Says Trump Backs GOP Immigration Bills, Despite Comments Opposing Them. One Official Says Trump Misunderstood Fox News’ Question.*, WASH. POST (June 15, 2018), https://www.washingtonpost.com/politics/trump-i-certainly-wouldnt-sign-house-gop-immigration-compromise/2018/06/15/731ffedc-70a0-11e8-9ab5-d31a80fd1a05_story.html [<https://perma.cc/JJ9Y-NVTN>].

administration denied, however, was *responsibility* for these harms.²⁷⁶ I will return to this blame episode later;²⁷⁷ here, it is simply offered as an example of ex post presentational blame avoidance.

In other cases, public officials try to renounce responsibility, ex ante, to keep constituent expectations in check and institutional blame focused elsewhere. A prominent example is the Obama administration's early denials of authority to unilaterally grant wide-scale relief to undocumented migrants.²⁷⁸ As it turned out, this attempt at blame avoidance proved futile and set in motion a series of subsequent presentational and policy tactics—most notably DACA and DAPA.²⁷⁹ I will return to this episode, too, in later parts of the discussion.²⁸⁰

B. Agency Strategies

Public officials may also avoid blame through agency strategies, which generally involve attempts to deflect or limit blame by (re)allocating responsibility.²⁸¹ Unlike rhetorical finger-pointing (which is a presentational tactic), agency strategies to avoid blame actually alter responsibility through legal structures and other arrangements.

For instance, and perhaps most significantly, officials may delegate decision-making authority with the intent or effect of avoiding institutional blame.²⁸² With respect to immigration, Congress delegates enforcement and policymaking authority to various executive officials—ranging from the president to various agency heads (e.g., Secretary of State, Attorney General, Secretary of Homeland Security), sometimes with overlapping or intersecting responsibilities.²⁸³ In turn, high-level federal officials can

276. See Tal Kopan, *'We Will Not Apologize': Trump DHS Chief Defends Immigration Policy*, CNN (June 18, 2018), <https://edition.cnn.com/2018/06/18/politics/kirstjen-nielsen-immigration-policy/index.html> [https://perma.cc/M3QQ-NQ5U].

277. See *infra* notes 357–87 and accompanying text.

278. For instance, in 2011, the Obama administration's Secretary of Homeland Security testified in Congress that the agency had no plans to confer deferred action to large groups of people. *Oversight of the Department of Homeland Security: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 32 (2011) (statement of Janet Napolitano, Secretary of Homeland Security). Obama personally renounced executive authority to unilaterally grant legal reprieve to undocumented migrants who were brought to the United States as children by their parents. 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, 472–73 (2012) (describing the administration's earlier position on its lack of authority to grant DREAM Act-type relief absent congressional action).

279. See DACA Memo, *supra* note 225; DAPA Memo, *supra* note 225.

280. See *infra* Part IV.C.2.

281. See HOOD, *supra* note 10, at 6–7, 67.

282. The notion that public officials delegate responsibility to avoid political flack has a lineage in political science. See ELLIS, *supra* note 239, at 1; Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 49 (1986).

283. See, e.g., 8 U.S.C. § 1103 (2012) (assigning different responsibilities to the Attorney General and the Secretary of Homeland Security); 8 U.S.C. § 1104 (2012) (assigning powers and duties to the Secretary of State); 8 U.S.C. § 1182(f) (2012) (authorizing the president to

delegate downward to midlevel officials, who in turn may delegate to frontline officials.²⁸⁴ When successful, these conferrals of authority shift or diffuse responsibility away from the delegating authority and toward other individuals or institutions that can serve as “lightning rods” if and when things go wrong.²⁸⁵

Apart from delegating downward, public officials can avoid blame through intergovernmental partnerships and arrangements.²⁸⁶ An immigration example may be “Section 287(g) agreements,” whereby the federal government cross deputizes subfederal officers to enforce federal immigration law.²⁸⁷ Separately, under the Secure Communities program (“SComm”), fingerprints of every person arrested and booked by state and local police are automatically entered into a federal database.²⁸⁸ Via this intergovernmental arrangement, federal immigration officials are automatically alerted when an arrestee is a noncitizen.²⁸⁹

Alternatively, or additionally, government officials may enter into public-private partnerships through contracting or regulatory controls. Examples of the former include public-private contracts for immigration detention

“suspend the entry” of noncitizens into the United States); *see also* Cuéllar, *supra* note 108, at 45–50.

284. As just one of many examples, the powers and responsibilities of the Executive Office for Immigration Review (EOIR), which adjudicates immigration cases, derives its delegated authority from the Attorney General. *See* 8 C.F.R. § 1003.0(a)–(b) (2018).

285. *See* Hood, *supra* note 3, at 200; *see also* ELLIS, *supra* note 239, at 4, 15–22 (describing this phenomenon in the context of presidential delegations).

286. *See* Hood, *supra* note 3, at 200.

287. *See* 8 U.S.C. § 1357(g) (2012); *see also* Michele Waslin, *ICE’s Enforcement Priorities and the Factors That Undermine Them*, AM. IMMIGR. COUNCIL (Nov. 9, 2010), <https://www.americanimmigrationcouncil.org/research/ices-enforcement-priorities-and-factors-undermine-them> [<https://perma.cc/8AXX-LDHC>]. Between 2006 and 2015, over 402,000 immigrants were identified for deportation through these partnership arrangements. Memorandum from John F. Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan et al. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [<https://perma.cc/X4DW-ZCBV>].

288. In 2014, under pressure from immigrant advocates and subfederal officials, the Obama administration replaced SComm with the Priority Enforcement Program (PEP). Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, et al. 1 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<https://perma.cc/LT7D-HEXS>] (“The Secure Communities program, as we know it, will be discontinued.”); *see also* Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1282–84 (2015) (discussing the similarities and differences between PEP and SComm). Upon taking office, President Trump rescinded PEP and reverted to the SComm program. *See* Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768 § 10(a), 82 Fed. Reg. 8799 (Jan. 25, 2017).

289. *See* Stumpf, *supra* note 288, at 1260, 1267–68 (explaining the SComm program).

facilities.²⁹⁰ Examples of the latter include laws that place legal responsibilities on employers to enforce immigration labor restrictions.²⁹¹

Proving that any particular delegation or partnering arrangement is *motivated* by blame avoidance is beyond what I can hope to accomplish here. Yet even if a delegation or partnering is not motivated to avoid blame *ex ante*, the resulting arrangements offer *ex post* presentational outs. For instance, a legislator who was not motivated to avoid blame when delegating a decision may try to avoid blame through excuses or justifications for any downstream harms.

C. Policy Strategies

A third set of blame-avoiding tactics falls under the rubric of policy strategies.²⁹² Such blame avoidance may be achieved by policies that reduce the chance of avoidable harm occurring, or reduce the chance that avoidable harm will be detected or easily traced.²⁹³

The policies designed to avoid blame can be substantive or procedural. Substantive policies directly affect rights and obligations, such as laws pertaining to the requirements of lawful admission, grounds for immigration removal, sanctuary policies, macrolevel federal enforcement policies, and so on. Procedural policies, by contrast, denote operational protocols, so that any resulting harms can be met with a ready-packaged excuse of having ticked all the boxes.²⁹⁴ For instance, procedural rights for immigrants can minimize errors in administrative adjudication, and thus minimize the risk of being blamed for mistakes like deporting U.S. citizens.²⁹⁵ And, insofar as such errors occur, robust protocols may allow the agency to avoid some blame on the basis (i.e., excuse) that it had followed established procedure.²⁹⁶

Likewise, the use of federal databases, which underlays SComm, can eliminate or reduce subfederal discretionary choices about which migrants to refer to federal immigration officials.²⁹⁷ By reducing discretion through automation, the federal government may hope to avoid being blamed for delegating too much discretion to subfederal officials; meanwhile, subfederal

290. See 8 U.S.C. § 1231 (2012) (authorizing the outsourcing of immigration detention); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1371 (2014).

291. See 8 U.S.C. § 1324a(a), (e) (2012); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1110–13 (2009).

292. See HOOD, *supra* note 10, at 91–107 (cataloguing and discussing a broad range of blame-avoiding policy strategies).

293. See generally *id.*

294. See Hood, *supra* note 3, at 170–71.

295. Cf. Meredith Hoffman, *The US Keeps Mistakenly Deporting Its Own Citizens*, VICE NEWS (Mar. 8, 2016), <https://news.vice.com/article/the-us-keeps-mistakenly-deporting-its-own-citizens> [<https://perma.cc/9FW8-6ZET>].

296. See, e.g., Wendy Feliz, *U.S. Settles with 4-Year-Old U.S. Citizen They Wrongfully Deported*, IMMIGR. IMPACT (July 2, 2015), <http://immigrationimpact.com/2015/07/02/u-s-settles-with-4-year-old-u-s-citizen-they-wrongfully-deported/> [<https://perma.cc/AN97-7CAZ>].

297. See *supra* notes 288–89 and accompanying text (discussing the SComm program).

officials might avoid blame for alerting federal authorities, on the excuse that the information was automatically shared in the normal course of operations.²⁹⁸

To be sure, in these and other examples, the underlying policies may be ill-advised. But that is the part of the point: the policies that emerge from institutional blame avoidance are sometimes ill-advised.

D. Limitations

All of the blame-avoidance strategies discussed above have situational limits. For instance, the efficacy of presentational tactics depends on a range of contextually contingent factors—including, most obviously, the credibility (or not) of the information at issue, as well as the credibility (or not) of the blamer and blamee. Thus, a blame avoider will not be excused if the “facts” clearly show the blamee is culpable in the relevant sense.

Moreover, if a blame avoider always has some excuse, and never takes responsibility, such tactics can have diminishing returns. Indeed, blame avoidance can have negative returns; for instance, when a migrant’s or official’s rhetorical attempt to avoid blame is deemed to be a blameworthy act itself.²⁹⁹ Strategically minded advocates may thus self-regulate, and perhaps limit, their presentational blame-avoidance tactics accordingly.

Agency strategies to avoid blame also have contextual limits. The Constitution, statutes, administrative rules, and judicial doctrines place limits on how government powers may be organized and operationalized.³⁰⁰ Even within the bounds of law, reshuffling formal lines of authority—through delegation, governmental partnerships, or otherwise—will not invariably deflect blame. For instance, key constituents can hold members of Congress responsible for delegating a decision.³⁰¹ Similarly, a president who relinquishes control over an issue may be blamed for not taking a more hands-on approach.³⁰²

298. Cf. Martin, *supra* note 272, at 443 (explaining that “key federal officials viewed [SComm] as presenting fewer risks of inappropriate [local enforcement] behavior than, for example, Section 287(g) task force agreements, because local officers have no occasion to make immigration status decisions as part of the [SComm] process; they were expected simply to continue making arrests for crimes within their own clear jurisdiction”). As it turned out, however, other discretionary aspects of the process—including which individuals to arrest in the first place, whether to honor subsequent federal detainer requests, and which arrestees to deport—attracted considerable amounts of institutional blame. *See id.* at 439–43 (discussing the causes and effects of these programmatic snags); *see also* Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1153–57 (2011).

299. The Trump administration’s attempt to pin responsibility for family separation on other institutional actors is a case in point. *See infra* notes 357–60 and accompanying text.

300. *See supra* Part I.B.

301. *See* HOOD, *supra* note 10, at 75.

302. Under that scenario, a strategically minded president might become actively involved because, if blame is going to attach anyway, the White House might gain credibility (or even credit) for taking ownership of hard decisions. *See* ELLIS, *supra* note 239, at 169–70.

Policy tactics have their limits too, which may be reached when there are no blame-free or low-blame options available. For instance, the advancement of a particular policy may attract blame from key constituents, whereas an alternative policy may attract blame from the same (or other) constituents. In these scenarios, policymakers may endeavor to select the least-worst options, but some institutional blame is inevitable. Moreover, when blame games are set to multiplayer mode—as they invariably are in the immigration context—attempts to avoid blame will be limited by the efficacy of blame avoidance counterstrategies.

Finally, as earlier discussed, blame attribution can be heavily influenced by cultural worldviews.³⁰³ For many of the same reasons, the efficacy of blame avoidance can be culturally contingent. Depending on cultural context, people's worldviews can make them more or less likely to give uptake to different blame-avoiding tactics. For example, all else equal, an excuse from an administrative official that "I was just following the President's orders" is far more likely to register with hierarchists than with egalitarians. Meanwhile, an excuse from an undocumented migrant that she came to America for a better life is more likely to register with individualists (for whom individuals are expected to secure their own needs) than with hierarchists (who are comfortable with social stratification and intolerant of lawbreaking).³⁰⁴

IV. DYNAMIC IMMIGRATION BLAME

Thus far, I have identified and explained four operative features of immigration blame: (1) migrant blame; (2) institutional blame; (3) blame attribution; and (4) blame avoidance. This Part coordinates them into a dynamic model. It then applies the model to a set of illustrative case studies, which build on and connect some earlier examples.

A. Piecing It Together

As modeled here, the features of immigration blame are both substantive and process oriented. Substantively, *migrant blame* and *institutional blame* involve judgments about whether migrants and public officials are responsible for avoidable harm. Along the process dimension, *blame attribution* involves cognitive and expressive acts of blaming others, while *blame avoidance* involves a range of tactics to evade, refute, disperse, and mitigate attributions of blame.

The matrix below captures these dimensions, with thumbnail examples of each:

303. See *supra* Part II.C.

304. Cf. Kahan, *supra* note 147, at 153–54 (summarizing the general preferences of cultural worldviews). As far as I am aware, immigration regulation has not been the subject of any empirical studies in cultural cognition. But, for studies in other hot-button areas—including gun control, abortion, and global warming—which may provide theoretical support, see generally *id.* and CULTURAL COGNITION PROJECT AT YALE LAW SCHOOL, <http://www.culturalcognition.net/> [<https://perma.cc/75AS-NUE2>] (last visited Aug. 24, 2018).

	Migrant Blame	Institutional Blame
Blame Attribution	<ul style="list-style-type: none"> • Blaming lawful migrants for stealing jobs • Blaming undocumented migrants for “cutting the line” • Narratives and metaphors depicting migrants at odds with American culture and values 	<ul style="list-style-type: none"> • Blaming the Executive for unilateral immigration policies • Blaming state officials for cooperating, or for not cooperating, with federal officials • Blaming agency officials for how they exercise delegated and discretionary enforcement power
Blame Avoidance	<ul style="list-style-type: none"> • Statistical reports showing how migrants boost the economy • Excuses and justifications for amnesty • Narratives about hardworking, family-centric migrants 	<ul style="list-style-type: none"> • Deflecting institutional blame by blaming other public officials • Delegating authority to federal, state, and local officials • Designing policies to appease key constituents, principals, or peers

Unpacking immigration blame is an important starting point for understanding the myriad ways that blame permeates the immigration system. But of more consequence is how these blame dynamics operate in tandem, churning the politics, policies, and structures of immigration law.

As theorized here, institutional blame is often linked to migrant blame. All else equal, as dominant perceptions of migrant blame increase, so too does the risk of institutional blame for taking favorable action toward the migrants at issue. That correlation, in turn, triggers other dynamics. Among them, migrants have pragmatic incentives to avoid blame. Often, that blame avoidance will implicate other migrants, public officials, and nongovernmental actors (such as policy entrepreneurs and media personalities). In addition, migrant blame avoidance often involves pinning blame on structural or situational causes (such as dysfunctional or immoral immigration controls, conditions in the home or host country, and so on). Meanwhile, public officials have their own incentives to manage their risk of institutional blame, and do so through a range of presentational, agency, and policy strategies.³⁰⁵

As a purely descriptive matter, these iterative dynamics have catalyzing effects on the operation and design choices of the U.S. immigration system.

305. *See supra* Part III.

B. Law as Input and Output

Before proceeding to the case studies, it is worth emphasizing that immigration blame entails more than rhetoric and political posturing. The law, too, is implicated in various ways.

First, as *input*, the law informs perceptions relating to avoidable harm and responsibility, which are the key ingredients of blame attribution. As earlier noted, a legal violation or its effects may be deemed a blameworthy harm; meanwhile, legal structures may rule in (or rule out) the responsible agents. It must also be appreciated that a legal violation is neither necessary nor sufficient for blame to attach. On the one hand, a legal violation is not necessary because lawful action may nevertheless be deemed morally, socially, or politically blameworthy. Thus, for example, lawful migrants are often blamed for not “assimilating,” while law-abiding legislators are blamed for bad immigration policies. On the other hand, a legal violation may not be sufficient for blame to attach because different laws carry different moral, social, and political significance.

For instance, it is one thing for a migrant to unlawfully enter the country, which some people may tolerate or justify. Yet it is quite another if that migrant commits a violent crime while unlawfully present, which most people do not condone. Likewise, it is one thing for a public official to violate a procedural technicality. Yet it is another thing when officials flout clear constitutional mandates. Depending on one’s perspective and the circumstances of the legal violation, blame might attach in all of these examples, or it might not attach in any of them. That is because legal violations may sometimes be excused or justified on moral or political grounds, even if not on purely legalistic grounds.³⁰⁶ Thus, although a legal violation is often considered a sufficient harm for purposes of attributing blame, other considerations and normative predispositions may alter the calculus.

As *output*, the law is a byproduct of agency and policy blame-avoidance strategies. More specifically, the iterative dynamics of attributing and avoiding blame can manifest in the creation, maintenance, or dismantling of institutional structures and policies.³⁰⁷ Consider, for example, strategic delegations of authority and partnership arrangement. By their very design, the structures of decisional authority will be affected. Similarly, policies may be pursued to avoid blame, in ways that affect legal rights and obligations of migrants and public officials.

Importantly, the legal inputs and outputs of immigration blame often relate. For instance, as input, the law may assign which public officials bear

306. The public controversies orbiting President Obama’s and President Trump’s signature immigration programs are prime examples of how perceptions of law feed perceptions of political harm and responsibility. *See infra* Part IV.C.2. *See generally* David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168 (2018) (canvassing the legal and political debates over Obama’s and Trump’s respective immigration initiatives).

307. *See supra* Parts III.B–C (offering examples); *infra* Part IV.C (offering additional examples).

legal responsibility for causing or fixing a perceived problem with the immigration system. In turn, the legal question of *who* decides often affects the output of *what* is decided. Owing to different constituencies and accountabilities, Congress may decide matters differently than the president or courts, which may decide differently than agency heads or frontline enforcement agents, which may decide differently than states or cities, and so on.³⁰⁸

C. Case Studies

To further develop and illustrate these points, the discussion below delves more deeply into the subjects of (1) amnesty; (2) executive enforcement policies under the Obama and Trump administrations; (3) the plenary power doctrine and its application to Trump's travel ban; and (4) immigration federalism.³⁰⁹

1. Amnesty

The dominant anti-amnesty narrative characterizes undocumented migrants as blameworthy lawbreakers, whose cheating of the system should neither be rewarded nor countenanced.³¹⁰ For reasons already explained, these characterizations are contestable on the merits. Here, however, my focus is on the relationship between migrant blame and institutional blame. The more that undocumented migrants are depicted and perceived as blameworthy, the more institutional blame legislators will face for granting amnesty.

The ongoing saga over DREAM Act proposals is revealing in this and related respects. Since at least 2001, the so-called Dreamers have received special legislative consideration for amnesty.³¹¹ In large measure, that is because most Dreamers have compelling excuses: their parents brought them here as children, and this is the only life they know. If any subpopulation of undocumented migrants deserve a chance at amnesty, the Dreamers arguably top the list.³¹² Even if Dreamers are not completely blameless, the innocence

308. See generally David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983 (2016) (studying the relationship between who decides, and what is decided, in the immigration federalism context). Local jurisdictions may decide questions of crime-based deportation differently than the centralized federal government. See Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 745–64 (2017) (explaining why and how such decisions are made, and arguing for decentralization on normative grounds).

309. “Immigration federalism” refers to state and local regulations and their relationship to federal controls. Included in this domain are sanctuary cities, as well as other cooperative and uncooperative subfederal initiatives. Rubenstein, *supra* note 308, at 984 (discussing a range of federalism issues implicated by the recent uptick in state and local immigration initiatives).

310. Bosniak, *supra* note 252, at 26–27.

311. See *supra* note 258 and accompanying text; see also Tal Kopan, *Lawmakers Compete to Carry President's Mantle on DACA as Talks Continue*, CNN (Jan. 11, 2018), <http://www.cnn.com/2018/01/10/politics/daca-latest-talks/index.html> [https://perma.cc/75UM-YHHN].

312. Cf. Balara, *supra* note 268.

narrative depicts them as less blameworthy than other undocumented migrants (including, somewhat problematically, their parents).³¹³

The DREAM Act saga also helps to make another, finer, point. If Dreamers are ostensibly “blameless,” then why have they not yet received amnesty? Surely, politics and a cumbersome legislative process are parts of the answer.³¹⁴ But another part is found at the intersection of negativity bias and blame.³¹⁵ To be “blameworthy” implies a negative departure from behavioral norms. To be “blameless,” however, is generally neutral—it is simply the absence of blame. That being so, the innocence narrative has its limits. It puts Dreamers in their own category for legislative consideration.³¹⁶ Still, more is needed for legislative grace under current sociopolitical conditions. A positive narrative—something that makes Dreamers praiseworthy, or otherwise beneficial to America’s welfare—is a push in the right direction. But therein lies the rub. Narratives depicting Dreamers as hardworking and beneficial to the country can also be said for a *much* larger pool of amnesty seekers.³¹⁷ Yet, coming full circle, as the pool of amnesty beneficiaries expands to include more “blameworthy” migrants (e.g., the “lawbreakers” and “cheaters”),³¹⁸ the risk of institutional blame for granting amnesty increases too.

Emphatically, this blame-centric gloss is not an alternative to political or structural explanations for why the DREAM Act has languished in Congress

313. See Fanny Lauby, *Leaving the ‘Perfect DREAMer’ Behind? Narratives and Mobilization in Immigration Reform*, 15 SOC. MOVEMENT STUD. 374, 375 (2016) (arguing that “the use of the ‘perfect DREAMer’ narrative has led to the marginalization of other undocumented migrants who have been implicitly constructed as less deserving because of their age or level of education”).

314. See, e.g., Yamiche Alcindor & Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize ‘Dreamers,’* N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html> [https://perma.cc/3X4F-D25R] (discussing sixteen years of failed efforts to pass the DREAM Act); Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/> [https://perma.cc/8L94-2YAC]; see also William M. Eskridge, Jr., *Vetogates*, CHEVRON, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008) (describing a range of “vetogates” in the legislative process that stifle a bill’s passage into law).

315. See *supra* notes 142–43 and accompanying text (discussing negativity bias).

316. See Richard V. Rodriguez & Gidget Benitez, *Congress Must Move Forward with the Bridge Act to Prevent Deportation of DREAMers*, HUFFINGTON POST (May 11, 2017), https://www.huffingtonpost.com/entry/congress-must-move-forward-with-the-bridge-act-to-prevent-deportation-of-dreamers_us_59147e39e4b066b42171d9d0 [https://perma.cc/5G6G-9MCA]; see also *supra* notes 258, 261, 314 (discussing and citing DREAM Act proposals in Congress).

317. Cf. Lauby, *supra* note 313, at 374–75, 380–81; Benjamin Harris, *Why Your Economic Argument Against Immigration Is Probably Wrong*, FORTUNE (Sept. 11, 2017), <http://fortune.com/2017/09/11/daca-immigration-economy-donald-trump/> [https://perma.cc/2DNB-J6ZL]; Rodriguez & Benitez, *supra* note 316.

318. Cf. Press Release, House Comm. on the Judiciary, *Collateral Damage: President’s Unilateral Actions Punish Legal Immigrants* (Dec. 4, 2014), <http://judiciary.house.gov/index.cfm/press-releases?id=21782655-651B-44F9-8230-FBAA001EA0C5> [http://perma.cc/UJB8-KQC6].

for nearly two decades.³¹⁹ Rather, my suggestion is that blame dynamics offer a new way to understand the political results.

Also worth emphasizing here is that one legislator's risk of institutional blame may be another legislator's opportunity for political credit. Thus, an amnesty program might attract institutional blame for one legislator and garner praise for a different legislator. Meanwhile, funding a border wall might carry inverse political risk and credit for these lawmakers. Aggregating the two policies together thus can have offsetting effects, which potentially makes a deal possible. Again, however, this is where negativity bias can be cognitively and politically distorting. First, as voters, our own negativity bias may cause us to feel more displeasure with what is given up in a deal than satisfaction with what is gained.³²⁰ Moreover, a legislator may assume that constituent perceptions are skewed by negativity bias, even if they are not. Thus, if a legislator thinks that key constituents are more likely to vote out of displeasure than pleasure,³²¹ the legislator may be skewed toward blame-avoiding rather than credit-claiming policies and packages.

2. Executive Immigration Enforcement (and Nonenforcement)

The still-unfolding DACA saga offers another iteration of these themes but captures some additional dynamics worth elaborating on. Whereas amnesty is an issue for Congress to decide (subject to the president's veto),³²² DACA involves the Executive in a significantly different way. More specifically, DACA raises questions about the *Executive's* power to categorically defer enforcement of *Congress's* laws that are already on the books.³²³ When the political branches are at loggerheads, the cat-and-mouse dynamics of immigration blame take new twists.

As earlier noted, President Obama and his top officials repeatedly renounced authority to unilaterally grant relief to undocumented migrants during his first presidential term.³²⁴ From the start, however, Obama was caught in a political pickle. Legal authority or not, Obama's political base routinely blamed him for not protecting the Dreamers and, more generally,

319. See *supra* note 314 and accompanying text.

320. Again, what qualifies as "gains" and "losses" in this context depends on what the reference point is, and how it and the deal around it is rhetorically framed. See *supra* notes 222–27 and accompanying text (discussing framing effects).

321. See Weaver, *supra* note 13, at 373–77 (modeling this voting behavior around negativity bias).

322. U.S. CONST. art. I, § 7 (requiring congressional bills be presented to the president for veto).

323. Between 2012 and 2017, approximately 800,000 individuals were granted DACA benefits. See *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status: Fiscal Year 2012–2017*, U.S. CITIZENSHIP & IMMIGR. SERVS. 1 (June 30, 2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performedancedata_fy2017_qtr3.pdf [<https://perma.cc/9J6E-TCUH>] [hereinafter *Number of I-821D*].

324. See *supra* note 278 and accompanying text.

for not fulfilling his campaign pledge of comprehensive immigration reform.³²⁵

During his second term, President Obama proclaimed that he would no longer “wait for an increasingly dysfunctional Congress,” which was not doing *its* job.³²⁶ In June 2012, that ambition sprang to life with the DACA program.³²⁷ DACA provides “deferred action” and employment eligibility to undocumented migrants who were brought to the country as children.³²⁸ Deferred action is a type of limbo status; it suspends unlawful presence but does not confer lawful status.³²⁹ In 2012, the number of eligible DACA beneficiaries was estimated to fall between one and two million.³³⁰

The White House knew that DACA would be a blame-avoiding *policy vis-à-vis* its Democratic base. But wider popular support was contingent on the efficacy of supporting *presentational* tactics. Toward that end, President Obama stressed the innocence of the Dreamer population.³³¹ Moreover, he argued that DACA was the right thing to do not only for these youths but also for the country, which would benefit economically and otherwise from their social integration.³³² Beyond these justifications, President Obama’s “We Can’t Wait” slogan implied that someone had to act and, because Congress was not doing *its* job, the Executive should pick up the mantle.³³³

Putting aside whether DACA was justified on the merits, President Obama’s decision to blame Congress was entirely strategic. Needless to say, members of Congress did not want to be blamed either. And they, too, had excuses and justifications: the country was deeply divided over immigration

325. Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 268–69 (2015).

326. See, e.g., President Barack Obama, Remarks by the President on the Economy and Housing (Oct. 24, 2011), <http://www.whitehouse.gov/the-press-office/2011/10/24/remarks-president-economy-and-housing> [<https://perma.cc/QV94-PBNU>] (“So I’m here to say to all of you . . . we can’t wait for an increasingly dysfunctional Congress to do its job. Where they won’t act, I will.”).

327. See DACA Memo, *supra* note 225; Press Release, Office of the Press Sec’y, Remarks by the President on Immigration (June 15, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/QSK7-Z5BK>] (“Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people.”).

328. DACA Memo, *supra* note 225.

329. See Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 713–15 (2015).

330. *Fact Sheet: Who and Where the DREAMers Are, Revised Estimates*, AM. IMMIGR. COUNCIL (Oct. 16, 2012), <https://www.americanimmigrationcouncil.org/research/who-and-where-dreamers-are-revised-estimates> [<https://perma.cc/BJ2G-NEG7>].

331. See, e.g., Barack Obama, *A Nation of Laws and a Nation of Immigrants*, TIME (June 17, 2012), <http://ideas.time.com/2012/06/17/a-nation-of-laws-and-a-nation-of-immigrants/> [<https://perma.cc/FZH2-6ZLX>] (writing in support of DACA).

332. See *id.*

333. Cf. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 43–44 (2014) (describing Obama’s initiative as a self-help measure, and normatively defending the practice). *But cf.* David S. Rubenstein, *Self-Help Structuralism*, 95 B.U. L. REV. 1619, 1650–59 (2015) (extending Pozen’s ideas to include federalism, and critiquing constitutional self-help on normative grounds).

reform, including with respect to the Dreamers.³³⁴ Congressional inaction was thus arguably quite consistent with their legislative role. Further, some members of Congress sought to reverse the blame coming from the White House. According to congressional conservatives, President Obama was not doing *his* constitutional job of “tak[ing] Care” to “faithfully execute” Congress’s laws.³³⁵

Comparing DACA to the Obama administration’s subsequent deferred-action program, DAPA, further showcases the connections between migrant blame and institutional blame.³³⁶ Under DAPA, undocumented parents of U.S. citizens or lawful permanent residents would be eligible for deferred action if certain requirements were met.³³⁷ Like DACA, DAPA beneficiaries would be considered lawfully present in the United States for renewable periods and eligible for work authorization.³³⁸ An estimated four million undocumented migrants might have qualified for DAPA (had it not been judicially enjoined).³³⁹

Obama’s presentational blame-avoidance tactics were on full display when he announced DAPA during a primetime, nationally broadcast speech from the White House.³⁴⁰ To justify DAPA (and DACA) on policy grounds, Obama offered this to the viewing public:

Even as we are a nation of immigrants, we’re also a nation of laws. Undocumented workers broke our immigration laws, and I believe they must be held accountable—especially those who may be dangerous. That’s why, over the past six years, deportations of criminals are up 80 percent. And that’s why we’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids. We’ll prioritize, just like law enforcement does every day.³⁴¹

334. See *supra* note 258 and accompanying text.

335. See U.S. CONST. art. II; see also *Unconstitutionality of Obama’s Executive Actions on Immigration: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 5–6 (2015) (statement of Rep. Trey Gowdy, Member, H. Comm. on the Judiciary) (“If this President’s unilateral extraconstitutional acts are not stopped, future Presidents, you may rest assured, will expand that power of the executive branch, thereby threatening the constitutional equilibrium.”).

336. See generally DAPA Memo, *supra* note 225.

337. See *id.* at 4.

338. *Id.* at 2–4.

339. See *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam) (affirming, without opinion, the Fifth Circuit’s preliminary injunction of DAPA in *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015)); Press Release, Migration Policy Inst., As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation Under Anticipated New Deferred Action Program (Nov. 19, 2014), <http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new> [<https://perma.cc/52LC-6RYL>].

340. Press Release, Office of the Press Sec’y, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/8JLL-4QT6>].

341. *Id.*

In this short snippet, notice how much is happening through a presentational lens. The mention of criminals and gang members changes the reference point, thus positioning the hardworking mom in a more favorable light. At the same time, by stressing the Obama administration's hawkish deportation policies against more blameworthy migrants, the White House hoped to offset institutional blame for DAPA. His analogy to everyday law enforcement was in the same blame-avoiding spirit (although it was a stretch).³⁴²

Through a blame lens, the *timing* of Obama's announcements of DACA and DAPA is also telling. The former was announced in the summer of 2012, a few months prior to Obama's bid for reelection. This was no coincidence. Whether to gain credit or avoid blame, the White House's political calculus was that DACA would improve President Obama's electoral prospects.³⁴³ By contrast, DAPA was announced immediately after the 2014 midterm elections.³⁴⁴ This was no coincidence either. The political calculus for DAPA was that the backlash from Republican voters could hurt the electoral prospects of Democratic candidates who were competing for congressional seats.³⁴⁵ By waiting to announce DAPA until after the midterm elections, the White House could avoid being blamed by Democrats for jeopardizing their chances.

But *why* was that the political calculus for DAPA? Substantively, DACA and DAPA were near equivalents. True, DAPA covered many more people. But if DACA was perceived as a credit-gaining program, then why would a bigger program not gain even more institutional credit? The missing link, I suggest, is blame. Generally speaking, public perceptions of migrant blame surrounding adult undocumented migrants was greater than for the Dreamer population. That being so, the risk of institutional blame for granting legal reprieve to the adult population was greater too.

342. Obama's analogy to everyday law enforcement elides the scope of DAPA. *See generally* DAPA Memo, *supra* note 225. If implemented, the program would have offered millions of undocumented migrants the opportunity to legally work in the country and be eligible for certain social-security benefits (which arguably is not the stuff of everyday law enforcement). *See* Complaint for Declaratory and Injunctive Relief at 21–31, *Texas v. United States*, No. 1:18-cv-00068 (S.D. Tex. May 2, 2018) (discussing the downstream legal implications of DAPA and DACA, beyond mere nonenforcement).

343. *See* Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 261 (2013).

344. *See, e.g.*, Jennifer Epstein, 'Come Out of the Shadows': Obama, At Last, Unveils Sweeping Action on Immigration, POLITICO (Nov. 20, 2014), <https://www.politico.com/story/2014/11/obama-immigration-action-113072> [<https://perma.cc/8LBA-6KWS>] ("The president's moves reflect a second-term White House that is fed up with congressional dysfunction and that, with the midterm elections behind them, no longer has to worry about the immediate political fallout for Democrats on the ballot.")

345. *See* Julie Pace, *Why It Took 6 Years for Obama to Act on Immigration*, PBS (Nov. 21, 2014), <https://www.pbs.org/newshour/nation/heres-why-it-took-6-years-for-obama-to-act-on-immigration> [<https://perma.cc/F7WP-VMBJ>] ("The move came in response to requests from nervous Democrats who feared the controversial actions could upend their chances of keeping control of the Senate.")

Now, under the Trump administration, some of these dynamics are unfolding in reverse. Although his administration's repeal of DAPA was met with public criticism,³⁴⁶ it paled in comparison to the intensity of institutional blame sparked by Trump's subsequent decision to repeal DACA.³⁴⁷ One reason for this asymmetry, I have already suggested, is the compelling force of the innocence narrative in public discourse. But Trump's reversal of Obama's signature deferred-action programs presents an opportunity to tease out and connect some additional points.

First, ending DAPA was not widely felt as a "loss" because it never went into effect.³⁴⁸ By contrast, DACA did go into effect and was granted to approximately 800,000 Dreamers.³⁴⁹ Thus, from the vantage of DACA recipients (and their allies), the prospect of ending the program was perceived and weighted quite differently. This is a framing effect.³⁵⁰ Owing to negativity bias (and loss aversion), the psychological impulse to avoid DACA's loss is greater than if the program had never been implemented in the first place.

Second, and relatedly, the innocence narrative resonates differently in this context than it does in the amnesty context.³⁵¹ The absence of blame may not be a strong prompt for favorable government action. Yet, at the very least, being blameless is arguably a reason for neutral government action. Framed as a "loss,"³⁵² DACA's repeal will strike many observers as *unfavorable* government action toward *blameless* migrants. This is a recipe for institutional blame. Moreover, in the enforcement setting, the loss is compounded by an additional framing effect: there are millions of more

346. See Memorandum from John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2017), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf> [<https://perma.cc/97XW-CUS6>]; Tal Kopan, *Trump Administration Reverses DAPA in 'House Cleaning'*, CNN (June 16, 2017), <https://www.cnn.com/2017/06/16/politics/dhs-scraps-dapa-keeps-daca-deferred-action/index.html> [<https://perma.cc/AHP9-CF36>].

347. See Memorandum from Elaine Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/2YL3-NSG7>] [hereinafter Memo from Elaine Duke]; Jennifer Rubin, *Ending DACA Would Be Trump's Most Evil Act*, WASH. POST (Sept. 4, 2017), <https://www.washingtonpost.com/blogs/right-turn/wp/2017/09/04/trump-ending-daca-would-be-cruelty-wrapped-in-a-web-of-lies/> [<https://perma.cc/29WT-FVYF>]; Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> [<https://perma.cc/6MCA-E6AL>]; Derek Thompson, *The Economic Senselessness of President Trump's DACA Repeal*, ATLANTIC (Sept. 5, 2017), <https://www.theatlantic.com/business/archive/2017/09/trump-daca-repeal/538911/> [<https://perma.cc/C37R-38FK>].

348. See *supra* notes 339, 346 and accompanying text.

349. See *Number of I-821D*, *supra* note 323, at 1.

350. Trump's repeals of DAPA and DACA can both be framed as losses; they can also be framed as a return to the pre-2012 status quo. Yet, as between these alternative framings, it seems most natural to frame the repeal of DACA as a "loss" and the repeal of DAPA as more neutral.

351. See *supra* Part IV.C.1.

352. See *supra* notes 349–50 and accompanying text.

blameworthy migrants at-large to expend limited government resources on. Put otherwise, spending resources to deport DACA-eligible migrants seems irrational, if not also unfair, when the migrant blame lens is expanded.

Thus, as might be expected, Trump's blame-avoiding approach with respect to DACA was replete with presentational and policy tactics. In one tweeted breath, Trump first announced DACA's suspension and redirected would-be blamers to Congress: "Congress, get ready to do your job—DACA!"³⁵³ A few hours later, Trump responded to a firestorm of public protest with a second tweet: "Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!"³⁵⁴ Put otherwise, Trump's message to America was: blame Congress, blame Obama, but do not blame Trump—at least not yet.³⁵⁵

Further, the choice to provide a six-month phase-out period for DACA, rather than terminate the program outright, was likely an attempt to minimize blame.³⁵⁶ The very anticipation of being blamed, it seems, had some effect on the politics and policies surrounding DACA's suspension.

For another illustration, return to the family-separation crisis still unfolding under the Trump administration. As earlier noted, more than two thousand migrant children were separated from parents who were apprehended at or near the border in 2018.³⁵⁷ Although family separations occurred under prior administrations,³⁵⁸ the practice ballooned in scope under the Trump administration and drew far greater public attention and scorn.³⁵⁹ As pressure mounted, the Trump administration denied responsibility for family separation and tried to pin it elsewhere.³⁶⁰

More specifically, per the Trump administration, the proper targets of blame were: (1) the Democrats, who passed the "horrible" laws requiring

353. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 5:04 AM), <https://twitter.com/realDonaldTrump/status/905038986883850240> [<https://perma.cc/CDQ3-J9Q3>].

354. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 5:38 PM), <https://twitter.com/realDonaldTrump/status/905228667336499200> [<https://perma.cc/6AYA-TU2E>].

355. As of this writing, lower courts to address the issue have enjoined the Trump administration's repeal of DACA, on the ground that the repeal was "arbitrary and capricious" under the Administrative Procedure Act. *See generally, e.g.,* NAACP v. Trump, 315 F. Supp. 3d 457 (D.D.C. 2018); *New York v. Trump*, No. 16-CV-4756, 2018 U.S. Dist. LEXIS 23547 (E.D.N.Y. Feb. 13, 2018); *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2017).

356. Memo from Elaine Duke, *supra* note 347 (phasing out DACA and calling for its repeal).

357. *See supra* note 274 and accompanying text.

358. *See* Brian Sonenstein, *Separation of Immigrant Families Was Part of Deportation Under Obama—Now Trump Is Expanding the Practice*, SHADOWPROOF (June 15, 2018), <https://shadowproof.com/2018/06/15/separation-immigrant-families-part-deportation-obama-now-trump-expanding-practice/> [<https://perma.cc/G8VJ-3H29>].

359. *See* Rucker et al., *supra* note 274.

360. *See, e.g.,* Kevin Liptak et al., *White House Scrambles to Contain Immigration Fallout*, CNN (June 18, 2018), <https://www.cnn.com/2018/06/18/politics/immigration-white-house-pressure/index.html> [<https://perma.cc/R8ZR-W79C>].

family separation and who were obstructing legislative fixes;³⁶¹ (2) the judiciary, which had previously prohibited the detention of migrant children with their parents;³⁶² and (3) undocumented parents, who not only entered the country illegally, but also exposed their children to life-threatening dangers.³⁶³

For a variety of reasons, the Trump administration's attempts to divert institutional blame were unsuccessful.³⁶⁴ To begin, the Trump administration's account of institutional responsibility was not credible.³⁶⁵ Family separation is the result of a conflation of laws and policies, but they are not *Democratic* laws and policies. One of the key laws, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), requires that unaccompanied migrant children be placed in the custody of the Department of Health and Human Services.³⁶⁶ TVPRA was passed by a unanimous Congress and signed into law by Republican President George W. Bush.³⁶⁷

Moreover, the judicial orders and decrees at issue—commonly referred to as the “*Flores* Agreement”—limit the federal government's ability to detain migrant children.³⁶⁸ But the *Flores* Agreement does not require that parents be criminally prosecuted, much less incarcerated, when they are

361. Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2018, 6:59 AM), <https://twitter.com/realDonaldTrump/status/1000375761604370434> [<https://perma.cc/2JWN-Z7C8>].

362. See, e.g., Dara Lind & Dylan Scott, *Flores Agreement: Trump's Executive Order to End Family Separation Might Run Afoul of a 1997 Court Ruling*, VOX (June 20, 2018, 3:20 PM), <https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration> [<https://perma.cc/7T6T-C7EL>] (“The administration has fingered *Flores v. Reno*, or the ‘Flores settlement,’ as the reason it is ‘forced’ to separate parents from their children to prosecute them.”).

363. See Kirstjen M. Nielsen, Sec’y, Dep’t of Homeland Sec., Remarks on the Illegal Immigration Crisis (June 18, 2018), <https://www.dhs.gov/news/2018/06/18/dhs-secretary-nielsens-remarks-illegal-immigration-crisis> [<https://perma.cc/9WDC-WCHZ>] (“[P]arents who entered illegally are—by definition—criminals. . . . By entering our country illegally—often in dangerous circumstances—illegal immigrants have put their children at risk.”); see also *Border Security Loopholes Drive Massive Surge in Unaccompanied Alien Children*, DEP’T HEALTH & HUM. SERVICES 1, <https://www.hhs.gov/sites/default/files/fact-sheet-border-security-loopholes.pdf> [<https://perma.cc/K77Z-47AA>] (last visited Aug. 24, 2018) (stating that Congress’s inability to pass legislation on border security “created perverse and dangerous incentives for illegal border crossings and child smuggling”).

364. See, e.g., Liptak et al, *supra* note 360.

365. *Id.*; see Manuela Tobias, *Donald Trump Blames Democrats for Own Immigration Policy Separating Families*, POLITIFACT (May 29, 2018), <http://www.politifact.com/truth-o-meter/statements/2018/may/29/donald-trump/trump-blames-democrat-own-policy-separating-family/> [<https://perma.cc/H4N4-ED2F>].

366. 8 U.S.C. § 1232 (2012) (providing that “care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services” and its subagency, the Office of Refugee Resettlement).

367. Kim & DeBonis, *supra* note 275.

368. The *Flores* Agreement requires the government to (1) place migrant children with a close relative or guardian “without unnecessary delay” (generally no more than twenty days), and (2) keep migrant children who are in custody in the “least restrictive setting” possible. Stipulated Settlement Agreement at 7, 10, *Flores v. Reno*, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997).

accompanied by their children at the border.³⁶⁹ Rather, the decisions to prosecute parents *and* incarcerate them were operational features of the Trump administration's "zero-tolerance" policy, which took effect in the spring of 2018.³⁷⁰

Properly understood, family separation resulted from a mix of causal factors: the TVPRA, the *Flores* Agreement, the arriving parents' unlawful entry, and the Trump administration's zero-tolerance policy.³⁷¹ Despite the legal nuances, it was clear enough to the general public that the Trump administration was at least partly responsible for the family-separation crisis.³⁷² And, whatever the merits of the zero-tolerance policy, the Trump administration clearly had (and still has) the discretionary authority to undo it. Upon these realizations, the White House's incredulous attempt to deflect blame became a blameworthy act itself.³⁷³

What ultimately tipped the scales, however, were the unrelenting stories, sounds, and images of suffering children.³⁷⁴ The Trump administration tried its hand at publicizing more positive images of children playing video games, attending classes, and living contently.³⁷⁵ Yet, unsurprisingly, the heart-wrenching accounts of crying children dominated public perceptions, including among many Republicans.³⁷⁶ As one journalist reported: "No matter how much [Trump's] base loves his tough-guy act on the border, the sounds of little children crying for their parents was winning out."³⁷⁷ This is negativity bias at work.³⁷⁸

It is hard to overstate the impact these images and sounds had on America's collective psyche. Suffice to say, it was enough to cause the White House to relent, at least in part. Under intense bipartisan pressure, Trump signed an executive order prospectively halting family separation.³⁷⁹ Instead, the executive order called for *family detention*, whereby parents and children would be detained together "to the extent permitted by law and

369. See generally *id.*

370. See Zero-Tolerance Memo, *supra* note 18.

371. Of course, depending on perspective, more might be added to this causal list: country conditions in Central America, the Obama administration's practice of "catch-and-release," and so on.

372. See, e.g., Liptak et al., *supra* note 360.

373. *Id.*

374. See, e.g., Chris Cillizza, *The Sounds of Separation—How Eight Minutes of Audio Changed the Immigration Debate*, CNN (June 25, 2018), <https://edition.cnn.com/2018/06/22/politics/donald-trump-pro-publica-sound/index.html> [<https://perma.cc/8DF8-TFE6>]; Miriam Jordan, *'It's Horrendous': The Heartache of a Migrant Boy Taken from His Father*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/us/children-immigration-borders-family-separation.html> [<https://perma.cc/5ZE9-9CD3>].

375. See, e.g., U.S. Dep't of Health & Human Servs., *UC Shelter in Brownsville, Texas—June 13, 2018*, YOUTUBE (June 17, 2018), <https://www.youtube.com/watch?v=WYRu1PiPYIc> [<https://perma.cc/CFU6-EHWF>]; U.S. Dep't of Health & Human Servs., *UC Shelter in San Diego, California—June 13, 2018*, YOUTUBE (June 17, 2018), <https://www.youtube.com/watch?v=mHWKjUtbYtc> [<https://perma.cc/C896-FH8K>].

376. See Cillizza, *supra* note 374.

377. *Id.*

378. See *supra* note 139 and accompanying text.

379. See Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018).

subject to the availability of appropriations.”³⁸⁰ The title of the executive order—“Affording Congress an Opportunity to Address Family Separation”—was a less-than-subtle attempt to redirect blame to Congress.³⁸¹

A section of the executive order also called upon the Attorney General to seek a judicial modification of the *Flores* Agreement to allow family detention.³⁸² As of this writing, litigation over the *Flores* Agreement is still pending.³⁸³ In the opening scene, however, federal Judge Dolly Gee flatly ruled against the government’s request.³⁸⁴ Her closing dicta was striking, and of special interest here.³⁸⁵ Loath to accept blame, Judge Gee lodged institutional responsibility with Congress (for its “inaction”) and the executive branch (for its “ill-considered” action).³⁸⁶ “Regardless,” Judge Gee wrote, “what is certain is that the children . . . are blameless.”³⁸⁷ A favorable judicial ruling for the government could make the court complicit, and a target of blame, for their detention. Judge Gee understandably wanted no piece of that.

Although it is too soon to say how the episodes discussed above will play out, the dynamics of immigration blame have already left their mark on the politics and policies under consideration.

3. The Plenary Power Doctrine (and the Travel Ban)

The literature on the Supreme Court’s plenary power doctrine is legion but has never been studied through the prism of blame.³⁸⁸ This Article suggests

380. *Id.*

381. *Id.*

382. *Id.*

383. *See Flores v. Sessions*, No. 2:85-cv-04544 (C.D. Cal. July 9, 2018). Under a separate court order, efforts to reunite separated children with their parents are underway. *See Ms. L. v. U.S. Immigration & Customs Enf’t*, No. 18-cv-0428, 2018 WL 3129486, at *11 (S.D. Cal. June 26, 2018).

384. *Flores*, slip op. at 7. Judge Gee wrote:

It is apparent that [the government’s] Application is a cynical attempt . . . to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action that have led to the current stalemate. The parties voluntarily agreed to the terms of the *Flores* Agreement more than two decades ago. The Court did not force the parties into the agreement nor did it draft the contractual language. Its role is merely to interpret and enforce the clear and unambiguous language to which the parties agreed, applying well-established principles of law. Regardless, what is certain is that the children who are the beneficiaries of the *Flores* Agreement’s protections and who are now in [government] custody are blameless. They are subject to the decisions made by adults over whom they have no control. In implementing the Agreement, their best interests should be paramount.

Id.

385. *Id.*

386. *Id.*

387. *Id.*

388. *See* David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015) (“It almost seems an obligatory rite of passage for scholars embarking on the study of immigration law to provide their own critique of plenary power or related doctrines of deference.”). For an in-depth treatment of the descriptive and normative debates over the plenary power doctrine, see Rubenstein & Gulasekaram, *supra* note 19, at 593–626.

that the plenary power doctrine both shapes, and is shaped by, the dynamics of immigration blame.³⁸⁹ To the extent that judges are politically insulated, they may have less reason to avoid blame.³⁹⁰ But judges *do* have instincts and incentives to avoid blame, whether for psychological, reputational, or institutional reasons.³⁹¹ Judge Gee's remarks in the *Flores* litigation are a stark example of judicial blame avoidance, egged on by the Trump administration's blaming of the court.³⁹² Far from idiosyncratic, her instincts are entirely natural. Indeed, if judicial legitimacy depends on public support, then judges arguably should avoid blame in appropriate ways and situations.³⁹³

Through these optics, the Supreme Court's plenary power doctrine may be understood as a self-preserving blame-avoidance strategy. The message splayed across this anachronistic line of cases is unmistakable: aggrieved parties should take their complaints to the federal political branches.³⁹⁴ Time and again, the Court has invoked the plenary power doctrine to uphold federal immigration laws that would be inconceivable in other regulatory

See also supra notes 84–89 and accompanying text (summarizing the contours of the plenary power doctrine).

389. *See supra* Part I.B (explaining how the doctrine can potentially rule in, and rule out, which public officials to blame for perceived harms in the immigration system); *infra* Part IV.C.3 (discussing how the plenary power doctrine may be viewed as a form of judicial blame avoidance); *infra* Part V.D (discussing how revisions to the plenary power doctrine might limit the political branches' range of policy strategies for avoiding blame).

390. Weaver, *supra* note 13, at 376–77 (noting that while judges “might not like to be blamed for unpopular decisions, they can withstand blame better than legislators and elective and appointed officials in the executive branch”).

391. That judges are fallible and emotional humans combines the jurisprudential insights of the Legal Realists, see, for example, BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167–77 (1921) (asserting the relevance of the subconscious mind to judicial decision-making), and the more recent psychological insights discussed in Part II of this Article. That judges may be responsive to blame, and seek to avoid it, also coheres with Professor Barry Friedman's argument that the Supreme Court's decisions in the modern era are influenced by public opinion. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 14 (2009). Friedman argues that the Court acts not just out of a fear that its decisions will be unpopular, but that its decisions will not be put into action. *But see* Sanford Levinson, *Courts as Participants in “Dialogue”*: *A View from American States*, 59 KAN. L. REV. 791, 795–96 (2011) (critiquing the connections that Friedman draws between popular opinion and judicial outcomes).

392. *See supra* note 384 and accompanying text.

393. *Cf.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (“[T]o overrule [*Roe v. Wade*] under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.”); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 29–32 (2d ed. 1986). It is beyond this Article's scope to specify when, and how, it might be appropriate for judges to avoid blame. I do, however, offer some generalized prescriptions in Part V that could serve as a starting point. *See infra* Part V.C (calling for and outlining an “ethics of immigration blame”).

394. The original dictum comes from the foundational *Chinese Exclusion Case*: “If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government” 130 U.S. 581, 606 (1889).

contexts.³⁹⁵ Still, citing principles of stare decisis, the Court effectively punts.³⁹⁶

In *Galvan v. Press*,³⁹⁷ for example, the Court explained that if it “we[re] writing on a clean slate,” then perhaps the Due Process Clause would protect the petitioner from the harsh deportation law at issue.³⁹⁸ Yet, the Court stressed, “[T]he slate is not clean. . . . [T]here is not merely ‘a page of history,’ but a whole volume.”³⁹⁹ The doctrinal slate is more marked today. As earlier discussed, the Court in *Trump v. Hawaii* stressed that federal immigration policy has been “largely immune” from constitutional review “[f]or more than a century.”⁴⁰⁰

One might view these paeans to stare decisis as judicial minimalism. One might also, however, view the Court’s appeals to stare decisis as a form of blame avoidance: the judicial analog to a political official’s excuse that their hands are tied.⁴⁰¹ From reams of scholarly work, the Court already has ample fodder to scrap the plenary power doctrine on the merits.⁴⁰² Perhaps if the doctrine attracts significantly more blame than it deflects, and if the Court cares about such things (for the sake of its own legitimacy or otherwise), then the impulse to avoid blame may tip the scales toward a normalized immigration jurisprudence.⁴⁰³

Despite its potential, *Trump v. Hawaii* was not that case. To begin with, the Court had no blame-free options: it would be widely blamed (by some) for allowing Trump’s Proclamation to survive and widely blamed (by others) for striking it down. From an institutional vantage, what was the least-worst option for the Court? On the one hand, allowing the Proclamation to survive exposes the Court to a certain type and intensity of blame. Justice Sotomayor’s strongly worded dissent in *Trump v. Hawaii*, for example, blames the Court’s majority for “ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation

395. See *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

396. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 n.4 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766–67 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

397. 347 U.S. 522 (1954).

398. *Id.* at 530–31 (upholding deportation on the basis of Communist Party membership).

399. *Id.* (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

400. No. 17-965, slip op. at 30 (U.S. June 26, 2018) (quoting *Fiallo*, 430 U.S. at 792).

401. *Cf. id.* at 32 n.5 (“The dissent criticizes application of a more constrained standard of review as ‘throw[ing] the Establishment Clause out the window.’ But as the numerous precedents cited in this section make clear, such a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals.” (alteration in original) (quoting Justice Sotomayor’s dissenting opinion)).

402. In a nutshell, the plenary power doctrine has been attacked as both legally and morally unjustified. For some of the early leading work, see, for example, STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 177–222* (1987). For a collection and summary of decades of academic critique, see Rubenstein & Gulasekaram, *supra* note 19, at 615–18.

403. I will revisit this possibility in Part V, with some observations and suggestions for how tweaking the plenary power doctrine might counter some pathologies of blame avoidance. See *infra* Part V.D.

inflicts upon countless families and individuals, many of whom are United States citizens.”⁴⁰⁴

On the other hand, however, imagine a counterfactual scenario in which the Court enjoined the Proclamation and a terrorist attack occurs on American soil within the next few years. According to many national-security experts, the likelihood that the Proclamation can prevent an attack is extremely low.⁴⁰⁵ Still, in the hypothetical event of attack, it is almost certain that the Court would be intensely (if not ruinously) blamed by large swaths of the U.S. population. Owing to cognitive biases, people are highly prone to blame decision makers for good decisions that turn out badly in hindsight.⁴⁰⁶ When in doubt, maintaining the status quo is not only consistent with the principle of stare decisis, it also generally attracts less blame if things later go wrong.⁴⁰⁷

Indeed, anticipating a Supreme Court showdown, President Trump primed this pump. Soon after his first travel ban was enjoined in federal district court, President Trump took to Twitter: “Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!”⁴⁰⁸

It is hard to know whether and how much the risk of institutional blame factored into the Court’s decisional calculus in *Trump v. Hawaii* or in other immigration cases. Nothing in my account here depends on it. As a purely descriptive matter, and regardless of the Court’s motivations, the plenary power doctrine provides the Court with some institutional cover—and has “[f]or more than a century.”⁴⁰⁹ Staying the course is not a blame-free path for the Court.⁴¹⁰ For better or worse, however, the plenary power doctrine hedges against the risk of other types and intensities of blame that might follow if the Court were to assign itself a greater role in matters of federal immigration and national security.

4. Immigration Federalism

If state and local officials were precluded from passing immigration-related laws, then they might plausibly deny responsibility for perceived

404. *Trump*, slip op. at 1 (Sotomayor, J., dissenting).

405. *Id.* at 21–22 (“[S]everal former national-security officials from both political parties . . . have advised that the Proclamation and its predecessor orders ‘do not advance the national-security or foreign policy interests of the United States, and in fact do serious harm to those interests.’”); Nina Totenberg, *Why Dozens of National Security Experts Have Come Out Against Trump’s Travel Ban*, NPR (Apr. 24, 2018), <https://www.npr.org/2018/04/24/604949251/why-dozens-of-national-security-experts-have-come-out-against-trumps-travel-ban> [https://perma.cc/E3CT-QL43].

406. See KAHNEMAN, *supra* note 119, at 203–04 (discussing outcome bias and hindsight bias).

407. *Cf. id.*

408. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:39 PM), <https://twitter.com/realDonaldTrump/status/828342202174668800> [https://perma.cc/64K2-P3J9].

409. *Trump*, slip op. at 30.

410. See *supra* notes 402, 404 and accompanying text.

immigration-related harms. As earlier discussed, however, the more the federal government devolves immigration authority to state and local jurisdictions, and the more these jurisdictions assert authority, the more subfederal officials are exposed to institutional blame.⁴¹¹ In turn, the risk of institutional blame triggers avoidance strategies by subfederal officials, which then shape immigration policies on the ground.

For example, public officials in states and localities where undocumented migration is perceived as harmful are more inclined to pass restrictionist policies toward this population (for example, in Arizona and Texas).⁴¹² Meanwhile, states where undocumented migration is not perceived as harmful are more inclined to pass laws that seek to integrate and welcome these migrants (for example, in California and New York).⁴¹³

Even within integrationist jurisdictions, state and local officials must manage their risk of institutional blame. Return to the sanctuary city example. Not all sanctuary policies are the same. They differ, I suggest, because policy lines are drawn with an eye toward managing institutional blame.⁴¹⁴ Several major sanctuary jurisdictions, for example, make distinctions between migrants who commit minor versus major crimes.⁴¹⁵ Through blame spectacles, it is one thing for local law enforcement agencies to release minor criminal offenders back into the general population; it is quite another to release deportable drug dealers, rapists, and murderers.

Subfederal officials are keen to these distinctions, and they tailor their sanctuary policies accordingly. Again, I am not suggesting that avoiding

411. See *supra* notes 116–17 and accompanying text.

412. See, e.g., *City of El Cenizo v. Texas*, 885 F.3d 332, 360 (5th Cir. 2018) (upholding a Texas statute which forbids sanctuary policies by cities and localities within the state); S. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010) (“The legislature declares that the intent of this act is to make attrition through enforcement the public policy The provisions of this act are intended to . . . discourage and deter the unlawful entry and presence of aliens . . .”). The Supreme Court, in *Arizona v. United States*, invalidated portions of S.B. 1070, as it was popularly known. 567 U.S. 387, 407–10 (2012). Other sections of the bill survived. See also Ramakrishnan & Gulasekaram, *supra* note 66, at 1463–85 (describing restrictionist state and local laws).

413. Examples of integrationist measures include sanctuary or noncooperation laws, and laws that provide public benefits to unauthorized immigrants, such as in-state college tuition or municipal identification cards. See Rodriguez, *supra* note 116, at 576; Karthick Ramakrishnan & Allan Colbern, Opinion, *Immigration Reform: ‘The California Package,’* L.A. TIMES (June 24, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-0624-ramakrishnan-state-citizenship-20150624-story.html> [<https://perma.cc/LY5U-AV9E>] (explaining how California has “encourage[ed] integration rather than deportation” through immigration policies).

414. Cf. Natasha Tidwell, *Fragmenting the Community: Immigration Enforcement and the Unintended Consequences of Local Police Non-Cooperation Policies*, 88 ST. JOHN’S L. REV. 105, 142 (2014) (warning that “[w]hen discretionary policies are shaped by community preferences, legitimacy lasts only as long as the next election cycle”).

415. See COOK COUNTY, ILL. § 46-37 (2018) (allowing detainer compliance where the target of detainer is convicted of a serious or violent felony offense for which he or she is currently in custody); N.Y.C., N.Y., ADMINISTRATIVE CODE § 9-131 (2018) (including numerous crime-based exceptions to noncompliance with detainers); see also CAL. GOV’T CODE §§ 7282.5(a), 7284.6(a)(4) (West 2018) (same).

blame is the only consideration; just that it is an important one that helps to explain (and perhaps justify) where sanctuary policy lines are drawn.⁴¹⁶

* * *

Parts I through IV, above, provide a descriptive account of how the conflation of migrant blame, institutional blame, blame attribution, and blame avoidance, infuse immigration politics, policies, and structures. Understanding immigration blame will not resolve differences in opinion over how to fix the immigration system, which by all accounts is metaphorically “broken.” Rather, this Article’s descriptive modeling hopes to be empowering in at least three ways.

First, one cannot fully understand our immigration system, as it currently exists, without understanding the dynamic pulls and pushes of immigration blame. Sensitivity to these phenomena can enrich our understanding of immigration law.

Second, any who aspire to improve the extant system—whether as advocates, public officials, or voters—will need to account for immigration blame, both strategically and ideologically. We are all participants, not just victims, of immigration blame.⁴¹⁷

Third, the study of immigration blame can instill new perspectives on American values, both past and present. Which migrants to accept into our national and local communities, and how to treat them under the law, are reflections of who we are and hope to become as a nation.⁴¹⁸ So too are our decisions about which public officials to support and what to expect of them in office. The normative and prescriptive implications of immigration blame are taken up in Part V below. But those aspirations cannot be pursued, much less realized, without having a steady grip on the mechanics and machinations of immigration blame.

V. NORMATIVE AND PRESCRIPTIVE DIMENSIONS

If there is no way to harness or leverage immigration blame, then what it *ought* to be is intriguing but inconsequential. Within legal and pragmatic limits, however, there is reason to think—and hope—that we can do better. Toward that objective, this Part: (1) makes the positive case for immigration

416. The same might be said when viewing these sanctuary policies through an “equity” or “proportionality” lens. *See generally* Cade, *supra* note 15. Although Professor Cade’s equity-proportionality theory is quite different than the immigration blame model developed here, the two may overlap in this context. For example, in the sanctuary context, subfederal officials may be blamed for *lack of* proportionality if their sanctuary policies do not differentiate between nonviolent and violent criminal offenders, or blamed for interfering with federal determinations about what is equitable and proportionate.

417. *See infra* Part V.C (sketching the outlines of what an “ethics of immigration blame” should entail).

418. *Cf.* JOHNSON, *supra* note 7, at 171 (“Throughout U.S. history, the exclusion and deportation provisions of the U.S. immigration laws have acted as a ‘magic mirror’ into the domestic prejudices and biases in the nation’s heart and soul.”).

blame;⁴¹⁹ (2) argues for an “ethics of immigration blame”;⁴²⁰ and (3) suggests ways that legal doctrines and structures might help to counter some of immigration blame’s noxious manifestations.⁴²¹

A. Valuing Blame

When blame dynamics lead to dysfunctional or irrational outcomes, there may be reason to blame blame. Yet when the same dynamics lead to outcomes we favor, why not praise blame? More than ironic, this asymmetry is telling: the same negativity bias that nourishes blame can cause us to overlook or devalue blame’s constructive possibilities.

When done right, blame is essential to a well-functioning immigration system. First, blame is a way to signal disapproval of harmful or wrongful behavior by migrants and public officials.⁴²² Indeed, sometimes blame is the *most* appropriate response to violations of social, political, and legal norms.⁴²³ It would not be fitting, for example, to feel only apathy (much less pleasure) in reaction to a public official’s constitutional violation or in reaction to a migrant’s violent crime. To *not* blame in these and other situations could signal complacency, if not condonation of harmful or wrongful behavior.⁴²⁴

Second, and relatedly, blame can serve an important dialogic function.⁴²⁵ Because blame is a normatively infused judgment of disapproval, it generally calls for a response from the blamee.⁴²⁶ Any number of responses are possible: denial of wrongdoing, an excuse, a justification, an apology, a promise to act differently next time, and so on. When the blamee denies the accusation of harm or wrongdoing, the *blamer* may be called upon to defend the veracity and fairness of the accusation.⁴²⁷ For example, the excuses and justifications proffered by pro-amnesty advocates return pressure on anti-amnesty politicians and pundits to explain, or at least to consider, why the proffered excuses and justifications are unconvincing. In this example, and countless others, the dialogic process of attributing and avoiding blame can

419. See *infra* Part V.A–B.

420. See *infra* Part V.C.

421. See *infra* Part V.D.

422. See *supra* Part I (discussing migrant blame and institutional blame); cf. Jay R. Wallace, *Dispassionate Opprobrium: On Blame and the Reactive Sentiments*, in REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T. M. SCANLON 348, 368 (2011) (noting that blame may be “peculiarly appropriate” in a situation, and thus important to have in our repertoire of reactions to wrongdoing).

423. Macalester Bell, *The Standing to Blame: A Critique*, in BLAME: ITS NATURE AND NORMS, *supra* note 1, at 263, 268 (“Condemning wrongdoing is a central way for persons to express their moral commitments and avoid condonation.”).

424. *Id.*

425. For parallel views in moral philosophy, which depict blame as a type of dialogical exchange, see Victoria McGeer, *Civilizing Blame*, in BLAME: ITS NATURE AND NORMS, *supra* note 1, at 162, 175 and see McKenna, *supra* note 45, at 119, 127–30, which analogizes blame to a conversation, whereby blamer and blamee exchange ideas and make their respective cases.

426. See McGeer, *supra* note 425, at 162, 175.

427. See Kelly, *supra* note 248, at 244, 256 (“In evaluating an agent’s blameworthiness, we assess how reasonable it is to expect an agent to act morally in the face of obstacles.”).

force interlocutors to consider different perspectives.⁴²⁸ To be sure, the respective parties may not be moved by the other's viewpoint. What blame dynamics can do, however, is bring those competing viewpoints to the same table.⁴²⁹

Third, and perhaps most significantly, blame serves an important quasi-regulative function. More specifically, actual or anticipated blame can motivate better decisions and behaviors.⁴³⁰ Even if the blamee is unable or unwilling to accept responsibility, there can still be public value in blame's signaling effects on how others should conduct themselves in the relevant social, political, and legal communities.⁴³¹

B. Blame-Avoidance Tradeoffs

In large measure, the normativity of blame avoidance is an extension of the foregoing ideas. When blame avoidance is pursued with energy and ingenuity, every harm is contested, and every line of responsibility tangled.⁴³² But, drawing on key insights from political science, perhaps we can view blame-avoidance strategies as containing trade-offs, with potentially positive variants that can enhance the quality of governance.⁴³³

Start with *presentational strategies*. If blame attribution is a process of assigning responsibility for harm,⁴³⁴ then rhetorical tactics to avoid blame can upset that social function.⁴³⁵ In many contexts, however, presentational strategies might lead us to better information about whether the perceived harm is, in fact, a harm. Moreover, presentational strategies can help direct audiences to which individuals or entities are responsible for which harms, thus countering misattributions of migrant blame and institutional blame.⁴³⁶ Relatedly, presentational strategies can be an effective counterweight to heuristics and biases that would otherwise go unchallenged in public discourse.⁴³⁷ For example, well-framed excuses and justifications can in some cases better inform voters and public officials about the complexity of

428. *See id.* at 256–57.

429. *Cf. McGeer, supra* note 425, at 180 (arguing that the processes of laying and avoiding blame “invariably work to develop the normative understanding of the putative wrongdoer, the blamer, or both”).

430. *See* Paul Bloom, *Forum Response: Beyond Blame*, BOS. REV. (July 10, 2013), <http://bostonreview.net/forum/beyond-blame/paul-bloom-blame-motivates-good-behavior> [<https://perma.cc/LSE3-NVBP>] (“The thought of being blamed by others, and the associated feelings of guilt and shame, can motivate good behavior.”); *see also* Cheshire Calhoun, *Responsibility and Reproach*, 99 ETHICS 389, 406 (1989) (making the same point).

431. *See* Bell, *supra* note 423, at 263, 269.

432. *See* HOOD, *supra* note 10, at 184.

433. For an insightful and extended discussion of blame-avoidance trade-offs, from which the discussion below draws, *see id.* at 144–74.

434. *See supra* notes 42–45 and accompanying text.

435. *See supra* Part III.A.

436. *See* HOOD, *supra* note 10, at 165.

437. *See supra* Part II.A (discussing how heuristics and biases can lead to systemic cognitive errors, and, on a larger scale, can lead to blame cascades).

the matters at issue.⁴³⁸ To similar effect, narratives can be met with counternarratives, metaphors met with countermetaphors, and so on.

Agency strategies to avoid blame pose a different set of trade-offs. On the one hand, delegation and complex partnering arrangements can cause accountability trails to run cold, so that no one seems responsible when things go wrong.⁴³⁹ Moreover, the dispersion of authority can lead to the problem of “too many hands,” in which all players plausibly deny blame.⁴⁴⁰ On the other hand, however, agency strategies designed to diffuse blame may have positive (even if unintended) consequences. For instance, congressional delegation or the creation of “cooperative federalism” arrangements may lodge authority in institutions or officials that are better equipped to make and implement policy.⁴⁴¹ In addition, public-private partnerships and intergovernmental arrangements can pool resources and information in ways that enhance what the contributing partners could accomplish on their own.⁴⁴²

Policy strategies designed to produce alibis can lead to laws and protocols that are not in the public’s best interest.⁴⁴³ Even well-intended policy strategies can inadvertently result in overall welfare loss, as in the phenomenon of “iatrogenic risks”—the risks created by ostensibly risk-reducing policies.⁴⁴⁴ Notwithstanding these generalized concerns, policy strategies for avoiding blame can also have positive results and should be valued to that extent. Under the right conditions, the impulse to avoid blame might lead public officials to select better policies and practices. If “good” policies attract less blame than “bad” policies, then officials may be inclined toward good policies, whether anticipating or responding to institutional blame. Of course, what qualifies as “good” or “bad” policy is beyond this

438. See Hood, *supra* note 3, at 167–68.

439. See Bovens et al., *supra* note 3, at 16 (“When public policies are the product of difficult collaborations between many agents, private as well as public, it is more difficult to deliver; more difficult to call to account; more difficult even to understand who we should hold accountable.”).

440. See HOOD, *supra* note 10, at 174.

441. The term “cooperative federalism” generally connotes statutory arrangements in which states implement a federally prescribed program or goal. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1276 (2009) (arguing that states enjoy considerable leverage in the position of uncooperative agent); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 672 (2001).

442. See HOOD, *supra* note 10, at 166.

443. See *id.* at 171.

444. See Jonathan Baert Wiener, *Managing the Iatrogenic Risks of Risk Management*, 9 RISK 39, 52 (1998). Although too soon to say, an example might be President Trump’s travel bans. The Trump administration has touted each travel ban as a security-enhancing measure, but some critics worry that the symbolic expressions of the bans will enhance recruitment efforts of terrorist organizations and increase the risk of attack. See, e.g., Jessica Kwong, *Trump’s Travel Ban Helps ISIS Stage Attacks in the U.S., Democrats Say*, NEWSWEEK (Nov. 17, 2017), <http://www.newsweek.com/trumps-travel-ban-helps-isis-stage-attacks-us-democrats-say-715512> [<https://permacc/8WZK-N8KL>].

Article's scope. But, as a general point, it must be appreciated that we often blame public officials for "bad" policies *so that* we can get "good" ones.⁴⁴⁵

Nothing I have said is intended to minimize the ever-present dysfunctions of blame attribution and blame avoidance. In the immigration context, as elsewhere, blame can lead to irrational, counterproductive, painful, and destructive behaviors. Indeed, these concerns may be especially acute for immigration regulation. As history attests, migrants tend to be easy outlets for blame.⁴⁴⁶ Moreover, for some public officials, it can be politically risky *not* to blame certain categories of migrants. These phenomena of migrant blame and institutional blame are not coincidental: they go hand in hand and can pull in dangerous directions.

A main thrust of this Article, however, is to offer a partial rehabilitation. Appreciating that immigration blame can be functional *and* dysfunctional offers a fresh theoretical starting point. Future work can direct energy toward promoting blame's constructive possibilities, while reducing its pathologies. In the next sections, I offer some preliminary thoughts toward those symbiotic objectives.

C. Ethics of Immigration Blame

Immigration blame is cresting all around us, yet we have no principled way to answer some fundamental questions. What distinguishes legitimate from illegitimate *blame attribution*? What distinguishes legitimate from illegitimate *blame avoidance*? An "ethics of immigration blame," proposed here, speaks to these and related concerns.⁴⁴⁷ If followed, these ethical precepts could improve the quality of blaming practices in the immigration context (and beyond).

Even without formal legal sanctions, an ethics of immigration blame might be realized through voluntary compliance and external pressures from peers, principals, and voting constituencies. Although optimistic, it is not unthinkable. We already *do* blame public officials and migrants for how they attribute and avoid blame. Thus, the necessary instincts and motivations to modulate blaming practices already exist. An ethics of immigration blame

445. If that is not our hope when we blame, then why do we blame public officials for harmful policies?

446. *See supra* Part I.A.

447. The idea for an ethics of immigration blame is inspired by recent work in moral philosophy. *See generally* BLAME: ITS NATURE AND NORMS, *supra* note 1 (collecting essays on the nature and norms of blame). But an ethics of immigration blame must pick up where moral philosophy leaves off. The moral philosophy literature is focused on blaming ethics in the context of interpersonal relationships (e.g., friendships, families, and in other social contexts). However, government authority and legal structures give rise to different accountabilities and institutional roles, for which an ethics of immigration blame must account. *Cf.* David Shoemaker, *Blame and Punishment*, in BLAME: ITS NATURE AND NORMS, *supra* note 1, at 100, 100–01 (“[M]oral and legal blame have subtly but importantly different structures and functions.”); Smith, *supra* note 1, at 34 (“[T]he type of blame that it is appropriate for any particular individual to direct toward a blameworthy agent may vary depending on that individual’s relation to the agent and other specific features of the context.”).

supplies what is missing—a normative framework of engagement. By delineating a set of general and (I hope) agreeable principles, we will at least have something to shoot for.

Two caveats before proceeding. First, I make no pretense that better blaming practices will lead to better results. However, by improving the dynamics of immigration blame, both the politics and outcomes may be more acceptable. Surely, people will still disagree with the policies that emerge from rhetorical wrangling; but the outcomes could be perceived as more legitimate if reached through shared norms of engagement.

Second, to the extent that an ethics of immigration blame calls for pulling punches, it may not be in any party's strategic or ideological interest to comply (especially if opponents defect from these principles to their own advantage). Still, for many if not most Americans, there may be a greater appetite for fairer play on the fields of immigration blame. An ethics of immigration blame appeals to that demand and begins to chart a way forward.

1. Blaming Only Blameworthy Action

To start, blame should be reserved only for blameworthy action. Straightforward as it seems, this basic principle is often honored in the breach. A disquieting motif in immigration scholarship is that migrants (especially of color) too often get blamed for nonblameworthy action.⁴⁴⁸ Meanwhile, a persistent complaint in public discourse is that hyperpartisanship has led to unscrupulous finger-pointing among public officials and institutions.⁴⁴⁹ An ethic that forecloses warrantless blame is responsive to these concerns.

This ethic, however, does not resolve which behaviors are worthy of blame. As earlier explained, that judgment generally turns on perceptions of whether the blamee is responsible for an avoidable harm, and if so, whether a compelling excuse or justification exists.⁴⁵⁰ Although a more fully developed ethics of immigration blame might specify when these conditions are met, I doubt doing so would add much value. For instance, all should agree that it is clearly wrong to blame someone because of their race, and

448. See *supra* notes 7, 51–64, 153–56 and accompanying text.

449. See Zeke Miller et al., *A Weekend of Finger-Pointing as Democrats, GOP Try to Dodge Blame for Shutdown*, CHI. TRIB. (Jan. 21, 2018), <http://www.chicagotribune.com/news/nationworld/politics/ct-federal-government-shutdown-20180120-story.html> [<https://perma.cc/3LHF-PEU5>] (“[L]awmakers were eager to show voters they were actively working for a solution—or at least actively making their case why the other party was at fault.”); Alice Rivlin, Opinion, *Congress: Take a Timeout from Playing the Political Blame Game*, HILL (Jan. 29, 2018, 10:00 AM), <http://thehill.com/opinion/campaign/371181-congress-take-a-timeout-from-playing-the-political-blame-game> [<https://perma.cc/6R4U-3399>] (“A simple timeout and a no-blaming pledge could be the first steps to restoring constructive national policymaking.”); Press Release, Nat’l League of Cities, *Cities Urge Congress to Stop Blame Game, Do Its Job* (Jan. 19, 2018), <https://www.nlc.org/article/cities-urge-congress-to-stop-blame-game-do-its-job> [<https://perma.cc/N7GP-ZLYT>] (“For the sake of every person in every city and town in America, Congress and the White House need to stop playing blame games with the federal budget.”).

450. See *supra* notes 42–46, 241–48 and accompanying text.

generally wrong to blame public officials for matters beyond their jurisdiction or institutional role.⁴⁵¹ In the former example, being of a certain race is *not a harm*, much less an avoidable one, and is thus not blameworthy. In the latter example, the *absence of responsibility* for some governmental harm would negate the public official's blameworthiness. In these and countless other applications, the evaluative criteria of avoidable harm and responsibility do most of the required work. It thus seems unnecessary to delineate each and every iteration of warrantless blame, even if doing so were possible.

Moreover, to my mind, resolving questions of blameworthiness should not be the role of an ethics of immigration blame. Debates about whether blame is warranted often turn on normative judgments—for example, whether the putative harm is in fact a harm, or whether an excuse is compelling, or whether an apology is sincere, or whether a certain institution (and not some other) should have decisional authority over an issue. Shutting down such conversations, in the name of an ethics of immigration blame, could undermine the dialogic values of blame discussed above.⁴⁵²

2. Good-Faith Blaming

When blame carries sanctions (whether emotional, political, or legal), the blamer should follow an ethic of good faith. At a minimum, this ethic eschews the intentional misattribution of blame.⁴⁵³ Beyond that, a good-faith ethic could filter out unintentional misattributions of blame by requiring that the blamer: (1) not rush to judgment; (2) afford the blamee the benefit of the doubt in close cases; (3) give fair consideration to a blamee's excuse or justification; and, more generally (4) account for the possibility of cognitive errors, emotional influences, and epistemic uncertainty.⁴⁵⁴

451. It is not necessarily *always* wrong to blame public officials for matters outside of their control. Blaming might be appropriate, for example, in situations where public officials should be deemed accountable simply by virtue of their position in office. *See infra* note 453.

452. *See supra* Part IV.A.

453. Intentional misattribution of blame is almost never justified. From a utilitarian perspective, however, a narrow exception to this general rule arguably applies when the overall consequences of misattributed blame advance the public welfare. For example, wrongly blaming a public official (say, an agency head) might protect the political fortunes of other public officials (say, the president) who then might retain the necessary credibility to pursue other welfare-enhancing policies. *See* ELLIS, *supra* note 239, at 1–2, 153, 182–83 (studying this phenomenon in the presidential context).

454. There are similar suggestions in moral philosophy. *See* Coates & Tognazzini, *supra* note 237, at 22 (“[P]erhaps blame should have a threshold whereby we should not blame if reasonable doubt exists over blameworthiness.”); Kelly, *supra* note 248, at 262 (calling for interpretive generosity of the actions of others and the circumstances surrounding them, which can “open[] possibilities for understanding, forgiveness, and an honest reckoning with faults we might share”). An ethic of good faith that promotes fairness and factual accuracy links to some of my legal prescriptions below. *See infra* Part V.D. In particular, administrative processes that require transparency, reason giving, and open public participation are—all else equal—more likely to generate the type of deliberation and investigation needed to counter misattributed blame. *See infra* notes 488–97 and accompanying text.

Some self-awareness, cognitive effort, and interpretive generosity toward the actions and intentions of others, can go a long way toward countering unwarranted misattributions of blame. These correctives are all within reach because they are generally matters within our control. Emotional reactions, snap judgments, and biases are natural to the way we process information about the world around us. But, as recent studies show, these human tendencies might be mediated and improved through self-awareness and education.⁴⁵⁵

Manufactured blame cascades may lose their potency as more people become attuned to what motivates and causes them. For example, if we are aware that confirmation bias may cause us to discount inconvenient information, we can expand our cognitive compass to accept new data and perspectives.⁴⁵⁶ If we are aware that negativity bias may cause us to subjectively inflate the significance of bad over good, we might push ourselves to see matters in a more objective light, smoke out blame entrepreneurs who prey on negativity, and seek opportunities to praise deserving migrants and public officials.⁴⁵⁷ Aware that System One tendencies can lead to scapegoating, our System Two may lead us to realize that scapegoating allows the true source of psychic or social harm to go unaddressed.⁴⁵⁸

To be sure, all of this is easier said than done. The point, however, is that it can be done with intention.

3. Value-Based Blaming

To complement the foregoing, an ethic of “value-based blaming” would require that a token of blame advance one or more of blame’s social values. As explained above, those values include registering protest or condemnation of wrongful behavior; motivating compliance with social, political, and legal norms; and enriching collective thinking about what those norms are or should be.⁴⁵⁹ In contexts where *none* of those values would be served, a token of blame would have no legitimate social function.⁴⁶⁰ Thus, we might

455. See, e.g., David DeSteno et al., *Beyond Valence in the Perception of Likelihood: The Role of Emotion Specificity*, 78 J. PERSONALITY & SOC. PSYCHOL. 397, 412 (2000). According to studies by Dr. DeSteno and others, emotional bias can be overcome under the right circumstances. Such circumstances include (1) the realization that emotion might be influencing objectivity of the speaker or audience; (2) the motivation to arrive at an objectively accurate judgment; and (3) the ability and effort to think more deeply or differently about a problem so as to overcome emotion-related effects. *Id.*

456. See *supra* notes 147–48 and accompanying text (discussing the effects of confirmation bias on judgment formation).

457. See *supra* notes 141–44 and accompanying text (discussing the effects of negativity bias on judgment formation).

458. See *supra* notes 150–51 and accompanying text (discussing cognitive dissonance and its relationship to scapegoating tendencies); see also DOUGLAS, *supra* note 37, at 67 (“[T]he whole process of scapegoating . . . is not just one of evasion of responsibility but also one of obscuring the essential problem.”).

459. See *supra* Part V.A.

460. Cf. Bell, *supra* note 423, at 272 (arguing, in a different context, that “blame is morally appropriate when it is fitting and achieves at least one of its multiple aims”).

conclude that blame is unnecessary, and probably inappropriate, in such situations.⁴⁶¹

4. Receiving Blame

Individuals and institutions can respond excellently or poorly when targeted with blame. When *blaming others* is the blamee's response, the principles outlined above should apply. Thus, redirected blame should be warranted, made in good faith, and serve one or more of blame's instrumental values.⁴⁶²

Further, a blamee should at least consider a blamer's allegations and, ideally, reflect seriously on the charge.⁴⁶³ To be clear, the blamee need not accept the criticism or complaint. But blamees who reflexively deny blame can miss something important about their own behavior and forfeit the opportunity for remediation or improvement.

* * *

If followed, the foregoing principles would set a new benchmark for how blame is practiced and experienced. Almost everything we know about people outside of our social and professional circles is shaped by others (e.g., politicians, pundits, colleagues, the media) who have incentives to provide whatever information will elicit the intended reaction (e.g., outrage, sympathy, sorrow).⁴⁶⁴ Escaping those influences is not easy, owing to informational asymmetries, cognitive biases, and reputational concerns. But we generally can control how we react to others' attempts to dole out and avoid blame.⁴⁶⁵ Moreover, how we personally dole out blame, avoid blame, and assist others in these regards are certainly within reach.

D. Legalistic Nudges

To complement an ethics of immigration blame, the law might be leveraged to neutralize some of blame's downsides. There are important limitations, however, to any legalistic approach. Most notably, such prescriptions must account for existing legal structures that, in all probability, cannot be reengineered for blame's sake. The First Amendment's Free

461. To be sure, judgments about whether a particular token of blame serves a valuable function will often be contested. Most notably, a blamer may see value in blaming where others do not. There is no easy way around this puzzle. One way to address it, however, is through a rebuttable presumption: a token of blame might be deemed *presumptively* proper when, from an objective standpoint, one or more of blame's values are reasonably advanced.

462. See *supra* notes 449–60 and accompanying text (calling for these ethical norms).

463. See Bell, *supra* note 423, at 279–80.

464. See *supra* Part II; cf. Barbara Fried, *Forum: Beyond Blame*, BOS. REV. (June 28, 2013), <http://bostonreview.net/forum/barbara-fried-beyond-blame-moral-responsibility-philosophy-law> [<https://perma.cc/3U5M-DZSG>] (making a similar point and eschewing blame on metaphysical grounds).

465. Cf. Shaun Nichols, *After Incompatibilism: A Naturalistic Defense of the Reactive Attitudes*, 21 PHIL. PERSP. 405, 412 (2007) (distinguishing between narrow-profile emotional responses, which are local or immediate emotional reactions to situations, and wide-profile responses, which are not immediate and can involve rational reflection).

Speech Clause is an important example.⁴⁶⁶ Narratives, metaphors, excuses, justifications, and so on, may be preposterous, misleading, and offensive. Still, they generally will be constitutionally protected forms of speech and thus beyond regulatory controls.⁴⁶⁷ Therefore, any attempt to directly regulate blaming statements and presentational blame-avoiding tactics will generally be unavailing.

A more promising approach would focus on agency and policy strategies for avoiding blame.⁴⁶⁸ Because these blame-avoidance strategies are undertaken by government officials through the medium of law, they may also be more conducive to legalistic nudges. For example, agency strategies to avoid blame through delegation and governmental partnerships generally depend on legal warrants to do so. Likewise, policy strategies to avoid blame often take the form of hard or soft law.⁴⁶⁹ These and related blame-avoidance tactics, which generally depend on the law for their implementation, are potentially ripe for regulatory controls in ways that presentational tactics are not.

1. Agency Strategies

Agency strategies that tangle lines of accountability may engender unproductive, and potentially disruptive, immigration blame games. To counter those effects, lines of accountability might be simplified through legal doctrine and statutory design. To be clear, the suggestion here is not that delegations and governmental partnering be forbidden: those design choices pervade our legal system, often with good intentions and effect. Rather, the suggestion is that *when* those design choices are made, the resulting lines of accountability can facilitate or fluster ascriptions of institutional blame.

All else equal, institutional blame will be more productive when lines of governmental accountability are clear and stable, rather than opaque and shifty. First, clear lines of accountability are needed for the polity to know which public officials are responsible for which public harms. In turn, public officials—knowing they will be on the hook for perceived harms—may be more inclined to act responsibly, *ex ante*, to avoid being blamed *ex post*. Second, stable lines of responsibility will also generally enhance the efficacy of institutional blame. When the lines of accountability are unstable, or flimsy, public officials can too easily escape attributions of institutional blame.

466. U.S. CONST. amend. I (protecting free speech and ideas).

467. *Cf. Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“[S]peech cannot be restricted simply because it is upsetting or arouses contempt.”).

468. *See supra* Part III.B–C (discussing these blame-avoidance strategies by public officials).

469. By soft law, I mean to refer to government policies that are not formally binding but that nevertheless control or influence how government authority is exercised. For example, DACA and DAPA would fall into the category of soft law because they were formed outside of notice-and-comment rulemaking procedures, and they ostensibly do not create rights or duties. *See DAPA Memo, supra* note 225; *DACA Memo, supra* note 225.

As discussed further below, clear and stable lines of accountability are not a panacea, as those conditions may simply lead public officials to other, potentially more acute, forms of blame avoidance.⁴⁷⁰ But if tighter accountability is worth pursuing to close at least some blame-avoidance spigots, then the Supreme Court's exceptional immigration doctrines are prime candidates for reconsideration.

Start with the plenary power doctrine. The Court has yet to clearly delineate the scope of the Executive's immigration powers vis-à-vis Congress.⁴⁷¹ In contrast to the type of clear and stable delegations idealized above, the lawmaking relationship between Congress and the Executive in the immigration context is rather opaque.⁴⁷² It is characterized more by "de facto delegation" than formal delegations.⁴⁷³ That leaves important questions unanswered about which federal institutions are responsible, and thus which to blame, for the egregious mismatch between Congress's "laws on the books" and the "law in action."⁴⁷⁴

To this concern, Article II's Take Care Clause offers some residual promise.⁴⁷⁵ To wit, the Court might interpret this provision to create substantive limits on the Executive's discretionary authority. The metes and bounds of what that doctrine should be, or could be, has been debated at

470. There are two reasons for this. First, greater accountability can lead public officials toward other forms of blame avoidance (such as presentational or policy strategies) which may be even harder to control. Second, and relatedly, *too much* accountability, or the wrong type of it, can stultify creative and efficient governance. See Christopher Hood, *Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?*, 33 W. EUR. POL. 989, 992 (2010) ("[F]ormal transparency requirements tend to lead to low-intelligence defensive box-ticking and one-way communication rather than real answerability in effective dialogue.").

471. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 133–34 (2015); Rubenstein & Gulasekaram, *supra* note 19, at 609–12 (discussing this gap in the Court's immigration jurisprudence).

472. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 476–78, 485 (2009).

473. *Id.* at 485 (explaining that "the intricate rule-like provisions of the immigration code, which on their face appear to limit executive discretion, actually have had the effect of delegating tremendous authority to the President to set the screening rules for immigrants—that is, to decide on the composition of the immigrant community"); see also MOTOMURA, *supra* note 51, at 21–22, 53.

474. See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 101, 116 (2013) ("The law on the books is different from the law in action, and enforcement is a vital part of law's identity as law."); see also MOTOMURA, *supra* note 51, at 50–55 (explaining how the gap between Congress's immigration laws—law on the books—and executive enforcement—law in action—creates the conditions for arbitrary and racialized enforcement practices).

475. U.S. CONST. art. II, § 3. Incidentally, the Article I nondelegation doctrine is almost certainly not the answer, given how liberally the Court applies the doctrine. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099 (2004) (noting the "difficulty of squaring" the postulate that "Congress may not delegate legislative power[] with the fact that Congress has massively delegated legislative rulemaking authority to administrative agencies").

length in the literature⁴⁷⁶ and, in the DAPA litigation, was left undecided by the Supreme Court.⁴⁷⁷

A blame lens offers new perspective. Interpreting the Take Care Clause in accountability-enhancing ways can promote more accurate ascriptions of institutional blame. In turn, more efficacious blaming *may* lead to more responsible laws “on the books” (by Congress) and “in action” (by the Executive). Again, the emphasis on *may* here is important: limiting agency strategies can simply lead to other forms of institutional blame avoidance—namely, presentational and policy strategies. Thus, shoring up lines of accountability may be a start, but it no way guarantees better results.

To see how, return to the amnesty example. Over this subject, the lines of institutional accountability are reasonably clear and stable: only Congress can decide whether to legalize undocumented migrants. As reflected in today’s amnesty debates, however, that accountability does not necessarily portend rational or desirable policies. Fully accountable legislators might manage their risk of institutional blame through policy strategies that are responsive (or overresponsive) to the perceptions (or misperceptions) of their key constituents.⁴⁷⁸ In this and other examples, it is blame-avoidance *policy strategies*—not agency strategies—that may pose the greater challenge.

2. Policy Strategies

When immigration policies are crafted to avoid blame, they may not be economically, pragmatically, or normatively rational. Again, adjustments to the Court’s plenary power doctrine might indirectly help, but this time in a different way. Rather than (or in addition to) shoring up lines of accountability, the plenary power doctrine might be adjusted to limit the range of blame-avoiding policies available to the federal political branches.

As currently applied, the Court’s plenary power doctrine relaxes constitutional limits on federal immigration laws.⁴⁷⁹ In turn, this affords Congress and the Executive more maneuverability to design policies with an eye toward avoiding blame. If the Court brings the plenary power doctrine

476. For contrasting views on what the Take Care Clause entails, or should entail, in regards to executive enforcement discretion, compare Cox & Rodríguez, *supra* note 471, at 174–77, which eschews hard constitutional limits on the president’s enforcement authority, with 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, 784–85 (2013), and Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759–60 (2014), both of which argue that the Take Care Clause limits the president’s enforcement discretion.

477. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam) (affirming, without opinion, the Fifth Circuit’s preliminary injunction of DAPA in *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015)).

478. *See supra* Part IV.C.1.

479. *See supra* notes 84–89 and accompanying text.

in line with mainstream constitutional norms, some of the most concerning federal immigration policies might be taken off the table.⁴⁸⁰

I have already discussed how that is arguably the case for President Trump's travel bans.⁴⁸¹ If not for the Court's overweening deference to Congress and the Executive, the enabling statute and the travel bans might never have been crafted, much less survived judicial review in *Trump v. Hawaii*.

Consider also *Jennings v. Rodriguez*,⁴⁸² which the Supreme Court recently remanded to the U.S. Court of Appeals for the Ninth Circuit.⁴⁸³ At issue in *Jennings* is the constitutionality of statutes that require the detention of certain categories of migrants, without the opportunity for bond, even if the migrants pose no flight risk or danger to the community.⁴⁸⁴ This detention scheme is unmatched anywhere else in domestic U.S. law.⁴⁸⁵ Were the Court to apply its mainstream due process principles, rather than the highly deferential plenary power doctrine, this detention scheme would most likely be unconstitutional.⁴⁸⁶ Indeed, but for the enabling plenary power doctrine, the statutory scheme may never have been created in the first place.

The same ideas hold when moving from constitutional rights to constitutional structure. Ongoing litigation over the sanctuary city movement involves unsettled questions about formal immigration responsibility between Congress and the Executive, on the one hand, and between federal and subfederal officials on the other.⁴⁸⁷ Depending on how those structural issues are resolved, certain policy options—both federal and local—may be taken off the table.

Again, I cannot say with certainty that any of the policies in the foregoing examples were undertaken to avoid institutional blame. Nor do I mean to take a position here on the legal or normative merits of the policies under review. Rather, these examples are offered to illustrate a generalizable

480. *Cf.* Rubenstein & Gulasekaram, *supra* note 19, at 630–38 (explaining how and why adjustments to the plenary power doctrine would not lead to predictable or easily controlled policy outcomes).

481. *See supra* notes 95–105, 405–07 and accompanying text.

482. 138 S. Ct. 830 (2018).

483. *Id.* at 836 (holding that 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c) do not give detained aliens the right to periodic bond hearings during the course of their detention, and that the Ninth Circuit misapplied the canon of constitutional avoidance in holding otherwise).

484. *See id.*

485. *See* Kevin Johnson, *Argument Analysis: Justices Seem Primed to Find Constitutional Limits on the Detention of Immigrants*, SCOTUSBLOG (Oct. 4, 2017), <http://www.scotusblog.com/2017/10/argument-analysis-justices-seem-primed-find-constitutional-limits-detention-immigrants/> [https://perma.cc/M2UW-BU7H]. Ahilan Arulanantham of the ACLU, arguing the case for the immigrants, said “this Court has never authorized detention without a hearing before a neutral decision-maker, outside of national security, beyond six months.” *Id.*

486. *See* Rubenstein & Gulasekaram, *supra* note 19, at 596; *see also* Rubenstein, *supra* note 91.

487. *See* Complaint for Declaratory and Injunctive Relief at 1–3, 12, City & County of San Francisco v. Trump, No. 3:17-cv-00485-WHO (N.D. Cal. Jan. 31, 2017) (arguing that the Trump administration's attempt to deny San Francisco certain federal funding because of the city's policies violated principles of both federalism and separation of powers).

dynamic: namely, how adjustments to the Court's doctrines could have downstream effects on the policy choices *available* to officials across all levels of government. The policy options taken off the table would include blame-avoiding policies.

Apart from the Court's exceptional immigration doctrines, administrative law offers additional legalistic levers. Courts can hardly be expected to identify and invalidate regulatory policies merely for being products of immigration blame. Under the Court's "hard look" doctrine, however, regulators are required to demonstrate that their policies are rationally conceived and take due regard for available facts and alternative approaches to regulatory problems.⁴⁸⁸ Depending on how rigorously courts apply this standard, ill-advised policy strategies for avoiding institutional blame may be indirectly tempered.⁴⁸⁹

Along similar lines, irrational agency decisions might be countered by administrative processes that require transparency and offer a wider set of public viewpoints. Toward that end, administrative law doctrines (which are notoriously fuzzy with respect to certain procedural exemptions),⁴⁹⁰ could be clarified and tweaked to channel more administrative decisions toward notice-and-comment rulemaking under the Administrative Procedure Act (APA).⁴⁹¹

For notice-and-comment rulemaking, the APA requires the agency to provide advance notice of its proposed rulemaking in the Federal Register and offer interested parties the opportunity to submit written comments in response.⁴⁹² Moreover, to enable meaningful public comments, courts have required the agency to make its intentions clearly known in the notice of rulemaking.⁴⁹³ Finally, although the APA textually requires that a final regulation be accompanied by "a concise general statement of [the regulation's] basis and purpose,"⁴⁹⁴ courts generally require the agency to respond to all significant comments received and to explain its decisions rather thoroughly.⁴⁹⁵

488. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("No regulation is 'appropriate' if it does *significantly* more harm than good." (emphasis added)); *Judulang v. Holder*, 565 U.S. 42, 64 (2011) ("We must reverse an agency policy when we cannot discern a reason for it."); *see also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983) (establishing that courts must take a hard look at agencies' reasons for action and inaction).

489. *See supra* note 355 and accompanying text.

490. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312 n.2 (1992); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 894–96 (2004).

491. *See* 5 U.S.C. § 553(b)–(c) (2012).

492. *Id.* § 553(b).

493. *See, e.g., NRDC v. EPA*, 279 F.3d 1180, 1187–88 (9th Cir. 2002).

494. 5 U.S.C. § 553(c).

495. *See, e.g., Reytblatt v. U.S. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997); *see also Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990) (requiring an agency to respond to "comments which, if true . . . would require a change in [the] agency's

To be clear, I do not mean to suggest that considerations of blame dynamics should necessarily tip the scales in long-running debates on administrative law's optimal design. My more modest point is that generally accepted tropes of "good" governance—such as accountability, transparency, deliberation, and expertise—can also create obstacles to "bad" forms of policy blame avoidance.

CONCLUSION

More than just relevant, blame has transfiguring effects on the immigration system's operation and design. Although we might conceive of a society without immigration blame, it is not ours. Nor should we want one. The nature and norms of immigration blame are things to improve, not stamp out wholesale.

There are any number of directions that future work might take. First, the theoretical model offered here could benefit from empirical testing. For example, polling numbers and experiments might be used to test correlations between migrant blame and institutional blame. Anecdotally, there seem to be strong correlations in the contexts studied here. Empirical testing might offer important refinements and extensions.

Second, this Article's study of immigration blame can be complemented by an orthogonal study of "immigration praise." I have focused here on blame, rather than praise, because blame seems more potent and salient to current conditions. Moreover, as earlier explained, negativity bias helps to explain why blame generally dominates over praise as a social, political, and legal catalyst.⁴⁹⁶ That said, praise undoubtedly has a place in the immigration system. One can easily identify instances of *migrant praise*, *institutional praise*, *praise attribution*, and *praise seeking*. How these praise dynamics interact with each other, and with their foils in immigration blame, are subjects that warrant further study.⁴⁹⁷

Third, this Article's normative and prescriptive treatments of immigration blame are hardly meant to be the last word. I have outlined what an ethics of immigration blame should entail. Further, I have offered some preliminary thoughts on how legal doctrines and structures might be leveraged to promote the values of blame, while countering some of its more unsavory effects. Space did not allow for more, but surely more might be said. This Article

proposed rule" (first alteration in original) (quoting *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987))).

496. *Cf.* Baumeister et al., *supra* note 139, at 354–55 (describing how bad dominates good across multiple cognitive and social settings); Weaver, *supra* note 13, at 374 (explaining that, owing to negativity bias, voters are more likely to mobilize out of protest than out of satisfaction); *see also* GARY WATSON, AGENCY AND ANSWERABILITY 283 (2004) (arguing that praise is *not* the mirror image of blame, in part because the negative force of blame generally prompts more intense and consequential reactions than praise); *supra* notes 320–21 and accompanying text (discussing how negativity bias may be factoring into debates over comprehensive immigration reform).

497. I am currently exploring these subjects, in a piece tentatively titled "Immigration Praise."

has provided the vocabulary and vision. But what immigration blame ought to be is a shared responsibility. Future generations will rightly blame us if we do not try for better.