ARTICLES

The Unexamined Law of Deportation

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Prioritization by criminality, in which noncitizens who have been convicted of serious crimes are deported ahead of those with little or no criminal history, is the most consequential principle governing who is deported from the interior of the United States. This Article argues that, intuitive as prioritization by criminality may appear, it is only rarely justifiable.

I show, empirically, that the interior immigration-enforcement system is successful at such prioritization. Being convicted of a crime makes deportation at least a hundred times more likely. And I show that center-left attempts to reduce deportations over the last decade have sharpened this prioritization: both sanctuary policies and President Obama's Priority Enforcement Program, which caused the two largest reductions in interior immigration enforcement in the last decade, prioritized deportations by criminality.

Because well under one percent of undocumented noncitizens are deported in any given year, some principle for prioritizing deportations is needed (to the extent that deportations continue at all), but criminality should not be the primary principle. First, the crime-control rationales for punishing noncitizens more severely than citizens convicted of the same crime are surprisingly weak. Second, the immigration-policy rationale for prioritization by criminality is strongest among recent entrants to the United States. The longer a noncitizen has lived in the United States, and the stronger his or her ties here, the less deportation resembles a retroactive admission decision and the more it resembles punishment. Finally, the relationship between ties and criminality is asymmetric: there are better arguments for deporting people with weak

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ties and no convictions than for deporting people with strong ties and serious convictions.

If noncitizens convicted of crimes were mostly recent entrants, then the current prioritization might make sense. But the limited existing evidence on deportees' ties to the United States suggests that prioritization by criminality leads the government to target people with deep roots in this country. The result is that interior immigration enforcement functions more as a method of social control of long-term noncitizen residents than as a tool of immigration policy.

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INTRODUCTION

The administrative law of deportation depends on criminal charges and convictions to determine who is removed from the United States. President Obama vowed to deport "[f]elons, not families."[1] The Biden Administration prioritizes the deportations of people convicted of aggravated felonies.[2] And even immigrants' rights groups[3] often criticize the government for failing to concentrate on deporting noncitizens convicted of serious crimes. Indeed, the point seems so obvious that it needs no discussion: other things equal, why *not* deport people with serious convictions ahead of people with minor convictions?

The answer is that other things are not equal. Felons have families. As the law recognizes elsewhere, the human and economic costs of deportation rise with noncitizens' time in the United States and their ties to the community. Prioritizing deportations by criminality often means deporting people with deep roots in the United States.

Scholars have often argued that the fundamental problem with the interior enforcement system is that it is arbitrary—it lacks a strong prioritization principle in practice.[4] Although these scholars identify real problems, this Article finds a surprisingly high degree of actual prioritization by criminality in practice. The most important problem with interior enforcement is not that discretionary enforcement decisions are lawless but that they apply the wrong law.

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1. Christie Thompson, *Deporting 'Felons, Not Families*,' MARSHALL PROJECT (Nov. 21, 2014, 5:22 PM), https://www.themarshallproject.org/2014/11/21/deporting-felons-not-families [https://perma.cc/L85D-9HXP].

2. Nick Miroff & Maria Sacchetti, *New Biden Rules for ICE Point to Fewer Arrests and Deportations, and a More Restrained Agency*, WASH. POST (Feb. 7, 2021, 10:40 AM), https://www.washingtonpost.com/national/new-biden-rules-for-ice-point-to-fewer-arrests-and-deportations-and-a-more-restrained-agency/2021/02/07/faccb854-68c6-11eb-bf81-c618c88ed605_story.html.

3. *See Secure Communities ("S-Comm")*, ACLU, https://www.aclu.org/other/secure-communities-s-comm [https://perma.cc/8BM5-CKTB] (last visited Feb. 18, 2022).

4. Some scholars have emphasized the difficulty of supervising United States Immigration and Customs Enforcement (ICE) officers' implementation of enforcement priorities and have suggested that the Deferred Action for Childhood Arrivals (DACA) program functioned partly as a solution to that supervision problem. *See infra* text accompanying notes 86–88; *see, e.g.*, Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 23–25 (2015); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 193–94 (2015). Although DACA had massive benefits—granting work permits and some security to over 800,000 noncitizens who arrived in the United States as children—it did relatively little to reduce deportations because the noncitizens who were eligible for DACA had not committed significant crimes and were therefore unlikely to be deported even absent DACA protection. *See* Gustavo López & Jens Manuel Krogstad, *Key Facts About Unauthorized Immigrants Enrolled in DACA*, PEW RSCH. CTR. (Sept. 25, 2017), https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/ [https://perma.cc/P2WG-3SXS]. Other scholars have emphasized the bad effects, especially under the Trump Administration, of the absence of priorities. For example, Shalini Bhargava Ray has offered an important critique of the lack of structures for reason-giving in immigration enforcement decisions, *see generally* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 2049 (2021), along with a compelling account of why failure to prioritize violates the Executive duty of faithful execution of the laws, *see generally* Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. 1325 (2021).

This Article gives that law—the internal administrative law of deportation—the empirical and normative attention that it deserves.[5] Empirically, I demonstrate that prioritization by criminality is the de facto law of deportation. Prioritization by criminality is built into the structure of the interior enforcement system, which depends on criminal arrests to generate deportation cases. For an undocumented person, being convicted of a crime raises the probability of being deported from a fraction of 1% to above 50%. And I show that center-left policies over the last decade have caused the system to prioritize by criminality even further. Using individual-level deportation data, obtained through Freedom of Information Act (FOIA) requests, I find that two center-left initiatives—sanctuary policies and President Obama's Priority Enforcement Program (PEP)—reduced deportations and prioritized by criminality.

Normatively, this Article offers a framework for balancing the considerations underlying prioritization decisions. First, I argue that the crime-control rationale for prioritizing deportations by criminality is weak. The criminal justice system already punishes noncitizens for crimes; there is no good reason why noncitizens should be punished more than citizens convicted of the same crimes. Empirical evidence undermines the deterrence and incapacitation rationales for additional punishment, and the retributive rationales for additional punishment are weak. And to the extent that the criminal justice system achieves rehabilitation, those investments are wasted on noncitizens deported after their sentences.

Second, even if there were crime control reasons for prioritizing by criminality, those would need to be balanced against the immigration-policy rationales for prioritizing by ties to the United States (length of residence, family members, and other community ties). These rationales are strong: the costs of deportation, both to noncitizens and to the people with whom they have ties in the United States, increase with the strength of those ties. And prioritizing by ties—concentrating enforcement on recent entrants—might more effectively deter unlawful entry. Granted, information about criminal convictions might help improve admissions decisions retroactively, allowing the government to make more informed decisions about whom to permit to remain in the country. But that retroactive admissions rationale has the most force for recent entrants with weak ties for whom

5. Scholarship on the intersection of criminal and immigration law has typically focused on statutes—especially the collateral immigration consequences of crimes and the criminal consequences of immigration violations. *See infra* Part II. There are important exceptions. *See generally* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015) (focusing on prosecutorial discretion). Wadhia notes the troubling categorical prioritization of people convicted of crimes. *Id.* at 147. I build on her work to offer a full examination of the trade-off between dimensions of prioritization. Angélica Cházaro has also challenged the Executive dependence on criminality in enforcement. *See* Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 645, 661 (2016) (arguing, among other things, that efforts to prioritize enforcement by criminality actually widen the enforcement net and that noncitizens with criminal convictions should be protected from deportation). Although I share many of Cházaro's concerns about the harms of crime-based deportation, I make a distinct argument here: that prioritization has been successful in reducing deportations but that it necessarily involves trade-offs with other principles of prioritization.

deportation plausibly resembles a chance to reassess the initial admissions decision.

I therefore argue that the trade-off between these two dimensions is asymmetric: there may be good reasons to deport recent entrants with few ties and no criminal convictions (low criminality, weak ties), but there are not good reasons to deport people who have lived nearly their entire lives in the United States, even if they have committed heinous crimes (high criminality, strong ties).[6] Once a noncitizen has lived in the United States for many years and has a family here, deportation after a criminal conviction operates less as a selection mechanism for admissions than as a mechanism of social control, imposing a more demanding code of conduct for noncitizen residents than for citizens.

The wisdom of prioritizing by criminality depends in part on facts. If criminal convictions were associated with weak ties, then prioritizing by criminality might incidentally prioritize by ties. We lack these facts. United States Immigration and Customs Enforcement (ICE) does not make public, and may not systematically collect, reliable information on length of residence and family ties to the United States. The limited data that exist suggest that the trade-off is a sharp one: among noncitizens who have been deported, those with serious convictions have spent more time in the country than those with no criminal record.[7]

Prioritizing by ties could—but need not—help reduce the level of enforcement. On the one hand, just as scholars of criminal law increasingly recognize that ending mass incarceration requires reducing prison admissions not only for drug offenses but also for violent crimes,[8] scholars of immigration law should also recognize that reducing deportations further requires protecting noncitizens who have committed serious crimes. But the arguments here are not directed only toward those who favor less enforcement. Immigration hawks should also support prioritizing by ties. Granted, prioritizing by criminality may make each deportation cheaper because immigration officers can arrest noncitizens who are already behind bars. But prioritizing enforcement against recent entrants might more effectively deter unlawful entry even if fewer deportations result.

The difficult trade-offs in the internal administrative law of deportation are likely to persist. The balance between prioritizing by convictions and prioritizing by ties will remain important even if Congress passes new immigration

6. Although I use the word "criminality" throughout, I recognize that such a thing may not exist, and that criminal convictions are hardly a good measure of it. I continue to use the word, however, because my argument implies that *even if* convictions were a good measure of underlying criminality, prioritization on the basis of convictions would be difficult to defend.

7. As I explain in Section II.D, I do not draw any firm conclusions from the data because the ICE data record length of stay in fewer than one-third of all interior deportation cases. But the trade-off between prioritizing by criminality and prioritizing by ties is almost certainly a sharp one simply because of the degree of prioritization overall: unless the 1% of the noncitizen population with the most criminal history is also the 1% of that population with the weakest ties, the trade-off is a sharp one.

8. *See* John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 178 (2015) (explaining the relatively small role of drug convictions in the increasing U.S. prison population since the 1970s).

legislation. Soon after taking office, President Biden sent a bill to Congress that would remake the immigration system, offering a pathway to citizenship for most undocumented people in the United States.[9] If that bill, or a similar one, becomes law (which seems doubtful), the same problems of prioritization will continue to exist. The bill excludes people convicted of certain crimes from obtaining temporary (and eventually permanent) status;[10] the President will face a similar dilemma in deciding how to prioritize enforcement against those noncitizens.

This Article has three Parts. In Part I, I show that the interior-enforcement system prioritizes by criminality more effectively than scholars and advocates have thought, and that the two most effective attempts to reduce interior enforcement of the last decade—sanctuary policies and President Obama's 2014 PEP—caused large reductions in deportations and prioritized enforcement by criminality. In Part II, I consider the policy arguments that might inform the trade-off between prioritizing by criminality and prioritizing by ties to the United States. I conclude that the trade-off is asymmetric: there are better reasons to deport noncitizens with weak ties and no convictions than noncitizens with strong ties and serious convictions. The justifiability of the current set of priorities depends on facts that we lack, but there are nonetheless good reasons to believe that the trade-off between ties and criminality is a sharp one. Finally, in Part III, I draw on the literature on internal administrative law to describe possible policy solutions, and I consider implications for the study of immigration enforcement as a method of social control.

I. REDUCING DEPORTATIONS BY PRIORITIZING

This Part canvasses the empirical evidence and concludes that interior immigration enforcement effectively prioritizes by criminality: a criminal conviction makes deportation at least one hundred times more likely. And the two largest policy changes to reduce deportations in the past decade—federal enforcement priorities and sanctuary policies—sharpened this prioritization. This Part shows that each of those policy changes decreased deportations by roughly a third. These effects on deportations were larger than those of other salient policy changes during the same period, from Deferred Action for Childhood Arrivals (DACA) to the Trump Administration's efforts to control the immigration courts. And both policies worked by further prioritizing deportations by criminality.

9. *See* Press Release, White House, Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/ [https://perma.cc/3XZH-NNCM].

10. *Id.* (limiting the opportunity to apply for temporary legal status to noncitizens who "pass criminal and national security background checks").

A. IDENTIFYING THE INTERNAL ADMINISTRATIVE LAW OF DEPORTATION

The problem of prioritization is fundamentally one of internal administrative law[11] because there are no statutory or regulatory constraints on the Executive's decisions about which noncitizens, within the large pool of those who are likely removable, to arrest and attempt to deport. Lawmaking on priorities occurs through internal administrative law processes: guidance documents, internal management structures, and oversight mechanisms.[12] As Gillian Metzger and Kevin Stack have explained, such mechanisms are lawlike in the sense that they bind lower-level agency officials and that they offer notice of and reasons for agency action.[13]

Enforcement priorities determine who, of the 10.5–12 million undocumented people living in the United States, will be among the fewer than 100,000 deported from the interior of the country in any given year. The priorities can make this impact because the President has nearly limitless discretion to determine who is deported from the United States. As Adam Cox and Cristina Rodríguez have shown, a detailed statutory code governing immigration has given rise to what they call de facto delegation: the power that the President has, despite the complexities of the Immigration and Nationality Act,[14] to determine whom, within the large undocumented population, to deport.[15] And that power is only magnified by the discretion that the President has over whether to deport documented immigrants who have been convicted of crimes that might invalidate their immigration status.[16] The de facto delegation that Cox and Rodríguez identify makes possible the large impact of enforcement priorities.[17]

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11. *See* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1266 (2017). In fact, Metzger and Stack describe the Obama-Era deferred action policies as "paradigmatic examples of internal administrative law." *Id*. at 1241.

12. *See id*. at 1252–54.

13. *Id*. at 1257–58.

14. Ch. 477, 66 Stat. 163 (1952).

15. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009); *see also* Cox & Rodríguez, *supra* note 4, at 131 ("Importantly, this delegation of de facto screening authority comes not from specific statutory enactments, but emerges instead from the modern structure of immigration law as a whole."); ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 7–8 (2020) ("[P]aradoxically, Congress's ever-more-elaborate lawmaking has liberated the President and other executive branch officials, creating the conditions for presidential immigration law.").

16. Cox & Rodríguez, *supra* note 15, at 514–16.

17. In describing the impact of enforcement priorities, I am in debt to the many important articles and books that have analyzed the effect of Executive discretion on interior enforcement under Presidents Obama and Trump. Shoba Sivaprasad Wadhia followed her 2015 book on prosecutorial discretion with a book on how the Trump Administration used Executive discretion to change enforcement (although some of those changes, such as the failed attempt to end the DACA program, did not lead to many additional deportations). *See generally* SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP (2019). Michael Olivas offers a history of the DREAM Act and the DACA program. *See generally* MICHAEL A. OLIVAS, PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA (2020). César Cuauhtémoc García Hernández analyzes the rise of immigration detention both before and during the Trump Administration. *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION

The law constraining this delegated power is purely internal administrative law. No statute or regulation constrains ICE's decisions. Because the Immigration and Nationality Act is rife with provisions assigning immigration consequences to criminal convictions and criminal consequences to immigration violations, the lack of any statutory requirement for prioritizing by criminality might seem counterintuitive. Yet these crime-based provisions act not to require the prioritization by criminality but instead to broaden the group of potentially deportable noncitizens and, in some cases, to require detention after the decision to arrest.

In a series of laws passed between the 1980s and the early 2000s, Congress steadily expanded the role of criminality in determining who could enter and remain in the country.[18] There is now a large set of criminal convictions that make noncitizens inadmissible[19] or deportable[20] and that prevent noncitizens from obtaining immigration relief.[21] But these provisions do not mandate that the President *prioritize* enforcement against noncitizens who are deportable on the basis of a crime (as opposed to, say, inadmissible because they entered the country without inspection). In other words, these provisions make noncitizens convicted of crimes no more deportable or inadmissible than noncitizens who are deportable or inadmissible for noncriminal reasons.

Immigration detention provisions for noncitizens convicted of crimes similarly do not impinge on the President's power to prioritize. Congress directs that the Executive "shall" detain noncitizens convicted of certain crimes pending the outcome of their removal proceedings.[22] But that language has never been read to displace the Executive's presumptive prosecutorial discretion,[23] and no statute

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WITH LOCKING UP IMMIGRANTS (2019). Bill Ong Hing compares Trump Administration enforcement efforts with their historical forebears, concluding that President Trump has spread more fear in immigrant communities even when his policies were not unprecedented. *See generally* Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253 (2018). Catherine Y. Kim and Amy Semet evaluate the decisionmaking of immigration judges hired under the Trump Administration and conclude that their decisions are relatively similar to those of their colleagues. *See generally* Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579 (2020); Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 DUKE L.J. 1855 (2020).

18. For an account of this series of laws widening the scope of crime-based grounds for removal, see Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 382–84 (2006).

19. *See* 8 U.S.C. § 1182(a)(2)(A)(i).

20. *See id.* § 1227(a)(2)(A)(i).

21. *See id.* § 1229b(a)(3) (aggravated felony disqualifies lawful permanent resident from cancellation of removal); *id.* § 1229b(b)(1)(C) (referring to crimes that disqualify noncitizens who are not lawful permanent residents from cancellation of removal); *id.* § 1158(b)(2)(A)(ii), (B)(ii) (referring to crime-based exceptions to asylum eligibility).

22. *See id.* § 1226(c)(1).

23. This issue is currently being litigated in a challenge by the states of Texas and Louisiana to the Biden Administration's enforcement priorities. *See* Texas v. United States, No. 6:21-cv-00016, 2021 WL 3683913, at *1–2 (S.D. Tex. Aug. 19, 2021).

requires the Executive to initiate removal proceedings against noncitizens convicted of crimes.[24]

In sum, as Cox and Rodríguez have explained, there is no reasoned way to discern congressional enforcement priorities from the Immigration and Nationality Act.[25] Although criminal grounds of inadmissibility or deportability and crime-based mandatory detention certainly facilitate prioritization by criminality, the Executive remains free to make prioritization policy as a matter of internal administrative law.

This delegation means that ICE arrest decisions make up the law of deportation in practice.[26] An ICE officer's discretion over whether to arrest someone usually determines whether that person is deported—especially if that person has been convicted of a significant crime. Once ICE arrests someone, it rarely releases that person later in removal proceedings,[27] and noncitizens convicted of serious crimes are usually ineligible for a bond hearing before an immigration judge.[28] Detention then leads to deportation in the vast majority of cases, partly because noncitizens who are detained are less likely to find legal counsel.[29] Among noncitizens unable to obtain bond, perhaps nineteen out of twenty are deported.[30] The principle determining whom ICE arrests in the first place therefore makes up the law of deportation in practice. Federal enforcement priorities provide that principle: prioritization by criminality. The other likely principle—prioritization by

24. The Immigration and Nationality Act particularly protects the decision to "commence proceedings" from judicial review. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999) ("[8 U.S.C. § 1252(g)] applies only to three discrete actions that the Attorney General may take[, including] her 'decision or action' to '*commence* proceedings . . . .'"). Indeed, the Supreme Court recently acknowledged that the detention statute does not require ICE to take noncitizens convicted of crimes into immigration custody immediately upon their release from state or local custody. *See* Nielsen v. Preap, 139 S. Ct. 954, 965, 969–70 (2019). In *Nielsen*, the Court held that even noncitizens detained well after they were released from local custody were subject to mandatory detention under section 1226(c). *Id.* at 970.

25. Cox & Rodríguez, *supra* note 4, at 146.

26. For a discussion of the way that this process channels discretion to local police, see generally Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011). For an account of the causes and consequences of untrammeled police discretion, see generally BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION (2017).

27. *See* David K. Hausman, The Danger of Rigged Algorithms: Evidence from Immigration Detention Decisions 7 (June 30, 2021) (unpublished article), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3877470 [https://permacc/GZ9Y-XVN7.] (showing that the Trump Administration increased the rate at which ICE chose to maintain custody of noncitizens whom it had arrested from 90% to 93%).

28. *See* 8 U.S.C. § 1226(e) (making noncitizens convicted of certain crimes ineligible for a custody redetermination hearing before an immigration judge); *see also id.* § 1231(a) (governing detention in reinstatement of removal proceedings).

29. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 9, 32, 50 (2015) (showing that, between 2007 and 2012, only 2% of unrepresented detained respondents, and only 21% of represented detained respondents, avoided deportation in immigration court—and under 20% of detained respondents were represented). Assuming a 20% representation rate, which is likely higher than the actual current rate, these facts imply a deportation rate of more than 94%.

30. *See supra* note 29.

ties—has mattered little because ICE allows even minor criminal convictions to trump ties to the United States.[31]

Prioritization by criminality is built into the way that ICE makes arrests. The agency draws overwhelmingly from the pool of noncitizens whom local police have already arrested. From the beginning of Fiscal Year 2012 through March 2020, over 70% of ICE arrests occurred through transfers from local, state, or federal criminal custody, and that figure is likely an underestimate.[32] ICE relies heavily on this type of arrest because it is convenient: many local governments comply with ICE detainer requests, which ask jails and prisons, at their own expense, to continue to imprison noncitizens for forty-eight hours beyond when they would otherwise be released.[33] ICE's reliance on criminal arrests makes prioritization by criminality easy.

The result of this system is a high degree of prioritization by criminality. For example, during the period of the Obama PEP (November 2014 to November 2016), over 90% of deportations involved noncitizens convicted of at least a misdemeanor.[34] That meant a little under 60,000 crime-related deportations per year. Meanwhile, maybe one-half of 1% of undocumented people—somewhere around

31. The most direct evidence of ICE's failure to weigh community ties during the Obama Era comes from information on its detention decisions, where we know how the agency's risk-assessment software weighed ties and convictions. *See* Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. 789, 815 (2020). That software did allow ICE officers to record noncitizens' ties to the community in the United States—including time in the United States and family ties—and the software could have used that information to deprioritize people with strong ties to the United States. *Id*. But the presence of almost any criminal conviction automatically outweighed information about ties. The algorithm only recommended release when it determined that a noncitizen presented *both* a low flight risk *and* a low danger to the community. *Id*. at 804–33. And the software only considered information about ties in its evaluation of flight risk, meaning that for anyone deemed a medium or high public safety risk, ties to the United States were irrelevant. *Id*. Even minor convictions removed noncitizens from the low-public-safety-risk category and therefore meant certain detention and likely deportation. For example, during the first two years that the software was in place, a single driving under the influence (DUI) conviction rendered a person a medium safety risk, meaning that the software never recommended release for any person convicted of a DUI, regardless of the strength of that person's ties to the United States or the length of time that the person had lived here. *Id*. at 813.

32. U.S. Immigr. & Customs Enf't, Response to Oct. 3, 2018 FOIA Request by David K. Hausman (on file with author); *see also* David Hausman, *Replication Data for: The Unexamined Law of Deportation*, HARV. DATAVERSE, (Nov. 26, 2021), https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/SUB4MD [https://perma.cc/TMZ7-W8G4]. ICE's data do not group arrests by individual, and many ICE arrests outside jails and prisons involve rearresting noncitizens who were initially arrested at a jail or prison and who have been released pending a removal decision.

33. *See* IMMIGRANT LEGAL RES. CTR., ANNOTATED IMMIGRATION DETAINER (I-247A) (2021), https://www.ilrc.org/sites/default/files/resources/i-247a_new.pdf [https://perma.cc/Q6LV-B4HA].

34. Specifically, there were 127,301 deportations during this period: 69,056 involved noncitizens convicted of ICE Level One crimes (one aggravated felony or two felonies); 28,224 involved noncitizens convicted of Level Two crimes (one felony or three misdemeanors); and 20,636 involved noncitizens convicted of Level Three crimes (one or two misdemeanors). U.S. Immigr. & Customs Enf't, Response to Oct. 3, 2018 FOIA Request by David K. Hausman (on file with author); *see also* Hausman, *supra* note 32.

55,000—were incarcerated for crimes in 2017.[35] Together, these numbers suggest that most incarcerated noncitizens were deported. By contrast, ICE deported about 5,000 noncitizens without criminal convictions in each of these years, meaning that under one in a thousand of the around 10 million undocumented noncitizens without criminal convictions were deported.[36] These figures rely on survey data and are highly imprecise, but they suggest that being convicted of a crime made deportation hundreds of times more likely. Nor was prioritization by criminality only a feature of the late Obama Administration. Under the Trump Administration, the number of noncitizens without criminal convictions who were deported roughly quadrupled.[37] But even given that change, deportation likely remained at least one hundred times more common for noncitizens convicted of crimes than for those without convictions.[38] Recognizing this high degree of prioritization does not mean overlooking the human cost of deporting people without convictions; it just suggests that the cost of deporting people with convictions is an even larger part of the story.

Such a high degree of prioritization may seem surprising. Indeed, immigrants' rights advocates often criticize enforcement policy for not prioritizing *enough* by

35. This figure excludes civil immigration detention and incarceration for immigration-related crimes, though it may nonetheless be an overestimate because it may sweep in some institutionalized noncitizens not in criminal detention, such as those in mental institutions. Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants in 2017: Their Numbers, Demographics, and Countries of Origin*, CATO INST., (Mar. 4, 2019), https://www.cato.org/publications/immigration-research-policy-brief/criminal-immigrants-2017-their-numbers-demographics [https://perma.cc/N35Z-6P8S]. In addition, there were slightly over 50,000 legal immigrants incarcerated in 2017, some of whom were almost certainly deported. *Id.* As a result, the probability of deportation for undocumented noncitizens convicted of crimes was likely somewhere between one-half and one. That is a large range, but whatever the correct probability, it is far larger than the probability of deportation for an undocumented noncitizen not convicted of a crime.

36. From November 20, 2014, to November 20, 2016, there were 9,385 interior removals of noncitizens without criminal convictions. U.S. Immigr. & Customs Enf't, Response to Oct. 3, 2018 FOIA Request by David K. Hausman (on file with author). If approximately 5,000 undocumented noncitizens without criminal convictions were deported each year, and there were 10 million such noncitizens, the annual probability of deportation was 0.05%, or one in two thousand. This calculation is rough. For example, it does not account for the hundreds of thousands of noncitizens with old criminal convictions who are much less likely to be deported than those with new convictions because ICE cannot easily locate them in jails or prisons. *See* Muzzafar Chishti & Michelle Mittelstadt, *Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?*, MIGRATION POL'Y INST. (Nov. 2016), https://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal [https://perma.cc/TRF3-82UK]. Even including those older convictions, the basic point remains that a criminal conviction makes deportation dramatically more likely.

37. From November 20, 2014, to November 20, 2016, there were 9,385 interior removals of noncitizens without criminal convictions; from January 20, 2017, to January 20, 2019, there were 36,598 such removals. U.S. Immigr. & Customs Enf't, Response to Oct. 3, 2018 FOIA Request by David K. Hausman (on file with author).

38. With under 20,000 annual removals of noncitizens without criminal convictions, the chance of deportation for such noncitizens remained under two in a thousand. *Id.* Meanwhile, deportation remained more likely than not for noncitizens convicted of crimes: from January 20, 2017, to January 20, 2019, there were 135,257 deportations of noncitizens convicted of at least a misdemeanor, or close to 70,000 per year—almost certainly a majority of noncitizens who were incarcerated in this period. *Id.*

criminality.[39] These criticisms partly reflect a political equilibrium: for advocates who support lowering the level of enforcement, prioritization by criminality may seem like the only realistic policy option. But advocates have also underestimated the degree of prioritization in two ways. First, they have often lumped together interior and border deportations.[40] Border deportations occur through the patrol of the border rather than through local criminal arrests within the United States, so border arrests are less likely to involve noncitizens convicted of crimes. Second, scholars and advocates have also failed to consider the denominator: the large number of undocumented noncitizens present in the country, few of whom have committed any crime.[41] Evaluating prioritization by considering only deportations, and not the potentially removable population, understates the degree of prioritization. Isolating interior deportations and putting those deportations in the context of the undocumented population reveals that prioritization by criminality is the law of deportation.

In this Part, I evaluate the effects of two policies that prioritized deportations by criminality: Obama's PEP and local sanctuary policies. Although these policies overlapped in time, most local sanctuary policies took effect before the PEP did. I nonetheless begin by evaluating the PEP because previous Executive attempts to prioritize form the backdrop for local sanctuary policies.

B. THE PRIORITY ENFORCEMENT PROGRAM

This Section shows, empirically, that President Obama's 2014 PEP accomplished what it was intended to: it reduced interior deportations by requiring immigration officers to focus their efforts on people convicted of more serious crimes.

The PEP followed a series of less successful Obama Administration attempts to reduce deportations by preventing minor arrests from leading into the deportation pipeline. Prioritization began, under the Obama Administration, with informal efforts to deprioritize deportations of noncitizens without criminal convictions.[42] As I explain in another work, those efforts may have caused a

39. *See, e.g.*, *The End of Immigration Enforcement Priorities Under the Trump Administration*, AM. IMMIGR. COUNCIL (Mar. 7, 2018), https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration [https://perma.cc/SVR3-ZSMN].

40. *See, e.g.*, Chishti & Mittelstadt, *supra* note 36 (combining border and interior deportations to conclude, for example, that over 40% of deportations in Fiscal Year 2015 involved noncitizens without convictions); *Growth in ICE Detention Fueled by Immigrants with No Criminal Conviction*, TRAC IMMIGR. (Nov. 26, 2019), https://trac.syr.edu/immigration/reports/583/ [https://perma.cc/YF8U-SKZU] (not distinguishing between noncitizens detained at the border and those detained in the interior).

41. Even including minor crimes and counting crimes committed any time in the past, well under 10% of the undocumented population has a criminal conviction. *See* Chishti & Mittelstadt, *supra* note 36. And under 0.5% of the undocumented population was incarcerated in 2017. *See* Landgrave & Nowrasteh, *supra* note 35 (showing an incarceration rate of 397 per 100,000, excluding immigration detention and immigration-related criminal convictions).

42. *See, e.g.*, Anna Gorman, *Obama Sets the Priorities on Immigration*, L.A. TIMES (July 26, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-jul-26-na-obama-immigration26-story.html (describing the Obama Administration's efforts to prioritize noncitizens with criminal records and employers who hire undocumented workers).

decline in the number of deportations of people without convictions between 2009–2010, although isolating a causal effect is difficult.[43]

The Obama Administration's next significant step in prioritizing came in the form of the so-called Morton Memo.[44] That memorandum, issued by ICE Director John Morton in June 2011, directed the agency to consider a large range of factors before initiating enforcement actions (such as arrest, detention, and deportation).[45] Those factors included ties to the United States and the seriousness of criminal convictions, with an emphasis on public safety.[46] The Morton Memo did not immediately change the deportation rate, but it may have had an effect over time: over the next two years, the rate of deportations of people with little or no criminal history fell more quickly than the rate of deportations of people with serious convictions.[47]

Finally, in November 2014, the Obama Administration instituted a set of priorities whose effect I evaluate here—the so-called "Priority Enforcement Program."[48] The PEP created a new set of enforcement priorities that limited crime-based deportations to noncitizens convicted of a felony, a significant misdemeanor, or three misdemeanors.[49] The program used several supervisory mechanisms to enforce this new bright-line rule. First, the program banned the use of "detainers"—requests from ICE to jails and prisons to hold noncitizens for forty-eight hours beyond their release dates—for noncitizens who were arrested but not convicted.[50] Second, the program required the sign-off of an ICE field office

43. *See* David K. Hausman, President Trump and Immigration Law 37 (2020) (working paper) (on file with author).

44. Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All Field Office Dirs., All Special Agents in Charge, & All Chief Couns., U.S. Immigr. & Customs Enf't (June 17, 2011) [hereinafter Morton Memo], https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/72SN-ZT4J].

45. *Id*. at 4.

46. *See id*.; *see also* SHOBA SIVAPRASAD WADHIA, AM. IMMIGR. COUNCIL, THE MORTON MEMO AND PROSECUTORIAL DISCRETION: AN OVERVIEW 5–6 (2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Shoba_-_Prosecutorial_Discretion_072011_0.pdf [https://perma.cc/Q499-U2L6] (explaining that many of the factors in the Morton Memo were already standard prioritization considerations).

47. For a figure showing this trend, see *infra* Figure A2.

48. *Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/pep [https://perma.cc/P44Y-UR3E] (last updated Feb. 9, 2021).

49. *See id*. For a discussion of the enforcement policies the PEP builds upon, see Memorandum from Jeh Charles Johnson, Sec'y, DHS, to Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't, et al. 3–5 (Nov. 20, 2014) [hereinafter Johnson Memo], https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/MGC5-FW9L]. The memorandum defines a "significant misdemeanor" as

> an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence). . . .

Id. at 4 (footnote omitted).

50. *Priority Enforcement Program*, *supra* note 48.

director (a high-level manager) before enforcement against noncitizens without a qualifying conviction.[51] And finally, the memorandum directed ICE to collect data on the number of removals that did not comply with the bright-line rules it set out.[52]

I measure the impact of the PEP because it imposed the strictest prioritization of the Obama era, and it paired that strict prioritization with supervision to ensure that officers complied. I evaluate the program not only at its onset in late 2014 but also at its withdrawal in the first weeks of the Trump Administration, which former White House Press Secretary Sean Spicer described as "tak[ing] the shackles off ICE officers."[53]

Both the onset and the withdrawal of the PEP affected the trend in ICE interior arrests[54] and removals. Figure 1 shows interior ICE arrests over time. The number of monthly interior arrests looks similar in 2014 and 2017, with a dip in 2015 and 2016.[55] The timing of that dip matches the introduction of

51. *See* Johnson Memo, *supra* note 49, at 5. The memorandum also prioritized enforcement against noncitizens apprehended at the border, noncitizens recently ordered removed, and noncitizens who posed a threat to national security. *Id.* at 3–4.

52. *See id.* at 6.

53. Brian Molongoski, *ICE Director Homan Talks Immigration Enforcement, Public Relations*, POST-STAR (Mar. 2, 2017), https://poststar.com/news/local/ice-director-homan-talks-immigration-enforcement-public-relations/article_176095a0-b966-50e6-8d89-49a486edbc1b.html; *see also* Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (ordering withdrawal from PEP), *revoked by* Exec. Order No.13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021).

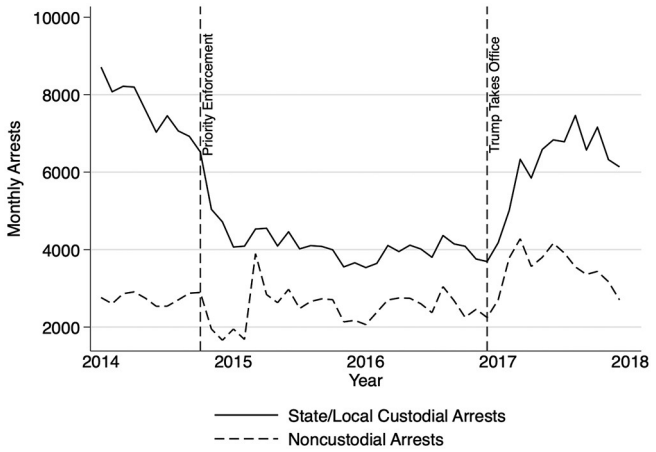
54. Interior arrests are arrests not at the border. Interior arrests, unlike border arrests, often involve noncitizens who have lived in the United States for a substantial period of time. In addition, a border arrest is much more likely for any given border crosser than an interior arrest is for any given undocumented person in the United States. Estimates of the chance of apprehension in crossing the border range from around 25% to over 70%, but either probability is an order of magnitude larger than the probability of being arrested and deported once in the United States—just over 1% of the undocumented population is deported from the interior in any given year. For estimates of the border apprehension rate, compare *Probability of Apprehension on an Undocumented Border Crossing*, MEXICAN MIGRATION PROJECT, https://mmp.opr.princeton.edu/results/008apprehension-en.aspx [https://perma.cc/C63R-FY3S] (last visited Mar. 14, 2022), with OFF. OF IMMIGR. STAT., DHS, EFFORTS BY DHS TO ESTIMATE SOUTHWEST BORDER SECURITY BETWEEN PORTS OF ENTRY 5, 8 (2017), https://www.dhs.gov/sites/default/files/publications/17_0914_estimates-of-border-security.pdf [https://perma.cc/45ZT-5ZCV]. Here, the estimate of the interior removal rate came from dividing interior arrests in Fiscal Year 2017 by estimates of the undocumented population. *Compare* GUILLERMO CANTOR, EMILY RYO & REED HUMPHREY, AM. IMMIGR. COUNCIL, CHANGING PATTERNS OF INTERIOR IMMIGRATION ENFORCEMENT IN THE UNITED STATES, 2016–2018, at 31 tbl.A1 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/changing_patterns_of_interior_immigration_enforcement_in_the_united_states.pdf [https://perma.cc/JY9H-BMPU] (reporting 155,548 ICE arrests in 2017), *with* Elaine Kamarck & Christine Stenglein, *How Many Undocumented Immigrants Are in the United States and Who Are They?*, BROOKINGS INST. (Nov. 12, 2019), https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/ [https://perma.cc/37AV-DFQE] (estimating undocumented population living in the United States to range from 10.5 million to 12 million).

55. *See infra* Figure 1.

the PEP and its elimination. As the solid line in Figure 1 shows, the dip was mostly driven by arrests in jails and prisons, many of which relied on the detainer requests that the PEP directly regulated. The number of arrests outside jails—noncustodial arrests—shows a less pronounced pattern.

These patterns in arrests match those in deportations: a swift decline at the introduction of the PEP, and a nearly matching rise at the beginning of the Trump Administration. Figure 2 shows that pattern for interior deportations: they decreased from over 7,000 per month to around 5,000 per month.[56] Figure 3 then confirms that the 2015–2016 dip reflected changes in prioritization: removals of people in ICE's most serious conviction category (those with two felony convictions or an aggravated felony conviction) declined gradually from 2014 and 2017, with no obvious effect of either the beginning or the end of the PEP.[57] Removals of people with no convictions, by contrast, dropped significantly with the PEP and rose again at the beginning of the Trump Administration.[58]

Figure 1: Interior ICE Arrests and the PEP[59]



56. *See infra* Figure 2.
57. *See infra* Figure 3.
58. *See infra* Figure 3.
59. U.S. Immigr. & Customs Enf't, Response to Oct. 3, 2018 FOIA Request by David K. Hausman (on file with author); *see also* Hausman, *supra* note 32.

Figure 2: Interior Deportations and the PEP[60]

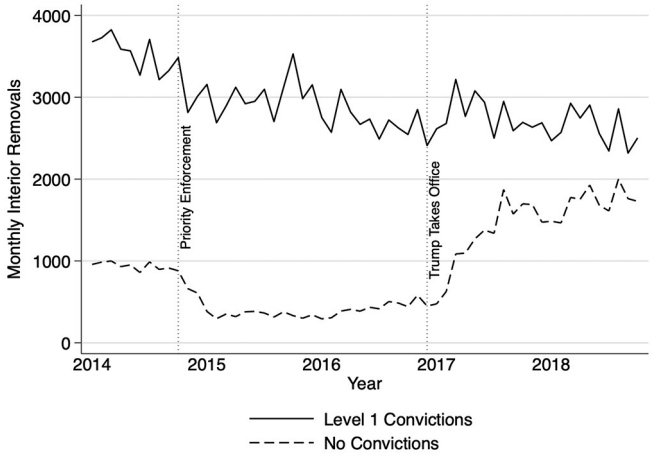
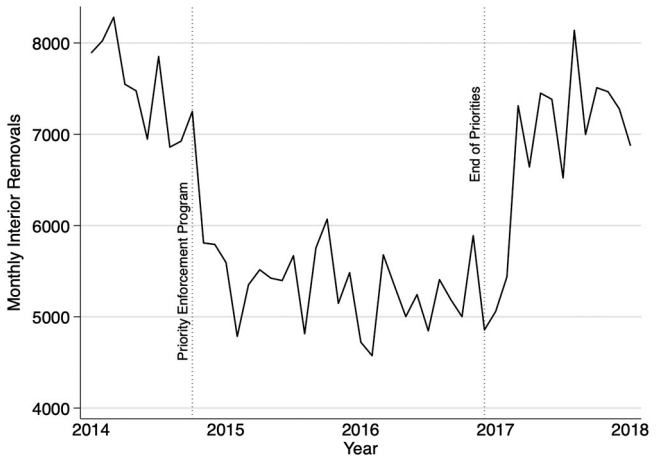


Figure 3: Interior Deportations, Criminal Convictions, and the PEP[61]



Together, Figures 1–3 show that interior enforcement decreased by about a quarter to a third when the PEP took effect. And Figure 3 shows that this decline reflected prioritization. Figure 3 also suggests that the Trump Administration not only reversed the PEP but also increased deportations of people without convictions to well beyond their 2014 levels, perhaps because the Administration reversed not only the PEP but also previous Obama Administration efforts to

60. U.S. Immigr. & Customs Enf't, Response to Oct. 3, 2018 FOIA Request by David K. Hausman (on file with author); *see also* Hausman, *supra* note 32.

61. U.S. Immigr. & Customs Enf't, Response to Oct. 3, 2018 FOIA Request by David K. Hausman (on file with author); *see also* Hausman, *supra* note 32.

prioritize.[62] Overall, under the Trump Administration, arrests and convictions only rose back to their 2014 levels likely because of the secular decline in removals of noncitizens with criminal convictions, which might reflect the aging of the undocumented population or other demographic factors.

These figures suggest a causal effect for two reasons. First, the level of enforcement changed swiftly both when the program took effect and when Trump discontinued it. And second, the accompanying changes in the composition of deportations were exactly those intended by the program. Prioritizing reduced deportations by preventing deportations of people with little or no criminal history.

C. SANCTUARY POLICIES

Sanctuary policies, like the PEP, reduce deportations by about a third—and, like enforcement priorities, those policies prioritize by criminality. This finding, previously published in the peer-reviewed companion to this Article,[63] underlines the centrality of prioritization by criminality. It might seem surprising that sanctuary policies, which decrease local cooperation with federal enforcement, dovetailed with federal priorities under the Obama Administration. But this prioritization effect follows naturally from two features of sanctuary policies. First, sanctuary policies make immigration arrests more costly, forcing ICE to prioritize. Second, some sanctuary policies explicitly incorporate prioritization by criminality, encouraging local officials to cooperate with immigration enforcement efforts against noncitizens convicted of certain crimes.

As a rich literature explains,[64] sanctuary policies work by reducing county jails' cooperation with federal immigration enforcement efforts in several distinct ways.

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62. Because interior removal numbers are critical to this Article, it is important to note a caveat about ICE's interior removals data. ICE mistakenly categorized certain border deportations as interior deportations in the period before 2014. *See* David K. Hausman, *Appendix to Sanctuary Policies Reduce Deportations Without Increasing Crime*, 117 PROC. NAT'L ACAD. SCIS. 27262, 5 (2020). As a result, I have recategorized some deportations that ICE considers interior deportations as border deportations. Specifically, where ICE's "removal program" field categorizes a deportation as an interior deportation, but the deportation is an expedited removal or voluntary return, I categorize it as a border removal. As a result of this adjustment, the numbers of interior deportations shown in the figures in this Article are lower than those in ICE reports and in the tool, maintained by the Transactional Records Access Clearinghouse, which tracks ICE removals. *See Historical Data: Immigration and Customs Enforcement Removals*, TRAC IMMIGR. (last updated Jan. 2016), https://trac.syr.edu/phptools/immigration/removehistory/ [https://perma.cc/7WYH-YK42]. I cannot be sure that this adjustment fully solves the problem, but as I explain in Appendix A, I am confident that the broad trends are correct. *See infra* Appendix A.

63. *See generally* David K. Hausman, *Sanctuary Policies Reduce Deportations Without Increasing Crime*, 117 PROC. NAT'L ACAD. SCIS. 27262 (2020).

64. For a comprehensive treatment of the diverse array of sanctuary policies, see generally Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703 (2018). For a discussion of the federalism principles underlying those policies, see generally Barbara E. Armacost, *"Sanctuary" Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197 and Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After*

A central feature of nearly all contemporary sanctuary policies is a refusal to comply with ICE detainer requests.[65] ICE generates these requests through the Secure Communities program, which integrates Federal Bureau of Investigation (FBI) and ICE databases: whenever a county jail takes fingerprints, those fingerprints are transmitted to the FBI, and the FBI automatically shares the information with ICE, which in turn performs database checks to determine whether the person is potentially deportable.[66]

If ICE seeks to deport the noncitizen, it typically issues a detainer request, asking the local authority to hold the noncitizen beyond that person's release time to facilitate a transfer to ICE custody. Sanctuary jurisdictions, by refusing to comply with detainer requests, require ICE officers to make arrests whenever noncitizens would be released in the normal course, rather than at ICE's convenience. Because a refusal to comply with detainer requests is common to nearly all sanctuary policies, I use this feature to categorize sanctuary and nonsanctuary jurisdictions in the empirical analysis below.

Many sanctuary policies also include a variety of other features. Some jurisdictions decline to notify ICE of noncitizens' release dates and times, requiring ICE to stake out a jail to make arrests.[67] Others require a judicial warrant before allowing ICE officers to enter jails and interrogate noncitizens.[68] And some jurisdictions prohibit local officials from asking inmates about their immigration status or birthplace.[69]

These policies, which attracted relatively little public attention when they were introduced (mostly during President Obama's second term), became a flashpoint during President Trump's campaign and term in office. The Trump

Secure Communities, 91 CHI.-KENT L. REV. 13 (2016). And for a discussion of the state-level backlash against such local policies, see generally Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, Essay, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837 (2019). For social science research on the causes and effects of sanctuary policies, see generally Jennifer Ridgley, *Cities of Refuge: Immigration Enforcement, Police, and the Insurgent Genealogies of Citizenship in U.S. Sanctuary Cities*, 29 URB. GEOGRAPHY 53 (2008) and Benjamin Gonzalez O'Brien, Loren Collingwood & Stephen Omar El-Khatib, *The Politics of Refuge: Sanctuary Cities, Crime, and Undocumented Immigration*, 55 URB. AFFS. REV. 3 (2019).

65. *See* Lasch et al., *supra* note 64, at 1741–43; *see also* KRSNA AVILA, KEMI BELLO, LENA GRABER & NIKKI MARQUEZ, IMMIGRANT LEGAL RES. CTR., THE RISE OF SANCTUARY: GETTING LOCAL OFFICERS OUT OF THE BUSINESS OF DEPORTATIONS IN THE TRUMP ERA 4 (2018), https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf [https://perma.cc/K69L-85RE] (describing common types of sanctuary policies).

66. *See Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/secure-communities [https://perma.cc/HG9H-67Z4] (last updated Feb. 9, 2021). Detainer requests issued through this process require no finding of probable cause of removability, and the sanctuary movement gained early momentum after civil rights groups obtained damages from sheriffs for improperly holding U.S. citizens on detainers. *See* Galarza v. Szalczyk, No. 10-cv-06815, 2012 WL 1080020, at *12–15 (E. D. Pa. Mar. 30, 2012), *rev'd in part on other grounds*, 745 F.3d 634 (3d Cir. 2014); Morales v. Chadbourne, 996 F. Supp. 2d 19, 33–35, 38–39 (D. R.I. 2014), *aff'd in part*, 793 F.3d 208 (1st Cir. 2015); Miranda-Olivares v. Clackamas County, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014).

67. *See* Lasch et al., *supra* note 64, at 1745–48.

68. *See id.* at 1743–45.

69. *See, e.g.*, AVILA ET AL., *supra* note 65, at 4.

Administration maintained that sanctuary policies harm public safety,[70] and the Administration launched an unsuccessful campaign to withhold federal funding from sanctuary jurisdictions and thereby persuade them to drop their policies.[71]

To measure the effect of sanctuary policies, I take advantage of the staggered timing of states' and counties' sanctuary policies, which took effect mostly from late 2013 to early 2015. I use a difference-in-differences design to estimate the effect of policy implementation. This research strategy compares the trend in deportations in sanctuary jurisdictions after they implemented sanctuary policies to the trend in jurisdictions that did not implement sanctuary policies at that same time. For the research design to produce an estimate of the causal effect of sanctuary policies, I must assume that, if a jurisdiction had not implemented a sanctuary policy, its deportations trend would have remained parallel to the actual trend in jurisdictions that had not, or had not yet, implemented sanctuary policies.

To implement the design, I rely on ICE deportations data from 2010 to 2015, and I collect information on the onset dates of sanctuary policies (if any) in 300 of the 312 largest U.S. counties by Latino population, which account for more than 80% of ICE deportations following local arrests during this period. In the peer-reviewed companion to this Article, I describe the research design and data in more detail.[72] Here, I present the results more briefly.

I find that sanctuary policies reduced deportations by about a third. Sanctuary policies also caused ICE to prioritize more by criminality: sanctuary policies reduced deportations of people without convictions by about half but had no measurable effect on deportations of people with violent convictions.

Figure 4 shows these results.[73] The results in Figure 4 come from event-study regressions. These regressions set the month of policy implementation for each jurisdiction at zero and estimate the change in deportations relative to that date, holding constant general changes over time (by including month fixed effects in the regression). In the months before month zero (the month of implementation), the design tests whether jurisdictions that were about to implement sanctuary policies were on a trend different from the overall trend. Figure 4 suggests that

70. *See, e.g.*, Jeff Sessions, Att'y Gen., U.S. Dep't of Just., Remarks on Sanctuary Jurisdictions, (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions [https://perma.cc/5E8Q-9DN9] ("The American people are justifiably angry. They know that when cities and states refuse to help enforce immigration laws, our nation is less safe.").

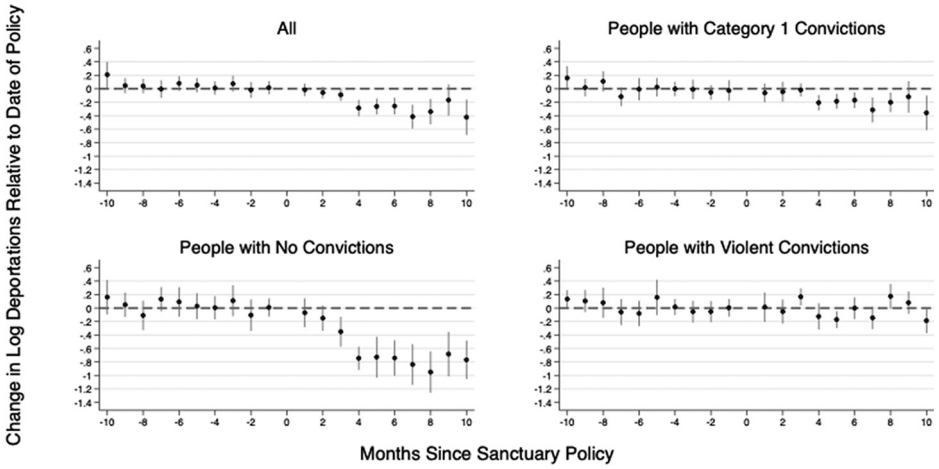
71. The Administration initially attempted to withdraw all funding from sanctuary jurisdictions, but that attempt was quickly enjoined. *See* County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017) (granting preliminary injunction); *see also* County of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1201 (N.D. Cal. 2017) (granting summary judgment and permanent injunction), *aff'd in part, vacated in part, remanded sub nom.* City & County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018). The Administration later attempted to withdraw criminal-justice-related funding from sanctuary jurisdictions. That second attempt failed in most but not all of the circuits, and the Trump Administration left office before the dispute reached the Supreme Court. *See* City of Philadelphia v. Att'y Gen., 916 F.3d 276, 285 (3d Cir. 2019); City of Chicago v. Sessions, 888 F.3d 272, 293 (7th Cir. 2018); City of Los Angeles v. Barr, 941 F.3d 931, 945 (9th Cir. 2019). *But see* New York v. DOJ, 951 F.3d 84, 102–04, 123–24 (2d Cir. 2020) (disagreeing with other circuits to uphold funding conditions).

72. *See generally* Hausman, *supra* note 63.

73. *See infra* Figure 4.

sanctuary-jurisdictions-to-be matched the overall trend until they implemented their sanctuary policies, when deportations began to decrease. The top left panel shows that sanctuary policies reduced deportations by about a third, and the other three panels show that those policies prioritized by convictions, with the largest effect on people without convictions and no effect on people with violent convictions.[74]

Figure 4: Sanctuary Policies Reduce Deportations and Prioritize by Criminality[75]



In sum, sanctuary policies and enforcement priorities had similar effects: sanctuary policies reduced deportations by about a third in the counties that adopted them, and sanctuary policies promoted prioritization by criminality.[76] In absolute terms, sanctuary policies prevented more deportations of people convicted of crimes than of people without convictions—simply because the initial pool of noncitizens arrested by police included mostly people with convictions. But in relative terms, sanctuary policies prioritized by criminality, reducing the probability of deportation more for noncitizens with convictions than for those without. Just as the PEP made the process of issuing a detainer more difficult for ICE

74. These results come from negative binomial count regressions, using an unbalanced panel of 18,299 county-months from 2010 to 2015. The coefficients for -10 and 10 months include all previous and subsequent months. The event study results include jurisdictions that never implemented sanctuary policies; their relative month indicators are set to 0, so they only contribute to the estimation of the month fixed effects. In the Appendix to the companion peer-reviewed piece, I show a variety of robustness checks, including results from balanced panels (excluding jurisdictions that never adopted policies) and results using linear regression with logged dependent variable. The results remain similar. *See generally* Hausman, *supra* note 62.

75. This Figure reproduces Fig. 2 from Hausman, *supra* note 63, at 27263.

76. Note that most sanctuary policies took effect before the PEP, and that program might have had an even larger effect had sanctuary policies not partly anticipated it.

officers, so too did sanctuary policies. Sanctuary policies changed incentives to prioritize in two complementary ways. First, by making immigration arrests more costly, sanctuary policies reduced the total number of such arrests, forcing ICE to apply its existing priorities to a smaller pool of possible deportations. Second, many sanctuary policies included carve-outs allowing county jails to honor detainers and provide notifications in cases involving more serious criminal convictions.[77] Both aspects of sanctuary policies, much like the PEP's requirement that officers seek permission before initiating enforcement outside the priorities,[78] functioned to shape the actual norms that lower-level officials followed.

Although most sanctuary policies went further than the PEP, the policies eventually overlapped in part—and in the sanctuary companion piece to this Article, I find that sanctuary policies had a larger impact earlier in time, before the PEP took effect.[79] Although I cannot quantify the relationship between federal priorities and local sanctuary policies, sanctuary policies had a larger effect before the PEP took effect, suggesting that the programs were at least partly substitutes.[80]

These effects of prioritization are not only large but also larger than the effects of other prominent enforcement policy changes during the same period.[81] As a simple back-of-the-envelope comparison, I estimate that sanctuary policies prevented slightly under 1,000 deportations a month in 2014 and 2015,[82] and that the introduction of the PEP prevented 1,500–2,000 deportations a month.[83] By contrast, the Trump Administration's elimination of administrative closure in the immigration courts—a dramatic change that prevented many noncitizens from pursuing collateral relief—likely caused only an additional 250–500 deportation

77. For example, California permits cooperation in cases involving convictions for certain crimes. *See, e.g.*, CAL. GOV'T CODE § 7282.5(a) (2021).

78. *See* Johnson Memo, *supra* note 49, at 5.

79. *See* Hausman, *supra* note 62, at 14.

80. On the one hand, one would expect the PEP to have a larger effect than sanctuary policies because the federal government remains free to take custody of noncitizens even when local jails do not cooperate to hold those noncitizens longer or notify the government of the noncitizens' release date and time. On the other hand, many sanctuary policies protect noncitizens convicted of at least some crimes, whereas the PEP was most effective at protecting noncitizens without criminal convictions (because ICE could no longer lodge detainers against those noncitizens). *See supra* note 50 and accompanying text.

81. I exclude from comparison the large increase and subsequent decrease in deportations that followed the introduction of the Secure Communities program. As I explain in another work, the enormous decline in deportations from 2011 to 2014 likely mostly reflected diminishing returns to the Secure Communities program, although it may also have partly reflected prioritization under the Morton Memo and informal, local resistance to Secure Communities. *See* Hausman, *supra* note 62, at 3; *see also* Alberto Ciancio & Camilo García-Jimeno, *The Political Economy of Immigration Enforcement: Conflict and Cooperation Under Federalism* 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25766, 2019) (evaluating the role of federal policy and local resistance in deportation patterns). Diminishing returns were not the result of any policy change, and the Morton memo and local resistance both helped impose the prioritization that, I argue, has been the internal administrative law of deportation under Democratic Administrations.

82. *See* Hausman, *supra* note 63, at 27264 (estimating that sanctuary policies prevented 22,300 deportations from the end of 2013 to 2015). Note that this is an underestimate, because the data on large counties in that article accounted for only about four-fifths of all deportations. *See id.* at 27263.

83. *See supra* Figure 2 (showing a decline from about 7,000 to 5,000 monthly interior deportations).

orders per month, many of which may not result in actual removal from the country.[84]

Even the DACA program did not have nearly as large an effect on deportations as either sanctuary policies or enforcement priorities.[85] The DACA program only applied to noncitizens who were already not priorities for deportation; any noncitizen with even a single significant misdemeanor was ineligible.[86] DACA may have prevented some ICE officers from ignoring enforcement priorities.[87] But assuming generously that DACA recipients made up about one-tenth of the population subject to removal (there are about 800,000 DACA recipients[88] and 10.5 to 12 million undocumented people[89] in the United States), then DACA may have prevented about one-tenth of the 5,000 monthly interior deportations of people with minor (ICE Level Three) convictions or no convictions—about 500 deportations per month in 2012, about half the number of deportations prevented by sanctuary and a quarter to a third the number of deportations prevented by the PEP. Prioritization—imposed federally and locally—was the most significant driver of reduced interior deportations over the last decade.

II. PRIORITIZING ALONG TWO DIMENSIONS

In this Part, I argue that Executive priorities allocating immigration enforcement by criminality give rise to sharp trade-offs and are only justifiable under limited circumstances. This argument subjects the most important legal principle governing deportation to overdue scrutiny. Although scholars have noted that deportations following criminal convictions impose disproportionate harm on noncitizens with strong ties to the United States,[90] this Article is the first to

84. *See* Matter of Castro-Tum, __ Op. Att'y Gen. __, 27 I&N Dec. 271, 271–72 (2018) (interim decision no. 3926); David K. Hausman, Daniel E. Ho, Mark S. Krass & Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection and Precedential Rulemaking*, 40 J.L. ECON. & ORG. (forthcoming 2024) (manuscript at 28–29), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830897.

85. Nevertheless, DACA had important independent effects through its grant of work permits and relative security from deportation.

86. Memorandum from Janet Napolitano, Sec'y, DHS, to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. 1 (June 15, 2012) [hereinafter Napolitano Memo], https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/CJ4M-P4CL].

87. For an account of DACA as a way of binding recalcitrant ICE officers, see Motomura, *supra* note 4, at 20–28.

88. *See* López & Krogstad, *supra* note 4.

89. *See* Kamarck & Stenglein, *supra* note 54.

90. *See* Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 708 (2015) (offering a compelling discussion of the lack of equitable balancing in enforcement decisions, but noting that "[t]his Article does not take a position here regarding *how* the federal government should evaluate the equities in cases involving noncitizens convicted of, or arrested for, crimes"); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1732–40 (2009) (suggesting the imposition of graduated immigration sanctions depending on the severity of the criminal conviction and other factors, including ties to the United States); Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1748–49 (2021) (describing the role of arrests in jails in leading to enforcement against noncitizens with strong ties to the United States).

consider in detail how a reasonable system of prioritization might balance criminality and ties.[91] Critically, I distinguish between crime-control rationales for deportation, which must explain why noncitizens should be punished more than citizens, and immigration-policy rationales, which must explain why one set of removable noncitizens should be deported before another.[92]

Any principle of prioritization is likely both to reduce enforcement[93] and make enforcement more predictable. The level of enforcement therefore depends on the *extent* of prioritization, not the principle of prioritization. Yet views about the optimal level of enforcement have nonetheless formed the background for the political debate over prioritization. Traditionally, liberals have sought more prioritization while conservatives have favored less.[94] The Obama Administration publicized its efforts to limit deportations of people without convictions,[95] and advocacy organizations criticized both the Obama and Trump Administrations for deporting many people without convictions.[96] This was, however, primarily a proxy battle over how many people should be deported—a question that is separate from the question of whether criminality or ties should drive prioritization.

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91. When scholars have advocated prioritizing deportations by ties to the United States, they have most often done so through the prism of deferred action programs. *See generally* Cox & Rodríguez, *supra* note 4 (arguing, in my view correctly, that the Deferred Action for Parents of Americans (DAPA) was not only legal but also a desirable form of institutionalization of enforcement discretion). Although such programs help noncitizens with strong ties to the United States obtain work permits and feel a sense of security, they do little to help the Administration navigate the trade-off between pursuing noncitizens with criminal convictions and those with few ties to the United States. Both DACA, which remains in effect, and DAPA, which never took effect, include carve-outs for noncitizens convicted of certain crimes. *See* Napolitano Memo, *supra* note 86; *see also* Memorandum from Jeh Charles Johnson, Sec'y, DHS, to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., et al. 4 (Nov. 20, 2014) [hereinafter Johnson Memo on Prosecutorial Discretion], https://web.archive.org/web/20141124181906/http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [https://perma.cc/REN2-GMQ8] (directing USCIS to establish the DAPA program).

92. This distinction is an established one in discussing the line between criminal and immigration law. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1296 (2010) ("The distinction between the functions of criminal law and immigration law is thus roughly drawn between punishment and screening.").

93. In theory, one might prioritize more without reducing enforcement, but given the same level of resources, that outcome is unlikely. That is because identifying noncitizens, whether in jails or at large, requires resources, and choosing a smaller subset to pursue (that is, prioritizing) means declining to pursue some of the identified noncitizens.

94. *See supra* text accompanying note 53 (describing the Trump Administration's emphatic rescission of enforcement priorities).

95. *See, e.g.*, OFF. OF ENF'T & REMOVAL OPERATIONS, U.S. IMMIGR. & CUSTOMS ENF'T, PRIORITY ENFORCEMENT PROGRAM (PEP) 1, https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf [https://perma.cc/3ZLX-X8FZ] (last visited Mar. 16, 2022) ("PEP focuses on targeting individuals convicted of significant criminal offenses or who otherwise pose a threat to public safety.")

96. *See, e.g.*, *ACLU Statement on Secure Communities*, ACLU, https://www.aclu.org/other/aclu-statement-secure-communities [https://perma.cc/FGA8-PJR9] (last visited Mar. 16, 2022) ("Despite the program's professed goal of targeting 'the most dangerous criminal aliens' for removal, a very large percentage of the individuals identified and deported under S-Comm have been minor offenders and people with no criminal charges or convictions.").

Prioritizing also increases predictability. When well under 1% of the undocumented population is deported in any given year, predictability has rule-of-law benefits. Recent scholarship has examined the ills of untrammeled Executive enforcement discretion;[97] prioritization counters those ills by providing a principle for decisionmaking. And prioritization has the practical effect of allowing noncitizens to live with less fear of deportation. As Asad L. Asad has shown, because deportation typically only occurs after arrest by police, undocumented people may seek out contact with other arms of the state, obtaining benefits for their children and paying taxes.[98]

Both effects of prioritization result from nearly any prioritization principle. In an extreme example, suppose that ICE deported only people with January birthdays. Although the substance of that policy would be arbitrary, the policy nonetheless would decrease the total number of people eligible for deportation (that is, reduce the level of enforcement) and allow noncitizens with birthdays not in January to live without fear of deportation (that is, increase predictability).

What principle(s) should drive prioritization? Part I showed that both local sanctuary policies and federal enforcement priorities cause criminality to drive enforcement. But ties to the United States also offer an accepted principle for prioritizing—albeit one that has been less commonly measured and enforced. This Part asks how to approach the trade-offs between prioritizing by criminal convictions and prioritizing by ties to the United States. I begin by arguing that the crime-control arguments for crime-based deportation are weak. I then consider the immigration-policy rationales for prioritizing by criminality and prioritizing by ties. I conclude that there is a sharp trade-off between the two principles, and prioritization by criminality is only rarely justifiable.

A. PRIORITIZATION AND CRIMINAL PUNISHMENT

Formally, citizens and noncitizens serve the same criminal sentence for the same crime,[99] but noncitizens, unlike citizens, may also be deported after completing their sentences. Although deportation is formally a civil sanction, it might nonetheless be justifiable as an additional criminal punishment—but I conclude

97. *See, e.g.*, Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 31 (2017) (arguing that crackdowns may "stretch statutory authority to the breaking point, threaten to infringe on constitutional values, generate unjust or absurd results, and serve the venal interests of the law enforcer at the expense of the interests of the public").

98. *See* ASAD L. ASAD, DOCUMENTED: LATINO IMMIGRANT FAMILIES MANAGING LAW, LIFE, AND PUNISHMENT (forthcoming) (manuscript at 68) (on file with author).

99. In fact, noncitizens serve systematically longer sentences for the same crime, at least in the federal legal system, meaning that deportation is only one of two ways that noncitizens are punished more severely than citizens in practice. *See* Michael T. Light, *The New Face of Legal Inequality: Noncitizens and the Long-Term Trends in Sentencing Disparities Across U.S. District Courts, 1992-2009*, 48 L. & SOC'Y REV. 447, 469 (2014); *see also* Eagly, *supra* note 92, at 1317–19 (detailing the sentencing discrepancy between citizen defendants and noncitizen defendants facing the same recommended sentence); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1156–90 (2013) (analyzing the enforcement approaches of Los Angeles County, California, Maricopa County, Arizona, and Harris County, Texas law enforcement toward noncitizens).

in this Section that the arguments for deportation as additional punishment are weak.[100] These arguments are not limited to prioritization; instead, the arguments here imply that deportation is not justified as additional criminal punishment at all.[101]

Although deportation is formally a civil consequence of a criminal conviction, the standard policy rationale for crime-based deportations is that such deportations protect the public. ICE puts public safety at the center of its mission: it aims "to protect America from the cross-border crime and illegal immigration that threaten national security and public safety."[102] ICE's mission statement is at odds with the formal legal purpose of deportation. It remains black letter law that "[w]hile the consequences of deportation may assuredly be grave, they are not imposed as a punishment."[103] As a formal matter, deportation is not intended as a punishment for crime; deportation, as a civil sanction, does not aim to deter crime, to incapacitate or rehabilitate those convicted of crimes, and certainly is not imposed in retribution for the commission of crimes.[104]

The formal separation of deportation and criminal punishment nonetheless leaves the Executive free to impose deportation as de facto punishment where deportation is available as a civil sanction. In this Section, I do not take a position on the constitutionality of imposing deportation as de facto punishment. Instead, I ask whether that use of deportation is justifiable as a matter of policy. The answer might seem obvious; even a prominent critic of crime-based deportation concedes that "[l]ocally, and in the short term, deportation as a crime control strategy is efficient."[105] But asking whether deportations of noncitizens reduce crime is asking the wrong question. Increasing punishments for *citizens* would also likely reduce crime, at least in the short run and outside prisons. The correct question is: Why should noncitizens be punished *more than* citizens for the same crimes? The answers are unsatisfying.

A first answer might be that the government should deport noncitizens convicted of crimes just because it can do so: deportable noncitizens have no right to remain in the country, whereas the Constitution prohibits exiling citizens.[106] But

100. These arguments partly resemble arguments that proportionality principles should bar certain deportations under the Due Process Clause. *See, e.g.*, Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 424 (2012). But unlike those arguments, I suggest that there is no legitimate crime-control justification for deportation, and I develop policy considerations for the Executive rather than doctrinal considerations under the Due Process Clause.

101. As the next Section explains, however, there are independent immigration policy reasons for deportations following criminal convictions. *See infra* Section II.B.

102. U.S. IMMIGR. AND CUSTOMS ENF'T, https://www.ice.gov/ [https://perma.cc/4QAE-8RZH] (last visited Mar. 16, 2022).

103. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999).

104. On the other hand, there is little doubt that many of the legislators who voted for laws increasing the immigration consequences of crimes intended those consequences as punishment.

105. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1893 (2000) (footnote omitted).

106. *See* Trop v. Dulles, 356 U.S. 86, 92 (1958). One possible response to the government's pursuit of deportations of people with convictions is to accept that those deportations have a criminal purpose and to argue that that criminal purpose of deportation requires the due process protections that are

this argument rests on the faulty premise that legislatures should impose the maximum constitutionally allowable punishment for all crimes. Most punishments would not be more severe in the absence of constitutional constraints; instead, legislatures reach (imperfect) conclusions about what level of punishment is sufficient for retribution, deterrence, incapacitation, and rehabilitation in light of costs. That the government can punish noncitizens more severely than citizens is not a reason that it should do so.

Nor is the potentially low administrative cost of deportation a convincing reason to impose that additional punishment on noncitizens. If deportation were justifiable purely as a low-cost method of additional punishment, that would imply that legislatures should choose to impose additional punishment on citizens as well if the costs of such punishment could be made comparable to the costs of deportation. It is far from obvious that the social cost of deportation (as opposed to its administrative cost) is lower than the social cost of additional years in prison, but even assuming a cost advantage for deportation, this argument is unconvincing because cost is only one of many considerations in setting punishments for crime. Cost does not plausibly, on its own, justify the vast disparity between citizens and noncitizens in punishment that deportation creates.[107]

Instead, a sound crime-related or public-safety argument for prioritizing deportations by convictions must not only show that there may be *some* crime-related benefit from punishing noncitizens more harshly but also explain why such harsher punishment is merited for noncitizens and not citizens. None of the

standard in criminal cases. Daniel Kanstroom has argued persuasively for such protections, and my argument is consistent with his, although my focus is on Executive prioritization rather than judicial safeguards. *See* Kanstroom, *supra* note 105, at 1935; Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1475 (2011).

107. All of this assumes that the criminal system operates in the way that it is formally designed, in which deportation occurs in addition to, rather than instead of, criminal punishment. One might imagine, by contrast, that plea bargaining occurs in the shadow of potential deportation, and that noncitizens receive shorter sentences as a result. The empirical evidence here is mixed: in the federal system, one study found that noncitizens receive *longer* sentences than their citizen peers, but a study of one state found the opposite pattern. *Compare* Michael T. Light, Michael Massoglia & Ryan D. King, *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 AM. SOCIO. REV. 825, 826, 837 (2014) (finding longer sentences for noncitizens in federal court), *and* Doyun Koo, Ben Feldmeyer & Bryan Holmes, *Citizenship and Sentencing: Assessing Intersectionality in National Origin and Legal Migration Status on Federal Sentencing Outcomes*, 59 J. RSCH. CRIME & DELINQ. 203, 228 (2022) (finding higher incarceration rates for noncitizens in federal court but inconsistent evidence on sentence length), *with* Erin A. Orrick, Kiersten Compofelice & Alex R. Piquero, *Assessing the Impact of Deportable Status on Sentencing Outcomes in a Sample of State Prisoners*, 39 J. CRIME & JUST. 28, 36–37 (2016) (finding shorter sentences for noncitizens in one "large southern state"). If noncitizens received systematically shorter sentences, deportation would operate as a substitute for, rather than a supplement to, other criminal punishment. In that case, the status quo might actually privilege noncitizens over citizens in criminal proceedings, raising distinct equality concerns. But to the extent that plea bargaining does reduce the punishment disparity between noncitizens and citizens in this way, it does so inconsistently in a way that depends on individual prosecutors' preferences. Prioritizing by ties, by contrast, would help restore equal treatment systematically by making deportation less likely and requiring plea bargaining to occur against an even backdrop. In any event, in light of the mixed empirical evidence, it seems safest to assume that the system operates as it claims to.

standard rationales for criminal punishment support harsher punishment of noncitizens than of citizens for the same crimes.

1. Retribution

The retributive arguments for punishing noncitizens more harshly than citizens are weak. First, one might argue that deportation acts like a recidivism sentencing enhancement. Just as people previously convicted of crimes receive an enhanced sentence for their second offense, noncitizens convicted of crimes might receive a sentence enhancement—deportation—for their lack of citizenship. The U.S. Sentencing Guidelines Manual provides that "[a] defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."[108] The arguments for recidivism enhancements are themselves doubtful, for reasons described in Christopher Lewis's recent work.[109]

But even accepting the view that subsequent crimes should be punished more than initial offenses, the analogy to crime-based deportation is flawed. For noncitizens who are in the United States lawfully until they become deportable after a criminal conviction, the analogy to a second criminal offense makes no sense: being a noncitizen is neither a crime nor a civil offense. For noncitizens who entered without authorization (a minor misdemeanor that is rarely prosecuted[110]), the analogy might have some surface appeal. But if the noncitizen had been convicted of that misdemeanor, that second conviction would lead to a recidivism sentencing enhancement independent of deportation, so criminal sentencing already accounts for the concern about recidivism.[111]

Perhaps there is another retributive rationale for crime-based deportation that depends on the probationary status of noncitizens. Just as noncitizens are not entitled to the same government benefits as citizens, this argument might go, they are also not entitled to the same solicitude as citizens in criminal punishment. The problem with this rationale is that it depends on the premise that formal citizenship captures the degree of solicitude that the government owes people in the United States. Formal legal citizenship captures only one, and far from the most accepted, possible understanding of citizenship; many theorists instead to emphasize affiliation or social membership, which I refer to broadly as ties to the United

108. U.S. SENT'G GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2016).

109. *See* Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L.J. 1209, 1215–40 (2021); *see also* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1151 (2010).

110. *See* 8 U.S.C. § 1325(a) (prescribing maximum sentence of six months for first entry without inspection); *see also* Ms. L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133, 1139 (S.D. Cal. 2018) (describing Trump Administration's "zero tolerance" policy of prosecuting this misdemeanor to separate children from their parents).

111. One might respond that committing a crime as a deportable or inadmissible noncitizen should lead to prioritization for deportation because that crime makes the noncitizen doubly deportable: both the criminal conviction and the unlawful presence independently could lead to deportation. That argument goes to immigration policy (which I consider below) rather than to crime control.

States.[112] Prosecution itself may create such ties. As Emma Kaufman has argued, "the imposition of punishment brings a person into the political community such that one's status as an outsider cannot justify differential treatment."[113] Kaufman's point is particularly strong when imprisonment is part of the punishment, because imprisonment is, among other things, forced residence in the United States.

Even if there is some slight retributive reason for more severe punishment of noncitizens, that slight reason is hard to square with the large and undifferentiated punishment of deportation. And that reason must be weighed against another retributive argument that points in the opposite direction. Christopher Lewis has argued, in the context of recidivist sentencing enhancements, that because the many collateral consequences of criminal convictions narrow economic and other life opportunities, people already convicted of one crime face stronger incentives to commit further crimes—and because they face such incentives, the crimes that they commit manifest less ill-will and are less blameworthy.[114] Noncitizens who are unlawfully present, like people with criminal convictions, face narrower opportunities than citizens or lawfully present noncitizens: most important, they can often only find informal employment, and they are ineligible for many government benefits.[115]

Applying Lewis's argument in the deportation context, the crimes that noncitizens commit are, if anything, less blameworthy than similar crimes committed by citizens because noncitizens have fewer economic opportunities. One might object that unlawfully present noncitizens are themselves responsible for being in the United States without authorization, and that they are therefore responsible for resisting any additional incentives for crime that their unlawful presence creates. But, as Lewis explains, "[t]he burdens that the law attaches to different choices are in need of justification themselves."[116] For many undocumented

112. For a discussion of the many possible understandings of citizenship, see LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 17–36 (2006). I discuss the impact of ties for prioritization in more detail below, but an "immigration as affiliation" rationale for national belonging suggests that a retributive justification for punishing noncitizens more harshly becomes more attenuated as noncitizens' ties to the United States deepen. For an introduction to the affiliation rationale, see Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 376–77 (2012); see also SARAH SONG, IMMIGRATION AND DEMOCRACY 132–50 (2018) (discussing the rationales for considering family relationships in immigration). Motomura also considers an informal contract rationale for national membership, which might also conceivably ground a view that recent entrants are entitled to less solicitude. *Id.* at 374; *see also* Joseph H. Carens, *The Case for Amnesty: Time Erodes the State's Right to Deport*, BOS. REV. (June 27, 2012), https://bostonreview.net/forum/case-amnesty-joseph-carens [https://perma.cc/YGR3-B5NY] (developing the arguments for an individual regularization process for noncitizens who have spent a given amount of time in the United States). For a review of theoretical arguments justifying and undermining immigration restrictions, see generally Jonathan Seglow, *The Ethics of Immigration*, 3 POL. STUD. REV. 317 (2005).

113. Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1443 (2019).

114. Lewis, *supra* note 109, at 1240–55.

115. *See, e.g.*, ASAD, *supra* note 98 (manuscript at 68–75) (describing the ways that noncitizens navigate these limited opportunities).

116. Lewis, *supra* note 109, at 1260.

noncitizens—such as those who arrived in the United States as children—the burdens of informal work and lack of access to government benefits are difficult to justify in the first place. In other words, for many deportable noncitizens, immigration status should lessen rather than increase the presumptive punishment for crimes. It is unsurprising that, as far as I know, proponents of crime-based deportation have not advanced retribution as a rationale.

2. Deterrence and Incapacitation

Setting aside retribution, crime-based deportation might be justified on incapacitation and general deterrence grounds. The additional sanction of deportation might deter noncitizens from committing crimes, and it certainly incapacitates noncitizens by forcibly removing them from the United States. But the deterrence and incapacitation rationales fail to explain why noncitizens should be treated differently from citizens.

The key fact undermining the deterrence and incapacitation rationales is that noncitizens commit crimes at lower rates than citizens.[117] In a particularly convincing recent study, scholars used administrative data from Texas to show that undocumented noncitizens commit violent crimes at about half the rate of citizens and commit property crimes at less than one-fourth the rate of citizens.[118] Lawful permanent residents commit crimes at higher rates than undocumented noncitizens but at lower rates than citizens.[119] That study's results were consistent with the results of dozens of others on the more general relationship between immigration and crime; a recent review of fifty-one credible studies found a slight negative association between immigration and crime.[120]

One might respond that noncitizens' lower crime rates merely demonstrate the efficacy of deportation as a method of deterrence and incapacitation: perhaps deportation is a particularly effective way to prevent recidivism.[121] But that response is inconsistent with the evidence that immigration enforcement has little or no effect on crime.[122] For example, I show that there is no evidence that

117. Others have pointed to the irrationality of focusing criminal enforcement on noncitizens, who commit crimes at lower rates; I add to this point by emphasizing the trade-off between prioritization by ties and prioritization by convictions. *See* David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 201–02 (2012).

118. *See* Michael T. Light, Jingying He & Jason P. Robey, *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas*, 117 PROC. NAT'L ACAD. SCIS. 32340, 32340 (2020).

119. *See id*. at 32342 fig.1.

120. Graham C. Ousey & Charis E. Kubrin, *Immigration and Crime: Assessing a Contentious Issue*, 1 ANN. REV. CRIMINOLOGY 63, 64–65 (2018).

121. I know of no evidence on noncitizens' recidivism rates, and it may be impossible to obtain, given that most noncitizens convicted of crimes are deported, and measuring recidivism among those who are not deported would not be informative because that group is likely different from the group of noncitizens who were in fact deported.

122. One response to this point might be that even if immigration enforcement does not affect the crime rate on average, deportation might be an important tool to make available to law enforcement officers in cases where they particularly fear recidivism. Deportation might be an important "lever" for law enforcement officers to have at their disposal. Sklansky, *supra* note 117, at 181 & n.65 (describing

sanctuary policies increase crime, even though they do reduce deportations, including many deportations of people with significant (but not violent) convictions.[123] And ramping up enforcement against noncitizens with criminal convictions also has little or no effect on crime. Thomas Miles and Adam Cox, for example, show that the rollout of Secure Communities, which led to a large increase in deportations of noncitizens convicted of crimes, had no effect on crime rates,[124] and two other studies by economists reach the same conclusion.[125] Even if these studies have missed some small deterrence and incapacitation effect of enforcement, such an effect could not explain why undocumented people commit crimes at *half* the rate that U.S. citizens do.

Finally, assuming (contrary to the evidence) that the low noncitizen crime rate does reflect deportation policy, it is unclear why that policy would aim to achieve a lower crime rate among noncitizens than among citizens. Perhaps the response is that deterrence and incapacitation are cheaper for noncitizens than for citizens. But that seems unlikely, given the high social costs of deportation and the doubtfulness of its explanatory role in the low noncitizen crime rate. And because there is no convincing retributive rationale to punish citizens and noncitizens differently, retributive or fairness concerns might prevent the government from imposing a draconian punishment just because it is cheap.

A final objection might be that this discussion of the relative cost of punishment omits a key difference between noncitizens and citizens: that citizens have a legal right to remain in the country, and the cost of deporting them is therefore categorically higher. This "rights-cost" objection, however, misses the mark in two respects. First, deportation is merely one form of incapacitation, and it may not be the cheapest form. For example, various forms of supervision, such as ankle bracelets, might similarly offer cheap incapacitation, even taking into account the rights cost of imposing the sanction. In other words, although *deportation* may have a lower rights cost for noncitizens than citizens, the availability of other types of incapacitation means that the overall cost, including the rights cost, of incapacitation is likely similar across citizens and noncitizens. Moreover, as Part I showed, legal rights are not the primary driver of patterns in deportations—prioritization plays that role.[126] Given the degree of underenforcement,

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the "'pulling levers' strategy of violence reduction"). But this argument implies only that deportation should be a sanction available for crimes, not that it should be consistently applied, as it is when enforcement prioritizes by criminality. Moreover, there are compelling rule-of-law and accountability objections to the pulling levers approach to law enforcement. *Id*. at 209–21.

123. *See* Hausman, *supra* note 63, at 27262.

124. *See* Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 956 fig.4 (2014).

125. Annie Laurie Hines & Giovanni Peri, IZA INST. LAB. ECON., IMMIGRANTS' DEPORTATIONS, LOCAL CRIME AND POLICE EFFECTIVENESS 3–4, 6 (2019), https://ftp.iza.org/dp12413.pdf [https://perma.cc/PJM7-GFS2]; Alberto Ciancio, The Impact of Immigration Policies on Local Enforcement, Crime and Policing Efficiency 5 (Apr. 1, 2017) (Ph.D. dissertation, University of Pennsylvania), https://repository.upenn.edu/cgi/viewcontent.cgi?article=4017&context=edissertations [https://perma.cc/93U2-LM6A].

126. *See supra* Part I.

however, deportation is extremely unlikely in the absence of a conviction, and the full social cost of deportation should be weighed against the benefits of additional deterrence and incapacitation. Put differently, given the strong pattern of prioritization, noncitizens who have not been convicted of a crime have, if not a right, then at least a strong reliance interest in remaining in the United States.

In sum, the standard rationales for punishment do not justify crime-based deportation as punishment.

B. PRIORITIZATION AND IMMIGRATION POLICY

Although crime-based deportations make little sense as a way of prioritizing criminal-justice resources, they might nonetheless be worth prioritizing for immigration-policy reasons. Indeed, there is a convincing immigration policy-rationale for prioritization by criminality—but an even stronger rationale for prioritization by ties to the United States. The difficult questions arise in the balancing of these two dimensions. In this Section, I argue that the relationship between the two dimensions should be asymmetric: as ties increase, convictions should receive less weight.

The standard immigration-policy (as opposed to crime-control) rationale for prioritizing deportations of people with convictions is that such deportations function as a type of ex post admissions screening.[127] When a person is convicted of a crime, that conviction offers information that would have been useful in the original decision about whether to admit the person. Prioritizing by criminality gives noncitizens a kind of probationary status in the United States, in which they can remain so long as they are not convicted of crimes. And such prioritization might also shape the incentives of noncitizens deciding whether to enter the country, deterring those who are likely to commit crimes.

Moreover, even accepting the argument above that there is little reason to spend additional resources punishing noncitizens for crimes, one might weigh the incidental public safety benefit of prioritizing enforcement by criminality. Such an incidental benefit is highly uncertain given the evidence that increased enforcement does not have a large crime-reduction effect and the additional possibilities that such enforcement undermines public safety by bolstering transnational criminal networks[128] and discouraging immigrants from reporting crime.[129] But reasonable minds might sift the available empirical evidence differently, and

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127. *See, e.g.*, Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 812 (2007).

128. *See generally* Maria Micaela Sviatschi, Spreading Gangs: Exporting US Criminal Capital to El Salvador (Nov. 9, 2021) (unpublished working paper), http://www.micaelasviatschi.com/wp-content/uploads/2021/11/making_agang25x10.pdf [https://perma.cc/N9HM-CJF9] (finding that deportations of noncitizens convicted of crimes led to the spread of criminal networks in Central America, eventually also increasing child migration to the United States).

129. *See* Ricardo D. Martínez-Schuldt & Daniel E. Martínez, *Immigrant Sanctuary Policies and Crime-Reporting Behavior: A Multilevel Analysis of Reports of Crime Victimization to Law Enforcement, 1980 to 2004*, 86 AM. SOCIO. REV. 154, 177 (2021) (finding that sanctuary policies make Latinos more likely to report violent crimes); CATALINA AMUEDO-DORANTES & MONICA DEZA, IZA INST. LAB. ECON., CAN SANCTUARY POLICIES REDUCE DOMESTIC VIOLENCE? 18 (2019), https://docs.iza.

public safety (through incapacitation and deterrence) might conceivably weigh on the side of prioritizing by criminality.

These are good reasons for prioritizing deportations by convictions—other things equal. But other things are not equal, and the difficult question is how to balance prioritization by convictions with prioritization along the other main dimension: ties to the United States.

The rationale for prioritizing by ties to the United States rests partly on a theory of immigration as affiliation. As Hiroshi Motomura explains, such a theory recognizes "the ties that unlawful migrants have built within the United States" and rests partly on "[t]he idea that the longer noncitizens are in the United States, the more they are treated like citizens."[130] This theory "is so pervasive in immigration law debates that it is usually taken for granted."[131] Ties indicate belonging and therefore weaken the grounds for expulsion from the national community.

Moreover, practically speaking, ties increase the costs of deportation in several respects. First, ties increase the cost of deportation for noncitizens themselves. As the Supreme Court has noted, deportation can cause the loss "of all that makes life worth living."[132] The costs to noncitizens include not only the loss of ties in the United States but also the harm caused by the absence of ties in the country of deportation. The absence of ties in the country of deportation helps explain the particular harm of deporting DACA recipients, who arrived in the United States as children. As President Obama said: "Imagine you've done everything right your entire life - - studied hard, worked hard, maybe even graduated at the top of your class - - only to suddenly face the threat of deportation to a country that you know nothing about, with a language that you may not even speak."[133] The same type of harm, if not to the same extent, exists for noncitizens who have lived in the United States for much of their adult lives and are deported to a country where they now have few ties.

Second, the stronger the noncitizen's ties in the United States, the higher the costs of deportation for those ties. Friends, family, employers, and acquaintances all suffer from the noncitizen's banishment. If the noncitizen has immediate family members in the United States, those family members may lose both their closest relationships and means of support. These costs are well known, and the

org/dp12868.pdf [https://perma.cc/6QLB-ZFSN] (finding that sanctuary policies reduce domestic homicide rates among Hispanic women).

130. Motomura, *supra* note 112, at 376–77. Note that this theory might reflect not only ties (which are my focus) but also noncitizens' economic and social contributions. For a compelling treatment of the costs of separating noncitizen families and the benefits of encouraging family-based immigration, see David A. Super, *The Future of U.S. Immigration Law*, 53 U.C. DAVIS L. REV. 509, 533–66, 574–81 (2019) and Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 673–89 (2014) (canvassing family reunification and immigration policy rationales underlying family-based immigration).

131. Motomura, *supra* note 112, at 377.

132. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

133. President Barack Obama, Remarks by the President on Immigration (June 15, 2012) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/69MQ-CC7N]).

Immigration and Nationality Act acknowledges them in providing for cancellation of removal for non-lawful permanent residents,[134] a form of relief from deportation for noncitizens who are not lawful permanent residents but have lived in the United States for over a decade and have a U.S. citizen spouse, child, or parent.[135] The focus in the statute is on hardship to the U.S. citizen family members. But cancellation of removal is much narrower than the group of potential beneficiaries,[136] and meaningful prioritization by ties would require immigration officers to decline to arrest noncitizens who might not obtain cancellation of removal but who do have strong ties to the United States.

Third, deporting people with strong ties to the United States also imposes costs by shaping the incentives of noncitizens. As Adam Cox and Eric Posner have explained, the possibility of deportation may deter noncitizens from making investments in their lives in the United States.[137] And focusing enforcement resources on people with weak ties—those who recently arrived in the United States—is likely to be more effective at deterring unlawful border crossings. As Steven Durlauf and Daniel Nagin note: "[S]hifting resources from imprisonment to policing" would likely reduce crime because an immediate increased likelihood of arrest deters more than a distant increase in sentence length.[138] For the same reason, increasing the likelihood of deportation soon after arrival in the United States is more likely to deter unlawful entry than increasing the punishment for crimes committed later. Prioritizing by ties directs interior enforcement more toward migration control.

These three types of costs—costs to noncitizens, costs to noncitizens' ties, and social costs imposed by incentives—all offer reasons to prioritize enforcement by ties to the United States. And the stated policies of Presidents Obama and Biden have made a (mostly unsuccessful) attempt to take account of these costs.[139] The June 2011 Morton Memo required ICE to consider "length of presence in the United States" as well as "the person's ties and contributions to the community, including family relationships."[140] The Department of Homeland Security's

134. 8 U.S.C. § 1229b(b)(1).

135. *Id.* § 1229b(b)(1)(A), (D).

136. To qualify for cancellation of removal, the hardship to immediate family members must be "exceptional and extremely unusual," *id.* § 1229b(b)(1)(D), and the statute makes even relatively minor criminal convictions a bar to relief, *see id.* § 1229b(b)(1)(C).

137. Cox & Posner, *supra* note 127, at 827–30. In other words, one advantage of prioritization by ties is that it reduces the tension that Cox and Posner identify between ex ante and ex post screening by reducing the disincentive to invest in the United States.

138. Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13, 38 (2011).

139. Scholars have also noted these costs. Juliet Stumpf, for example, has argued that proportional immigration sanctions would take into account the severity of the immigration violation and weigh that severity against the costs of deportation both to the noncitizen and others. *See* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1733 (2009).

140. Morton Memo, *supra* note 44, at 4.

(DHS) 2014 enforcement priorities similarly directed immigration officers to consider "length of time in the United States" and "family or community ties in the United States."[141] Although the interim enforcement priorities memorandum issued under the Biden Administration by acting ICE Director Tae D. Johnson made no mention of length of time in the United States, it did direct officers to consider "ties to the community" as a mitigating factor in enforcement decisions.[142] And the latest enforcement priorities issued by President Biden's DHS outline a variety of factors related to ties in making enforcement decisions.[143] As explained above, however, these provisions have remained hortatory, whereas provisions prioritizing enforcement by criminality have typically included bright-line rules—until the Biden Administration's latest memorandum, which does not include clear rules for considering *either* criminality or ties.

In sum, there are good immigration-enforcement rationales for both dimensions of prioritization, and both dimensions of prioritization have been part of official policy under Presidents Obama and Biden. The more difficult normative question is how the two dimensions of prioritization should be balanced. I turn to that question next.

C. TWO DIMENSIONS

To simplify the problem, I conceive of priorities as varying along only the two dimensions I have discussed: criminality and ties to the United States. This ignores the problem that each dimension of prioritization is multidimensional in its own right. For example, one might understand length of residence and presence of immediate relatives as separate dimensions of ties. Assume for now, however, that seriousness of conviction and strength of ties can each be arrayed along a single dimension.

141. Johnson Memo, *supra* note 49, at 6.

142. Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, U.S. Immigr. & Customs Enf't 5 (Feb. 18, 2021) [hereinafter Johnson Memo on Interim Guidance], https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [https://perma.cc/YLY6-Q5WX].

143. Memorandum from Alejandro N. Mayorkas, Sec'y, DHS, to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't 3–4 (Sept. 30, 2021) [hereinafter Mayorkas Memo], https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/5NLV-9243].

Figure 5: Dimensions of Prioritization

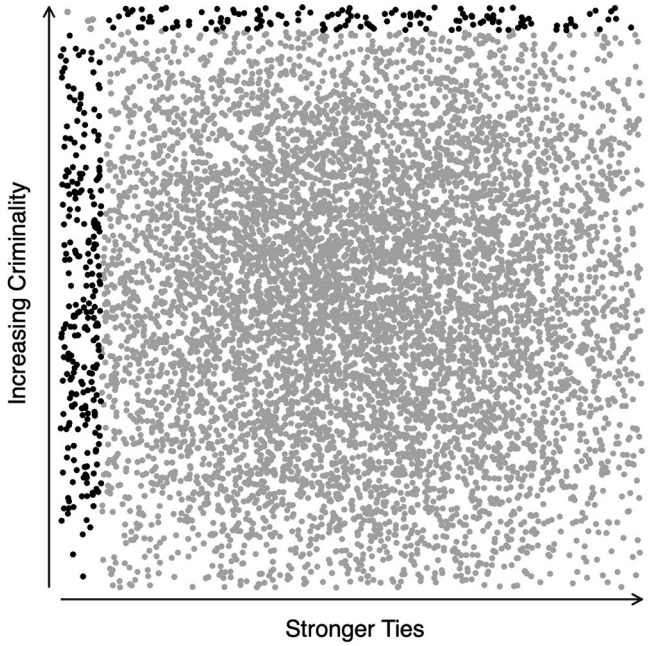


Figure 5 shows an imaginary set of immigration cases. The vertical axis shows the seriousness of the conviction: near the origin are noncitizens who have never been charged with or convicted of any crime, and at the top are those convicted of murder. The horizontal axis shows the strength of ties to the United States: on the left are noncitizens who have just entered the country for the first time and know no one, and on the right are noncitizens who have spent nearly their full lives in the United States, with U.S. citizen family members and established careers in the country.[144]

The cases in gray in Figure 5 are relatively easy cases. The few gray dots at the top left are noncitizens convicted of serious crimes who have few ties; both principles imply that these noncitizens should be priorities for deportation. There are only a few such dots because few undocumented noncitizens are incarcerated for crimes, and even fewer have weak ties to the United States. The cases covering most of the figure, in gray on the bottom right, are easy for the opposite reason. These are noncitizens who have at least some ties and history in the United States and have never been convicted of any crime. Such noncitizens make up the overwhelming majority of the undocumented population: few undocumented people have any criminal history,[145] and as of 2018, 84% of undocumented people lived in the United States since before 2010.[146]

144. *See supra* Figure 5.

145. *See* Landgrave & Nowrasteh, *supra* note 35.

146. *See* BRYAN BAKER, DHS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2015–JANUARY 2018, at 3 tbl.1 (2021), https://www.dhs.

The difficult questions concern what to do with the cases that fall outside the top left and bottom right. Should enforcement concentrate on the left side of the figure, targeting noncitizens with few ties, even if they have little or no criminal history? Or should enforcement—as it currently does—concentrate on the top of the figure, targeting noncitizens with criminal history, regardless of the strength of their ties to the United States?

My answer to this question begins with the observation that the two types of difficult cases in Figure 5 are not equally difficult. People with no ties and no convictions should be deported before people with strong ties and serious convictions. Consider two extreme examples. First, imagine a noncitizen who was brought to the United States by his parents at age two and is convicted of murder in the United States at age sixty-five. He receives a twenty-year sentence and is deported after the sentence is complete, at age eighty-five. For this noncitizen, there is virtually no ex post screening function of deportation because most of the noncitizen's life—the period that the screening is intended to affect—has already passed. The ties to the United States that screening would aim to prevent are already formed, and deportation is not only costly but serves little or no immigration purpose. By contrast, imagine a noncitizen who comes to the United States as a tourist, travels alone, and decides to stay beyond the ninety days that the tourist visa allows. On day ninety-one, the tourist is apprehended. There is a much better immigration policy rationale for deporting the tourist than for deporting the murderer: the arguments for deporting people with weak ties apply even to noncitizens not convicted of crimes, but the arguments for deporting people with convictions become unpersuasive for people with extremely strong ties.

The longer a person has lived in the United States, the less deportation resembles a retroactive admissions mechanism and the more it resembles the exile of a citizen as a punishment for a crime. Prioritizing by criminality keeps the original admissions decision nonfinal and subject to revision if new information (a criminal conviction) comes to light. But just as a statute of limitations eventually requires finality in the decision not to prosecute,[147] length of time and ties to the United States should eventually lead to finality in the decision not to deport. The purpose of admissions policy is to determine who has the opportunity to form strong ties by living in the United States. Once noncitizens have established themselves as part of a community, the question is no longer whom to allow to form ties but whether to break existing ties.

Consider a citizen who meets a noncitizen spouse in the United States and whose spouse later commits a crime. Admissions policy may aim to make it more likely that a citizen will meet someone who is unlikely to commit a crime, but it

gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf [https://perma.cc/4UXH-PBKJ] (showing 9.61 million out of 11.39 million undocumented people lived in the United States since before 2010).

147. *See* Carens, *supra* note 112 (arguing for a policy resembling a statute of limitations in the immigration context, and noting that statutes of limitations exist "[b]ecause it is not right to make people live indefinitely with a threat of serious legal consequences hanging over their heads for some long-past action, except for the most serious sorts of offenses").

is less clear why that policy would aim to end a marriage on the basis of a crime. Relatedly, the longer a noncitizen has lived in the United States and the stronger his or her ties, the more that time in the United States is likely to have contributed to the circumstances that led the noncitizen to commit a crime. Indeed, it is even possible that, as noncitizens become more acculturated in the United States, they become more likely to commit crimes.[148] If so, crime-based deportation of people with strong ties, far from implementing a retroactive admissions policy, would punish noncitizens for becoming more similar to citizens.

Because the admissions policy rationale for prioritization by criminality makes most sense for recent entrants with weak ties, the trade-off between ties and convictions should be asymmetric. Convictions should carry substantial weight for noncitizens with weak ties—noncitizens for whom deportation can realistically serve an ex post screening function—but little or no weight for noncitizens with strong ties. Criminal convictions are most useful for prioritizing deportations among recent entrants with few ties.[149]

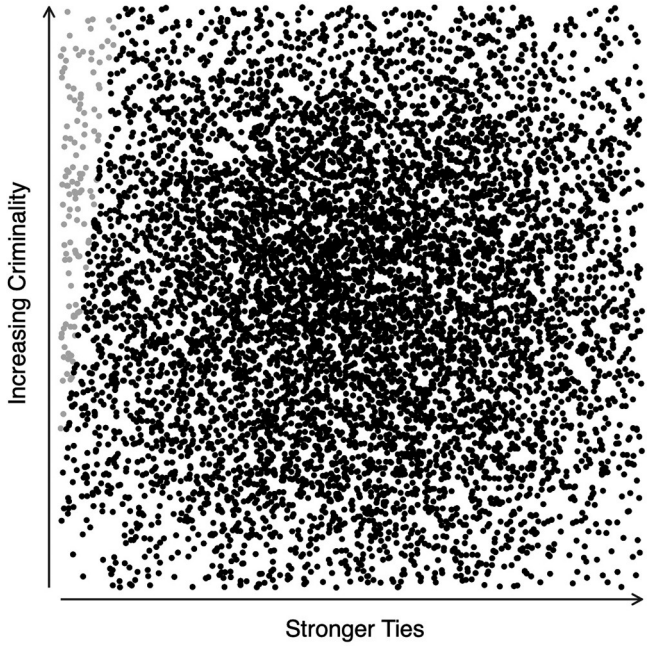
Figure 6 shows this proposed asymmetry graphically. Rather than drawing a horizontal line across the top of the figure, and deporting all noncitizens convicted of crimes regardless of their ties, Figure 6 shows a proposed prioritization framework in which criminality matters less than ties. Noncitizens subject to enforcement are in gray. At the top left corner, some noncitizens with moderate ties may be deported; as criminality decreases, along the vertical axis, only noncitizens with weaker ties are subject to enforcement. Because the line is steeper than forty-five degrees, ties matter more than criminality; a given increase in criminality raises the chance of deportation less than a given decrease in ties. The steep slope of the line also means that the sixty-five-year-old who commits murder after sixty-three years of residence is not a priority for deportation regardless of the level of enforcement, because even if enforcement were doubled or tripled, it would only affect 1%–2% of the undocumented population.[150]

148. Lorna L. Alvarez-Rivera, Matt R. Nobles & Kim M. Lersch, *Latino Immigrant Acculturation and Crime*, 39 AM. J. CRIM. JUST. 315, 315 (2014) (finding that "acculturation is consistently and positively associated with . . . crime-related outcomes").

149. Weighing criminal convictions less for noncitizens with strong ties also implies—correctly, in my view—that older criminal convictions should weigh less heavily against noncitizens. And for recently arrived noncitizens, for whom screening by criminality makes most sense, the analysis should also directly consider the recency of the criminal conviction. It might seem like a paradox lurks here: that more serious convictions lead to longer prison sentences and that such convictions are, by construction, less recent. But because time in prison is time that forces noncitizens to form ties with the United States, that paradox is weaker than it appears.

150. *See infra* Figure 6.

Figure 6: Asymmetric Priorities Trade-Off



Even a symmetric trade-off would, however, be a vast improvement over current prioritization efforts, which focus almost exclusively on criminality. The 2014 PEP established bright-line rules for prioritization by convictions but only required vaguely that officers consider ties as mitigating factors.[151] The result was that ICE was only accountable for prioritizing by criminality. And the Biden Administration's interim enforcement priorities similarly relied on a criminal bright-line rule.[152] Those priorities would be represented by a horizontal, rather than sloping, line. And the current priorities, in dropping all bright-line rules, are more likely to lead to something resembling a return to Trump-Era policy rather than to any additional weighing of ties.[153] The enforcement system's reliance on criminal arrests, together with a lack of any bright-line rules concerning ties, ensures the persistence of prioritization by criminality. That policy is hard to defend.

D. MISSING FACTS

The lack of any meaningful effort to balance ties and convictions is difficult to defend in theory. But evaluating how much harm that policy causes in practice

151. The 2014 priorities did include a bright-line rule prioritizing recent entrants; the rule allowed removals to proceed against noncitizens with final removal orders issued after January 1, 2014. *See* Johnson Memo, *supra* note 49, at 4. But that rule almost certainly had little practical effect beyond allowing border deportations to continue because it did nothing either to reduce the reliance of interior enforcement on local criminal arrests or to require the weighing of ties against criminal priorities.

152. Johnson Memo on Interim Guidance, *supra* note 142, at 4–5.

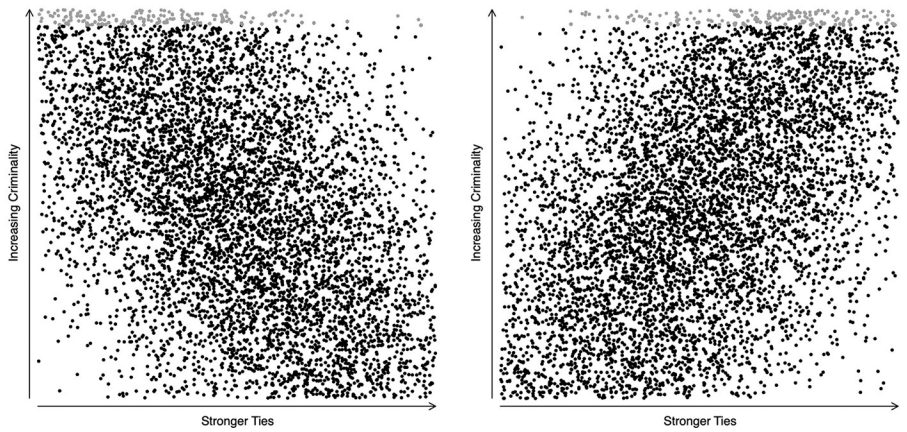
153. *See* Mayorkas Memo, *supra* note 143, at 2.

depends on facts that we mostly lack. If recent entrants are more likely than noncitizens with strong ties to be convicted of crimes, then prioritizing deportations by convictions might also, incidentally, lead to prioritization by ties. If, instead, there is a trade-off between prioritizing by ties and prioritizing by convictions, then the harm of prioritizing by criminality alone is larger.

Figure 7 illustrates this point, showing two imaginary states of the world. In one conceivable world, noncitizens convicted of serious crimes are likely to have fewer ties than noncitizens with less criminal history (left panel); in another conceivable world, criminal history and strong ties go hand-in-hand (right panel). The real world might also fall anywhere in between. The gray dots depict a bright-line rule that prioritizes purely by criminality; the Executive arrests and initiates deportation proceedings only against noncitizens represented by those gray dots. If people with convictions tend to be recent entrants, as at left, then prioritizing by criminality partly also prioritizes by ties; if, on the other hand, people with convictions tend to have strong ties, then prioritizing by criminality does the opposite, effectively targeting people with strong ties. In other words, the scale of the potential harm caused by using criminality as a principle depends on the correlation between ties and convictions.[154]

Yet Figure 7 also illustrates the point that, in either state of the world, the trade-off between ties and convictions is sharp. In both panels, many noncitizens who have average ties are deported—and undocumented noncitizens have relatively strong ties, on average.[155] Even if criminality is associated with weak ties in this way, many people with strong ties will be subject to enforcement. That trade-off would disappear only if ties and criminality were almost perfectly correlated—that is, only if the same noncitizens were in the top percentile by criminality and the bottom percentile by ties. Such a strong correlation is highly unlikely.

Figure 7: The Priorities Trade-Off in Two Imagined Worlds



154. *See infra* Figure 7.
155. *See supra* notes 146–47.

We lack the facts to evaluate whether the current enforcement priorities target noncitizens near the top, middle, or bottom of the distribution of ties. Although we have rough estimates of the length of time that undocumented noncitizens have lived in the United States and how many have immediate relatives in the United States, we do not have reliable, analogous estimates for noncitizens convicted of crimes or for the people whom ICE actually deports. ICE's deportations data contains an entry date (and therefore an indication of how long the noncitizen lived in the United States) for under 30% of interior deportees.[156]

The little that we do know suggests that prioritizing by criminality often targets people with substantial ties to the United States.

First, deportees convicted of more serious crimes are likely to have spent longer in the country; those with Level One convictions—an aggravated felony conviction or two convictions punishable by more than one year in prison—have, on average, lived in the country for about twelve years, nearly twice as long as those not convicted of any crime.[157] I interpret this pattern with extreme caution because we lack data for almost three-quarters of deportees. But even if we assume that we can make no inferences about the missing data, we can be confident that many deportees have spent significant periods in the United States. In the period from Fiscal Year 2017 through the end of the data, in March 2020, more than half of interior deportees for whom ICE collected data were deported more than five years after their latest entry to the United States.[158] That means that we can say, as an absolute lower bound, that 15% of interior deportees have spent at least five years in the country.[159] At a minimum, prioritizing by convictions does not allow ICE to target recent entrants with precision.

A second piece of evidence on the effect of prioritizing by criminality comes from detention decisions. ICE's risk assessment software for detention decisions uses information about convictions and ties to the United States to generate predictions about flight risk and danger to the community.[160] The flight-risk score therefore offers a rough indicator of ties to the United States, and the danger score a rough measure of criminal convictions. Those scores are inversely correlated,[161] suggesting that noncitizens with *more* ties have more serious convictions, on average. Within the set of already-arrested noncitizens, prioritizing by convictions

156. U.S. Immigr. & Customs Enf't, Response to Oct. 3, 2018 FOIA request by David K. Hausman (on file with author); *see also* Hausman, *supra* note 32.

157. U.S. Immigr. & Customs Enf't, Response to Oct. 3, 2018 FOIA request by David K. Hausman (on file with author); *see also* Hausman, *supra* note 32.

158. U.S. Immigr. & Customs Enf't, Response to Oct. 3, 2018 FOIA request by David K. Hausman (on file with author); *see also* Hausman, *supra* note 32.

159. One might object that at least part of this time in the United States was likely spent serving a sentence in prison. I lack any means of quantifying what proportion of this time was likely spent in prison, but the argument does not depend on it, because time spent in prison is also residence in the United States. Indeed, such imprisonment forces noncitizens to form ties by remaining in the country.

160. *See* Evans & Koulish, *supra* note 31, at 793, 827–29.

161. If the scores are put in numerical terms (1=low, 2=medium, and 3=high), the correlation coefficient is -.28. *See* Hausman, *supra* note 27, at 13–14.

means not prioritizing by ties. This evidence, too, has important limitations,[162] but it is, at a minimum, consistent with a sharp trade-off between prioritizing by ties and prioritizing by criminality.

Finally, demographic trends imply that the ties–convictions trade-off has become sharper over the past two decades. The undocumented population has become more stable because fewer noncitizens have crossed the border without authorization and fewer have left the United States. By 2018, according to the latest DHS estimates, about 84% of the undocumented population had lived in the United States since before 2010, and almost half of the undocumented population had lived in the United States since before 2000.[163] As the length of stay in the United States increased, so, unsurprisingly, did the average age. In 2010, 46% of the undocumented population was between the ages of eighteen and thirty-four; by 2019, that proportion had fallen to approximately 35%.[164] Because the undocumented population has aged and has spent more time in the United States, enforcement that fails to prioritize by ties will, other things equal, increasingly lead to enforcement against people with strong ties.

In sum, we lack the basic facts that would allow us to assess to what degree the current system prioritizes by ties. But the limited evidence that exists suggests that prioritizing enforcement against people with criminal convictions means prioritizing enforcement against people with deeper attachments to the United States.

III. IMPLICATIONS

A. DEPORTATIONS AS SOCIAL CONTROL

Rethinking prioritization should lead to questions about what purpose criminality-focused interior enforcement serves. All immigration enforcement affects behavior and therefore functions in some sense as a mechanism of social control. But prioritizing by criminality is distinct in its racial consequences and its focus on post-entry conduct in the United States.

The racial consequences of crime-based enforcement are well-known. Scholars have convincingly shown that the increasing statutory entwinement of criminal and immigration enforcement has racially disparate consequences, and the conclusions from that scholarship apply equally to Executive enforcement.[165] Latino

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162. Although the detention decisions dataset excludes noncitizens in expedited removal proceedings at the border, the dataset is not strictly limited to interior cases, and the inverse correlation might reflect differences between border cases and interior cases rather than patterns among interior cases. Moreover, like the deportations dataset, the detention decisions dataset only includes noncitizens whom ICE has already arrested, so it says little about the distribution of ties and convictions in the full population.

163. *See* BAKER, *supra* note 146.

164. *Estimates of Undocumented and Eligible-to-Naturalize Populations by State*, CTR. FOR MIGRATION STUD., http://data.cmsny.org/ [https://perma.cc/5LX5-UKVD] (last visited Mar. 18, 2022).

165. *See, e.g.*, Kevin R. Johnson, Response, *Back to the Future? Returning Discretion to Crime-Based Removal Decisions*, 91 N.Y.U. L. REV. ONLINE 115, 117–18 (2016); Cházaro, *supra* note 5, at 610–11; Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 650

men are dramatically overrepresented among deportees,[166] likely in part because enforcement that focuses on convictions reflects the racial biases of the criminal justice system, from arrest[167] through sentencing.[168] The limited political power of these groups makes crime-based deportation politically easy.[169] Prioritizing by ties could prevent immigration enforcement from reproducing these systematic racial effects.

Prioritizing by ties would also fundamentally reorient interior immigration enforcement toward immigration policy goals and away from supervision of post-entry conduct. Prioritizing by convictions means putting enforcement resources toward policing the behavior of noncitizens who have lived in the United States for long periods. Noncitizens understand that they are being policed in this way; for example, Asad L. Asad has shown that noncitizens seek out contact with some parts of the government—for example, by paying taxes—while understanding that they must do all they can to avoid arrest by police, even for minor crimes.[170] Prioritization by convictions therefore almost certainly influences the post-entry actions of noncitizens more than the decisions of people considering whether to immigrate to the United States without authorization. Indeed, strict prioritization by convictions tacitly accepts the right of noncitizens to remain in the United States if they do not commit crimes. Interior enforcement over the last decade has been less about enforcing the immigration laws and more about imposing a stricter code of conduct for noncitizens than for citizens.[171]

Although other scholars have noted this role of enforcement, increasingly successful prioritization by criminality has made that social control role primary in a way that it may not have been two decades ago. Daniel Kanstroom, in 2000, discussed a "social control model" of enforcement, which targets lawful permanent residents convicted of certain crimes, and contrasted that model with a border control model.[172] Because the undocumented population has become more stable

(2012); Jennifer M. Chacón & Susan Bibler Coutin, *Racialization Through Enforcement*, *in* RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING 159, 159–160 (Mary Bosworth et. al eds., 2017).

166. Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 LATINO STUD. 271, 272 (2013).

167. *See, e.g.*, Graham C. Ousey & Matthew R. Lee, *Racial Disparity in Formal Social Control: An Investigation of Alternative Explanations of Arrest Rate Inequality*, 45 J. RSCH. CRIME & DELINQ. 322, 324 (2008).

168. *See, e.g.*, Light et al., *supra* note 107, at 828–29.

169. *See, e.g.*, Sklansky, *supra* note 117, at 218–19.

170. ASAD, *supra* note 98 (manuscript at 75–77).

171. *Cf.* Kaufman, *supra* note 113, at 1441 (arguing that "migration control can be a legitimate justification for federal action in only the subset of cases most closely tied to the government's sovereign interest in policing its borders").

172. Kanstroom, *supra* note 105, at 1897–98 (emphasis omitted). Kanstroom argues that deportations aimed at social control are more analogous to criminal than to civil sanctions, and lawful permanent residents should receive more procedural protection from deportation. *Id.* at 1934–35. As interior deportations have increasingly targeted noncitizens convicted of crimes, and as noncitizens' average time in the country has increased, the social control model increasingly describes most interior enforcement, not only the relatively rare cases of lawful permanent residents facing deportation. *See, e.g.*, *id.* at 1893. Kanstroom's arguments concerning due process therefore apply more broadly than

and deportations have increasingly targeted noncitizens who have lived in the United States for long periods, most interior enforcement now resembles crime-based deportation of lawful permanent residents. The social control model now characterizes most interior enforcement.[173]

These criticisms of prioritization by convictions partly match the conclusions of scholars of "crimmigration," who have drawn attention to the increasing immigration consequences of crimes as well as the increasing criminalization of immigration.[174] These scholars have explained how immigration and criminal processes have become increasingly intertwined.[175] Prioritization is no doubt part of this trend, but rather than merging criminal and immigration purposes, prioritization by criminality divorces interior immigration enforcement from the goals of immigration policy.

The trend toward social control in immigration enforcement matches trends in other areas of the law. Scholars increasingly recognize the growth of incarceration and collateral consequences of criminal convictions as part of a larger political project of social control, with a strong racial element.[176] Prioritization by criminality has made interior immigration enforcement part of that project—and pushed such enforcement away from its original purpose.

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ever. But absent an about-face from the Supreme Court, increased procedural protections in the interior seem unlikely, and even such protections might do relatively little to change policy, given the harshness of the substantive law governing deportations. Stronger procedural protections make sense, but ultimately noncitizens should not face such deportations at all because prioritizing those deportations serves neither an immigration nor a criminal purpose.

173. For a similar perspective on the likely effects of interior enforcement, see generally Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007).

174. Juliet Stumpf's work here is foundational. *See generally* Stumpf, *supra* note 18 (offering a theory of why elements of criminal and immigration law have merged). For an explanation of why criminal and immigration law became increasingly entangled in the last decades of the twentieth century, see César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458.

175. Much of this work focuses on the criminalization of immigration offenses. *See, e.g.*, Chacón, *supra* note 165, at 614. For a useful framework for understanding such criminal enforcement, see Eagly, *supra* note 99, at 1131–32. *See generally* Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553 (2013) (explaining that crime-based deportation often puts local prosecutors in the position of determining whether a noncitizen is deported); Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243 (2013) (defending a principle of proportionality in crime-based deportation, and suggesting the use of ties, rather than citizenship, as a proxy for national membership).

176. *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001) (analyzing cultural changes accompanying more punitive responses to crime in the last three decades of the twentieth century); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (10th anniversary ed. 2020) (understanding mass incarceration as a system of racial subordination); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (documenting the many ways that a focus on crime has become a feature of many U.S. government institutions); Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301 (2015) (understanding collateral consequences as predictive risk regulation, and noting that those consequences have left approximately eight percent of U.S. adults with "second-class legal status").

B. SOLUTIONS

The failure to prioritize by ties to the United States has been a failure of guidance and supervision. The Obama Administration successfully prioritized by criminality using simple forms of administrative review. It monitored line-level decisions through data collection, and it required that line-level officers seek permission to deviate from rules. But the Obama Administration failed to create similar internal incentives to prioritize by ties because (1) it imposed no bright-line rules concerning ties, and (2) it failed to collect data on ties.[177] Neither of these decisions was inevitable, and both can be reversed. How, in practice, should a President prioritize by ties?

Deferred action programs, which allow certain undocumented noncitizens to apply for a work permit and provide an assurance that the government will not seek to deport them, are the most prominent rule-based programs for prioritization by ties, but they have never aimed to help noncitizens with anything but the most minor criminal convictions.[178] One obvious implication of the argument so far is that future deferred action programs should include noncitizens with serious convictions and strong ties.

Including noncitizens with serious criminal convictions in the DACA program might be politically difficult—but deferred action is just one way to control ICE officers' discretion. Given the Supreme Court's signals[179] that it may not allow new deferred action programs, alternatives are worth considering. The simplest of these would incorporate bright-line presumptions concerning ties into enforcement priorities. For example, the priorities could state that noncitizens who have lived in the United States for more than a decade are presumptively not priorities for removal and that officers must seek permission from high-level supervisors to arrest and initiate removal proceedings against such noncitizens. Or the priorities could include a similar rule for noncitizens with U.S.-citizen children. Pairing these presumptive bright-line rules with the two mechanisms of review that are already common for criminal convictions—data collection on ties and required supervisor preapproval for deviations from priorities—might give the rules bite.[180]

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177. *See supra* Sections II.B–D.

178. Helping people with strong ties was the goal of President Obama's second deferred action program, DAPA, which would have granted a reprieve from deportation, as well as work permits, to parents of U.S. citizens. That program never took effect; it was halted by litigation. Texas v. United States, 787 F.3d 733, 769 (5th Cir. 2015).

179. The Fifth Circuit's decision invalidating the Obama Administration's DAPA program was affirmed by an equally divide Supreme Court—before the confirmation of Justices Gorsuch, Kavanaugh, and Barrett. Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.). And that program would not have protected noncitizens with significant convictions from deportation; the DAPA memorandum excluded such noncitizens, who were still priorities for enforcement. *See* Johnson Memo on Prosecutorial Discretion, *supra* note 91.

180. Such bright-line rules should not be subject to notice-and-comment rulemaking requirements because they do not bind anyone except agency employees. *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995) (holding that rules are not legislative if they "do not have the force and effect of law"); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015) (quoting *Guernsey*, 514 U.S. at 99). Some lower courts have held that rules require notice and comment if they bind lower-level

Rules are not the only possible solution. The Executive can control line-level officers' exercise of discretion even if those officers apply standards rather than rules. An Administration could direct officers to form a more holistic picture of noncitizens' ties and to make enforcement decisions based on that holistic picture —and at the same time supervise those decisions. In fact, a body of literature in administrative law is dedicated to this supervision problem; the immigration-enforcement system could borrow supervision structures from it.[181]

A key lesson of the administrative review literature is that the selection of cases often invisibly drives adjudicators' decisionmaking.[182] Thinking about selection should lead ICE to rethink the fundamental way that cases are selected for enforcement: by local police.[183] Prioritizing by convictions is not just written into policy but baked into the way that ICE conducts arrests: in jails and prisons.[184] Even when the Trump Administration sought to sow terror among immigrants by deporting indiscriminately, making clear that it would target non-citizens with no convictions, it mostly ramped up enforcement in jails and prisons,[185] likely because that enforcement was the cheapest type of enforcement. Fundamentally changing selection would require finding cases in new ways—for example, by more quickly identifying visa overstays. Rethinking selection would also require careful balancing of the interests of asylum seekers, who often have few ties to the United States but compelling reasons to remain in the country.

Critically, managing any system of supervision requires collecting data on ties to the United States. The absence of reliable data helps explain why immigration

officials within the agency, *see* Metzger & Stack, *supra* note 11, at 1280–81 (discussing cases), but courts have often not understood even bright-line enforcement priorities as subject to notice and comment, *see* Texas v. United States, 14 F.4th 332, 335, 341 (5th Cir.) (staying district court decision that Biden Administration enforcement priorities memorandum violated the Administrative Procedure Act), *vacated in part*, 24 F.4th 407 (5th Cir. 2021).

181. One reason that the literature on administrative review has remained mostly separate from the literature on the exercise of enforcement discretion is that the dominant understanding of the role of due process in administrative adjudications is cast in terms of accurate application of statutes and regulations. *Mathews v. Eldridge* understood the Due Process Clause as requiring safeguards to the extent that those safeguards increased accuracy—as long as those safeguards did not impose too many countervailing costs. 424 U.S. 319, 343, 348 (1976).

182. Most famously, Jerry Mashaw argued that adversarial due process mechanisms often fail to protect the interests of disability claimants, who may lack the skills and resources to navigate those complex adversarial systems. *See* Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 775–77 (1974). In other words, the cases most in need of additional review are least likely to be selected for such review. *See id.* at 787; JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 72 (1983). In previous work on the immigration appeals system, I found empirical evidence of precisely this type of selection problem: noncitizens without lawyers rarely appeal, and immigration-judge decisionmaking in their cases therefore rarely receives review. David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1180 (2016); *see also* Daniel E. Ho & Sam Sherman, *Managing Street-Level Arbitrariness: The Evidence Base for Public Sector Quality Improvement*, 13 ANN. REV. L. & SOC. SCI. 251, 252, 264 (2017) (summarizing and organizing existing evidence).

183. *See* Motomura, *supra* note 26, at 1858.

184. For a critique of this system, see Jain, *supra* note 90, at 1704, 1707.

185. *See supra* Figure 1.

officers have been less likely to prioritize by ties. Annual enforcement reports during the Obama Administration noted compliance with criminal priorities but included no mention of the requirement that immigration officers consider ties to the United States as mitigating factors in enforcement decisions.[186] Lack of measurement meant lack of review. If data on ties were available—even a simple measure of the length of time that noncitizens lived in the United States before deportation—then Executive discretion and public debate could focus on ties. How many families should be separated by deportation each year? How many people who have lived in the United States for over a decade should be deported?

Pitfalls in measurement and data collection will of course arise in any effort to reverse course. For example, noncitizens might understandably fear giving information about their relatives to ICE officers, impeding efforts to document ties. And efforts to measure must also bear in mind Goodhart's Law: "[w]hen a measure becomes a target, it ceases to be a good measure."[187] Supervisees have incentives to manipulate data to meet targets. For example, when textile factories were paid by the length of the fabric they produced, they changed their looms to produce narrower pieces.[188] But ICE really did increase prioritization by convictions during the Obama Administration. The problem was that ICE did not measure ties. Some measurement is the first step toward effective supervision.

CONCLUSION

The two most effective tools for reducing deportations from within the United States—sanctuary policies and federal enforcement priorities—both rely on prioritizing enforcement by criminality. Yet such prioritization has no persuasive crime-related justification. Criminality might offer a reasonable principle for screening noncitizens after their entry to the country, but that screening rationale has the most force for noncitizens who have spent little time in the United States. As the undocumented population becomes more static, prioritizing by criminality increasingly means prioritizing deportations of noncitizens who have deep roots in the United States. The internal administrative law of deportation should grapple with this sharp trade-off. Coming to grips with this trade-off would reorient immigration enforcement away from racialized social control and toward immigration policy goals.

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186. *See, e.g.*, U.S. IMMIGR. & CUSTOMS ENF'T, DHS, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2015, at 1 (2015), https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf [https://perma.cc/2EJZ-FPBU] ("98 percent of individuals that ICE removed in FY 2015 met ICE's civil immigration enforcement priorities."); U.S. IMMIGR. & CUSTOMS ENF'T, DHS, FISCAL YEAR 2016 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf [https://perma.cc/XZE2-PQTB] ("99.3 percent of aliens ICE removed in FY 2016 clearly met DHS' enforcement priorities.").

187. Peter Coy, *Goodhart's Law Rules the Modern World. Here Are Nine Examples*, BLOOMBERG (Mar. 26, 2021, 8:31 AM), https://www.bloomberg.com/news/articles/2021-03-26/goodhart-s-law-rules-the-modern-world-here-are-nine-examples (quoting Marilyn Strathern).

188. Hannah Fry, *What Data Can't Do*, NEW YORKER (Mar. 22, 2021), https://www.newyorker.com/magazine/2021/03/29/what-data-cant-do.

APPENDIX A: ICE INTERIOR REMOVALS DATA

ICE began distinguishing between interior and border removals in its annual statistical enforcement reports in Fiscal Year 2013.[189] The monthly interior removal numbers used in this Article come from individual-level ICE data obtained by FOIA requests. For the years after 2013, I nearly replicate ICE's annual count of interior deportations by excluding deportations that result from Border Patrol apprehensions or land, air, or sea inspections. The resulting counts are similar to those reported by ICE, but they do not match precisely, likely because ICE "locks" the numbers it uses in its statistical reports on October 5 of each year even though some retroactive changes occur in the raw data.[190] Although this method mirrors ICE's own method of counting interior deportations, I nonetheless prefer a more restrictive definition that excludes expedited removals and voluntary returns, both of which occur at or near the border. This more restrictive definition has only a small effect on total counts after 2013 but results in significantly lower counts of interior removals before 2013. Figure A1 shows border and interior deportations over time with separate lines depicting the counts from ICE's definition and my proposed, more restrictive definition.[191]

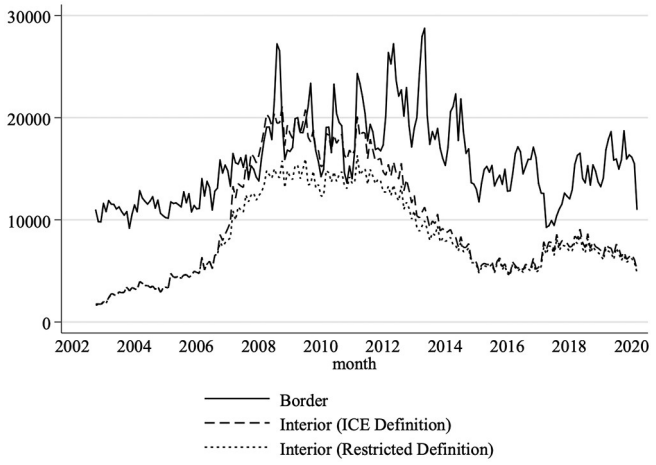
Figure A1 shows why I favor the more restrictive definition; it appears to exclude some border removals. Overall, border removals show a strong seasonal pattern with annual spikes. ICE's definition of interior removals shows similar spikes from 2008 to 2012, suggesting that its definition incorrectly includes some border removals. When I exclude expedited removals and voluntary returns, the spikes mostly disappear, but not completely: there are still small spikes in interior removals when there are large spikes in border removals. Those spikes completely disappear in 2012. As a result, the number of interior removals may be slightly inflated in the years from 2008 to 2012, but the issue is small enough that it cannot be responsible for the large trends over the full period.

189. *Compare* U.S. IMMIGR. & CUSTOMS ENF'T, DHS, ERO ANNUAL REPORT: FY 2013 ICE IMMIGRATION REMOVALS (2013), https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf [https://perma.cc/TF8G-UXRR] (reporting number of interior removals), *with* John F. Simanski & Lesley M. Sapp, DHS, ANNUAL REPORT–IMMIGRATION ENFORCEMENT ACTIONS: 2012 (2013), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2012.pdf [https://perma.cc/C4LG-TTH2] (not reporting number of interior removals).

190. U.S. IMMIGR. & CUSTOMS ENF'T, DHS, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014, at 18 (2014), https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf [https://perma.cc/8KPH-ZGN4].

191. *See infra* Figure A1.

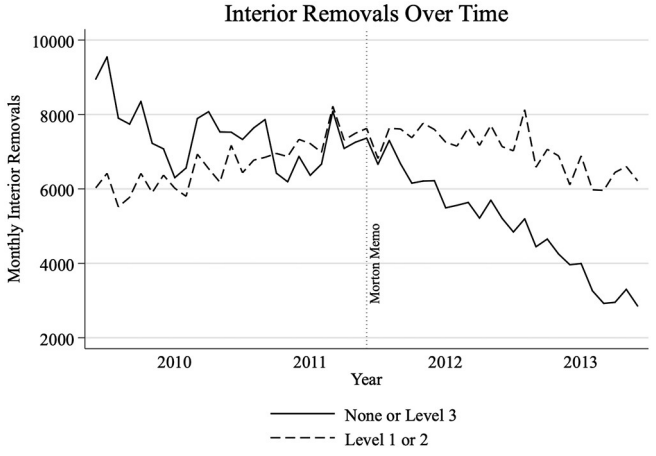
Figure A1: Counting Interior Removals



APPENDIX B: THE EFFECT OF THE MORTON MEMO

Unlike the PEP, the Morton Memo did not cause an immediate, obvious drop in deportations. Beginning around the time of the Morton Memo, however, deportations of noncitizens with minor convictions or no convictions did begin to fall more quickly than those of noncitizens with more serious convictions. Figure A2 shows that divergence.[192] It is hard to say whether the divergence reflects the Morton Memo. Other smaller policy changes might have allowed ICE to prioritize more effectively, and it is also possible that informal local resistance partly drove this trend.[193]

Figure A2: Deportations Before and After the Morton Memo



192. *See infra* Figure A2.
193. *See* Ciancio & Camilo García-Jimeno, *supra* note 81, at 48.