

# NOTES

## SEPARATING THE HANDS: WHY REORGANIZATION-ORIENTED ABOLITIONISM WON'T MEANINGFULLY CHANGE ICE

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“Under this president, who’s now letting us do our job and taking the handcuffs off the men and women of the Border Patrol and ICE, arrests are up.”  
– Thomas Homan, Former Immigration and Customs Enforcement Acting Director.<sup>1</sup>

“Any essential functions carried out by ICE that do not violate fundamental due process and human rights can be executed with greater transparency, public accountability, and adherence to domestic and international law by other Federal agencies.”  
– Establishing a Humane Immigration Enforcement System Act.<sup>2</sup>

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\* Casey L. Chalbeck, J.D. Candidate, 2020, Georgetown University Law Center. I would like to thank the participants of the Administrative Law and Public Administration Seminar, including Kerissa Barron, Ian Bruckner, Matthew Caplan, Gary DePalo, Isaac Hoenig, Alexandra Keck, Mitchell Mengden, Kate Rheaume, Danielle Robinette, Louis Rosenbaum, Julia Siegenberg, and Parnia Zahedi for their helpful comments during the drafting stages of this Note. I owe additional thanks to the editors of the Georgetown Immigration Law Journal for their outstanding work. This project benefited from Annamaria Morales-Kimball’s intensive and thoughtful engagement, which made every part better. Two people merit special acknowledgment. This piece – and so much more – would not have been possible without Professor Eloise Pasachoff’s careful feedback, constructive criticism, guidance, and mentorship; I am grateful to be her student. And, finally, I am most grateful to Sam Grayck for her commitment to intellectual production, willingness to interrogate that which we hold obvious, brilliant ideas, inspiring work ethic, and steadfast support. All errors are my own. © 2019, Casey L. Chalbeck.

1. Jennifer Earl, *Who is Thomas Homan? Meet the Acting ICE Director Vowing to Crack Down on Sanctuary Cities and Build a Wall*, Fox News (Feb. 28, 2018), <https://www.foxnews.com/politics/who-is-thomas-homan-meet-the-acting-ice-director-vowing-to-crack-down-on-sanctuary-cities-and-build-a-wall>.

2. Establishing a Humane Immigration Enforcement System Act, H.R. 6361, 115th Cong. § 2(18) (2018) (referred to the Subcomm. on Immigration and Border Sec., Aug. 6, 2018) [hereinafter Humane Immigration Enforcement System Act] (abolishing ICE and establishing a commission to administer the transition of functions to other agencies) available at <https://www.congress.gov/bill/115th-congress/house-bill/6361/text?q=%7B%22search%22%3A%5B%22ICE%22%5D%7D&r=13>.

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## INTRODUCTION

Prior to President Trump's ascension to the White House, calls to abolish the Immigration and Customs Enforcement agency ("ICE") primarily came from left-of-center immigration activist communities, both online and otherwise. But ICE's prominent role in the President's muscular immigration strategy has elevated the conversation about its abolition. Arrests by ICE's Enforcement and Removal Operations ("ERO") division between January and September 2017 increased by 42% percent compared to those made in the same period in 2016.<sup>3</sup> This surge in arrests followed President Trump's issuance of an Executive Order expanding the ERO's removal priorities to include all unlawfully present immigrants,<sup>4</sup> as opposed to only those with a criminal history.<sup>5</sup> This dramatic shift in enforcement operations and removal priorities, coupled with reports of guard-on-migrant sexual abuse in ICE controlled or affiliated detention facilities,<sup>6</sup> violations of national detention standards,<sup>7</sup> agency efforts to remove caps on detention periods for unaccompanied minors,<sup>8</sup> and remarks from agency officials suggesting glee in conducting the serious and solemn task of deporting migrants,<sup>9</sup> and the absolute rejection of criticism,<sup>10</sup> has galvanized activists and progressives across the country to demand ICE's liquidation.<sup>11</sup> Indeed, some,

3. Kristen Bialik, *ICE Arrests Went Up in 2017, With Biggest Increases in Florida, Northern Texas, Oklahoma*, PEW RESEARCH CENTER (Feb. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/02/08/ice-arrests-went-up-in-2017-with-biggest-increases-in-florida-northern-texas-oklahoma/>.

4. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017), available at <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

5. See, e.g., Memorandum from John Morton, Dir. U.S. Immigration & Customs Enforcement, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 02, 2011), available at <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [hereinafter the "Morton Priorities Memorandum"] (identifying and explaining ICE's enforcement priorities with enforcement against violent criminals posing a threat to public safety and national security taking precedence).

6. See, e.g., Emily Kassie, *Sexual Assault in ICE Detention: 2 Survivors Tell Their Stories*, N.Y. TIMES (July 17, 2018), <https://www.nytimes.com/2018/07/17/us/sexual-assault-ice-detention-survivor-stories.html>.

7. U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-18-86, MANAGEMENT ALERT – ISSUES REQUIRING ACTION AT THE ADELANTO ICE PROCESSING CENTER IN ADELANTO, CALIFORNIA (2018), available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf>.

8. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R. 263 pt. 212 and 236), available at <https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children>.

9. Earl, *supra* note 1.

10. Associated Press, *ICE Head Apologizes for Tweet Calling Democrats 'Neoklanist' Party*, NBC NEWS (Nov. 15, 2018), <https://www.nbcnews.com/politics/national-security/ice-head-apologizes-tweet-calling-democrats-neoklanist-party-n936766>.

11. See e.g., Domenic Powell, *How to Abolish: We Need to Abolish ICE. Here's How We Could Actually Do It*, JACOBIN MAGAZINE (June 29, 2019), <https://www.jacobinmag.com/2018/06/abolish-ice-immigration-cbp-deportation>; Sean McElwee, *The Power of 'Abolish ICE': Democrats are Shifting Left on Immigration, and it Shows at the Polls*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2018/08/04/opinion/sunday/abolish-ice-ocasio-cortez-democrats.html>; Domenic Powell, *How to Abolish ICE*, JACOBIN MAGAZINE (June 29, 2018), <https://www.jacobinmag.com/2018/06/abolish-ice-immigration-cbp-deportation>; Sean McElwee, *It's Time to Abolish ICE: A Mass-Deportation Strike*

but not all, ICE abolitionists see the agency's dissolution as the starting point for a radical overhaul of the United States' current immigration system.

This radical abolition movement views ICE's disbandment as part and parcel with a broader effort to move immigration enforcement policy in a fundamentally new direction. Radical abolitionists view the individual abuses noted above as symptomatic of a multi-decade trend in immigration law that enlarges the class of deportable immigrants by predicating removal eligibility on a migrant's criminal status. Such policies have resulted in the deportation of hundreds of thousands of immigrants—including those who have resided in the country for decades—due to minor offenses. Relatedly, radical abolitionists, as well as other activists, balk at the government's increased reliance on detention tactics to accomplish civil immigration goals. Together, these defining features of American immigration law have generated concerns that immigration enforcement powers are being used to the detriment of marginalized communities. In an effort to mitigate the costs these communities absorb after their members are removed, radical ICE abolitionists seek to remove ICE's enforcement functions from the government's repertoire of responses to most, if not all, immigration-related issues.<sup>12</sup>

But while the mainstreaming of the Abolish ICE movement has helped thrust concerns of human rights abuses and the cost of community upheaval into the national political conversation, prominent politicians have offered a less-than-full-throated endorsement of this goal to fundamentally reshape immigration enforcement. Instead, prominent Democratic politicians including Senator Elizabeth Warren of Massachusetts,<sup>13</sup> Senator Bernie Sanders of Vermont,<sup>14</sup> Senator Kamala Harris of California,<sup>15</sup> and Senator Kirsten Gillibrand of New York<sup>16</sup> have called for a different kind of abolition—one premised on rebuilding, rebranding, restructuring and reorganizing the

Force is Incompatible With Democracy and Human Rights, *THE NATION* (Mar. 9, 2018), <https://www.thenation.com/article/its-time-to-abolish-ice/>.

12. See *infra* Part 2, Section A.

13. See e.g., Nik DeCosta-Klipa, *Where Does the Massachusetts Delegation Stand on the Calls to Abolish ICE?*, *BOSTON.COM* (July 3, 2018), <https://www.boston.com/news/politics/2018/07/02/abolish-ice-massachusetts>, (quoting Senator Warren: "...we need to rebuild our immigration system from top to bottom, starting by replacing ICE with something that reflects our morality and values.").

14. Senator Bernie Sanders (@SenSanders), *TWITTER* (July 3, 2018, 10:27 AM), [https://twitter.com/SenSanders/status/1014199066819997698?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1014199066819997698&ref\\_url=https%3A%2F%2Fwww.huffingtonpost.com%2Fentry%2FBernie-sanders-abolish-ice\\_us\\_5b3bba5ce4b05127cced1535](https://twitter.com/SenSanders/status/1014199066819997698?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1014199066819997698&ref_url=https%3A%2F%2Fwww.huffingtonpost.com%2Fentry%2FBernie-sanders-abolish-ice_us_5b3bba5ce4b05127cced1535) (stating the Senator's position that representatives should "abolish the cruel, dysfunctional immigration system we have today and pass comprehensive immigration reform.").

15. Molly Hensley-Clancy, *Kamala Harris Wants You to Know She's Definitely Not Calling for Abolishing ICE*, *BUZZFEED NEWS* (July 3, 2018), <https://www.buzzfeednews.com/article/mollyhensleyclancy/kamala-harris-abolish-ice> (noting that Senator Harris wants "a complete overhaul of the agency, mission, culture, operations" but does not want to end immigration enforcement operations) (internal quotation marks omitted).

16. Justin Wise, *Gillibrand: 'We Should Get Rid of ICE' if Dems Flip House and Senate*, *THE HILL* (July 23, 2018), <https://thehill.com/latino/398375-gillibrand-we-should-get-rid-of-ice-once-we-flip-house-and-senate>, (noting that Senator Gillibrand issued the following statement: "So when we flip the House and flip the Senate, I think the first thing we should do is deal with the children who have been separated from their families at the border. I think we should get rid of ICE. . . We should separate out the two missions and do the anti-terrorism mission, the national security mission, and then on the other side, make sure you're looking at immigration as a humanitarian issue.").

agency. Unlike its more radical counterpart, reorganization-oriented abolition does not seek to remove ICE's core function of apprehending, detaining, and deporting removal-eligible immigrants from the government's toolkit. Instead, reorganization-oriented abolitionists want to abolish ICE in name and reassign its functions to a different or new authority.<sup>17</sup> If the Obama administration put the agency in handcuffs by prioritizing enforcement activity to dangerous criminals, then reorganization-oriented abolitionists seek to temper the agency's worst excesses by separating its hands.

It may be easy to dismiss both efforts, but Congress' history of using reorganization methods to address issues emanating from the immigration-enforcement bureaucracy requires us to examine this faction's proposals more closely.<sup>18</sup> The limited legislative activity addressing ICE's controversies underscores the importance of critically taking to task reorganization-oriented abolitionists; the only piece of legislation aimed at abolishing ICE coheres to their more moderate rubric.<sup>19</sup>

Given the political difficulties of abolishing immigration enforcement in its entirety, as radical ICE abolitionists propose, this paper considers the more politically palatable option of abolition-through-reorganization. In particular, I consider how reorganization-oriented abolitionists might try to address the hotly debated issue of immigrant detention. I conclude that agency reorganization is unlikely to remedy the detention-related problems its critics bemoan. I argue that reorganization is an appropriate measure when an institution's structure fosters internal competition for resources between operators<sup>20</sup> who find their jobs defined by antithetical missions housed under the same agency. One need only to review the reorganization history of ICE's institutional precursor, Immigration and Naturalization Services ("INS"), to identify the promise offered by reorganization strategies. When the INS was crippled by two competing missions—one premised on removing immigrants from the country and the other on letting immigrants in—reorganization helped disentangle two competing subdivisions of the bureaucracy. But the INS's history also illustrates that reorganization can be inappropriate when it draws bureaucratic borders and erects institutional walls between operators assigned overlapping tasks that complement a more singular mission. Hence, federal reorganization efforts that severed interior enforcement efforts from border enforcement efforts raised both logistical and institutional competence concerns for the retired agency.

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17. Humane Immigration Enforcement System Act, H.R. 6361, 115th Cong. § 2(18) (2018) (referred to the Subcomm. on Immigration and Border Sec., Aug. 6, 2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/6361/text?q=%7B%22search%22%3A%5B%22ICE%22%5D%7D&r=13>. See *infra* Part I.B.

18. As it happens, all four Senators have signaled their intentions to run for President in the 2020 elections.

19. Humane Immigration Enforcement System Act, H.R. 6361, 115th Cong. § 2(18) (2018) (referred to the Subcomm. on Immigration and Border Sec., Aug. 6, 2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/6361/text?q=%7B%22search%22%3A%5B%22ICE%22%5D%7D&r=13>. See *infra* Part I.B.

20. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 27 (1989). (defining operators as the front-line workers who perform an agency's primary tasks.).

These lessons do not bode well for the reorganization-oriented abolitionist movement, especially with respect to detention issues. ICE's detention "mission" works in tandem with the agency's larger deportation mission, and internal incentives to use detention methods to minimize various risks such as non-compliance with removal orders or violent crime reinforces the structural compatibility between the two. Of course, these observations do not minimize the important problems that both the radical and reorganization-oriented abolitionist factions seek to address. While reorganization-oriented abolition would fail to remedy ICE's problems, internal policy reform might offer a means to mitigate the social costs that abolitionists aptly identify as stemming from the immigration enforcement apparatus.

Section One of this paper includes a brief review of ICE and the controversies that have put it in political crosshairs. In Section Two, I evaluate more fully the two factions that define the Abolish ICE movement. The movement to Abolish ICE encompasses both efforts to radically reshape interior immigration enforcement and modestly reform enforcement agencies while preserving their core functions. Section Three of this paper begins where ICE's bureaucratic precursor, the INS ends. Looking to the reorganization history of the retired agency, I will show that, though federal reorganization may track the closest to the Abolish ICE movement's agenda to dismantle the agency, sweeping reorganization of ICE would offer little by way of insurance that the transgressions of today will not be repeated tomorrow. ICE's proclivity to use detention in furtherance of its enforcement agenda is born out of democratically-agreed-upon policies and the agency's own institutional DNA. Both present detention-based problems that defy reorganization-based solutions. In Section Four, I argue that, in the absence of legislative solutions, reformers might find executive power a promising vehicle for innovation and progress. Due to the political friction encasing immigration issues, I first consider whether an executive order requiring agency officials to base enforcement operations off of cost-benefit analysis assessments might curb the number of law-abiding, deportation-eligible immigrants from entering the detention and deportation pipeline and fix enforcement operations on the most dangerous deportation-eligible immigrants. I conclude that cost-benefit analysis methodologies are too morally and normatively fungible to consistently build the kind of politically neutral enforcement caste that reorganization-oriented abolitionists and other moderates might be open to. Instead, I suggest that the next administration look to the Obama administration's successes and failures with instituting prosecutorial discretion measures to develop a program exempting certain categories of immigrants from the detention and deportation process while simultaneously pioneering training programs to change ICE's organizational culture.

### I. WHAT IS ICE AND WHAT DOES IT DO?

ICE is a young agency that has been plagued by controversy in recent years. Critics of the agency claim that President Trump has turned it into a

“mass-deportation force”<sup>21</sup> that has strayed from doing its job.<sup>22</sup> But what is ICE’s job? What role does it serve? Has it changed over time? Understanding ICE’s own history is crucial to making sense of both the agency’s current role and the division within the Abolish ICE movement. As the following discussion explains, ICE’s core function has always been to deport certain immigrants and detain them in furtherance of this deportation mission. Structurally, the entire enforcement arm of the agency is predicated on these two functions. Over the years, changes in the underlying substantive law from which ICE derives its mandate have expanded the class of removable immigrants. However, as the number of removable and detained individuals has grown, so too have ICE’s failings in performing those tasks peripheral to its core function: ensuring the well-being of those in its custody.

The September 11<sup>th</sup> terrorist attacks fundamentally reshaped the organizational administration of the U.S. immigration laws. Three immigration-related agencies rose out of INS’s ashes in the wake of 9/11 to operate within the newly formed Department of Homeland Security (“DHS”):<sup>23</sup> Customs and Border Protection (“CBP”),<sup>24</sup> United States Citizenship and Immigration Services (“USCIS”),<sup>25</sup> and ICE. Initially formed to “prevent acts of terrorism by targeting the people, money, and materials that support terrorist and criminal activities,”<sup>26</sup> today ICE is DHS’s premier enforcement agency and is tasked with conducting investigations, gathering intelligence, managing detention programs, and executing removal operations and immigration

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21. See Sarah D. Wire, *Democrats’ Push to Abolish ICE Reaches Capitol Hill*, L.A. TIMES (July 12, 2017), (quoting Rep. Pramila Jayapal (D-Wash.), a co-sponsor of the Establishing a Humane Immigration Enforcement System Act, claiming that President Trump has weaponized ICE to create his “own mass-deportation force.”), <https://www.latimes.com/politics/la-na-pol-abolish-ice-house-20180712-story.html>.

22. ICE critics frequently claim that the agency is no longer doing its job under the current administration. For example, Vedant Patel, a spokesperson for Rep. Jayapal, stated that the Establishing a Humane Immigration Enforcement System Act is about “reforming and changing an agency that has not been doing its job.” See Martin Kuz, *Abolish ICE? Reform It? Or What?*, CHRISTIAN SCI. MONITOR (July 31, 2018), <https://www.csmonitor.com/USA/Politics/2018/0731/Abolish-ICE-Reform-it-Or-what>

23. See Homeland Security Act of 2002, 6 U.S.C. § 101 (2016).

24. See DEP’T OF HOMELAND SEC., U.S. CUSTOMS AND BORDER PROTECTION, CBP PUBLICATION NO. 0215-0315, VISION AND STRATEGY 2020: DELIVERING SAFETY, SECURITY, AND PROSPERITY THROUGH COLLABORATION, INNOVATION, AND INTEGRATION (2015) (on file with author) (“CBP was established by merging the legacy organizations of U.S. Customs Service, major elements of the U.S. Immigration and Naturalization Service, including the Immigration Inspections Program, the U.S. Border Patrol, and the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service. Later, CBP added the Air and Marine Operations Division from the U.S. Immigration and Customs Enforcement and . . . select elements of the former DHS, U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT). The resulting unified Federal law enforcement agency now called CBP became the nation’s first comprehensive border security agency focused on securing our country’s borders while facilitating legal trade and travel.”).

25. AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, *A Legal Guide for Ice Detainees: Petitioning for Release from Indefinite Detention* 8 (2006) (“USCIS is responsible for immigration benefit services, including the determination of visa petitions, affirmative asylum applications, applications by individuals not in removal proceedings to adjust their immigration status and naturalization applications.”).

26. Muzaffar Chishty and Jessica Bolter, *Once Relatively Obscure, ICE Becomes a Lightning Rod in Immigration Debate*, MIGRATION POLICY INSTITUTE (Aug. 22, 2018), <https://www.migrationpolicy.org/article/once-relatively-obscure-ice-becomes-lightning-rod-immigration-debate> (noting ICE’s original, 2004 mission statement).

proceedings.<sup>27</sup> In this respect, ICE's ERO—which is specifically tasked with overseeing enforcement, detention, and removal operations—is the first agency of its kind dedicated exclusively to enforcing immigration laws in the interior.<sup>28</sup> The ERO's internal structure is comprised of various subdivisions, including the Removal Division, the Secure Communities and Enforcement Division, the Immigration Health Services Division, the Mission Support Division, the Custody Management Division, and Local Field Offices. These subdivisions are charged with executing a subset of tasks in furtherance of these overarching missions.<sup>29</sup> Indeed, ICE's current mission statement reflects this operational and structural shift to immigration enforcement despite initial rhetoric casting the agency as a check on terrorism.<sup>30</sup>

The shift in mission statements reflects a growing trend to enlarge the class of individuals subject to ICE's authorities, but it is not suggestive of an expansion in agency function. The ERO's broad, complex division mission<sup>31</sup> to deport and detain in furtherance of deportation has remained consistent through the years.

While Article II of the Constitution affords the President prosecutorial discretion powers,<sup>32</sup> the class of individuals subject to ICE's enforcement duties is defined by a complex array of statutes. Under the Immigration and Nationality Act, unauthorized entry into the United States is a violation of law punishable by fine, imprisonment, and/or deportation.<sup>33</sup> However, the

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27. American Bar Association, *supra* note 25, at 9.

28. *Id.* at 15.

29. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ENFORCEMENT AND REMOVAL OPERATIONS, <https://www.ice.gov/ero> (last visited Jan. 26, 2019) (providing an overview of the ERO divisions and operations).

30. *Id.* (“[T]o protect America from the cross-border crime and illegal immigration that threaten national security and public safety”). Though not without controversy, ICE has retained some of its investigative and intelligence-gathering duties, though they largely fall within the purview of the Homeland Security Investigations division. *See*, American Bar Association, *supra* note 25, at 9. *See also* Nick Miroff, *Seeking a Split from ICE, Some Agents Say Trump's Immigration Crackdown Hurts Investigations and Morale*, WASH. POST (June 28, 2018), [https://www.washingtonpost.com/world/national-security/seeking-split-from-ice-agents-say-trumps-immigration-crackdown-hurts-investigations-morale/2018/06/28/7bb6995e-7ada-11e8-8df3-007495a78738\\_story.html?utm\\_term=.7d3a90b6fe14](https://www.washingtonpost.com/world/national-security/seeking-split-from-ice-agents-say-trumps-immigration-crackdown-hurts-investigations-morale/2018/06/28/7bb6995e-7ada-11e8-8df3-007495a78738_story.html?utm_term=.7d3a90b6fe14).

31. *See* U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-17-51, ICE DEPORTATION OPERATIONS 1 (2017), *available at* <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-51-Apr17.pdf>.

32. U.S. CONST. art. II, § 2 cl. 1; *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (recognizing that the Constitution affords the Executive Branch the power to decline to bring criminal charges against individuals). There is a vibrant debate as to the extent of the President's discretionary authority to not enforce immigration laws. *See* Adam B. Cox and Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L. J. 104 (2015). An in-depth treatment of this contested topic. *See also* Morton Priorities Memorandum, *supra* note 5. An example of how the President has tried to guide the exercise of prosecutorial discretion.

33. *See* Immigration and Nationality Act, 8 U.S.C. § 1325 (2016) (“Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.”). *Id.* § 1227 makes unauthorized aliens eligible for deportation.



immigration adjudication and deportation system is, at least facially, civil in nature. The civil character of the immigration system enables enforcement authorities like the ERO to detain unauthorized migrants and other immigrants eligible for deportation indefinitely, without the usual constraints applicable to criminal proceedings. As the Supreme Court explained in *Zadvydas v. Davis*, the Court's operating assumption in immigration cases is that immigration adjudications, deportations, and detentions are "nonpunitive in purpose and effect."<sup>34</sup> But despite these civil undertones, and much to the chagrin of activists, civil immigration law and criminal law have entered into an unsuspecting marriage.<sup>35</sup> Immigration law enlarges the class of migrants eligible for deportation by basing removal eligibility on criminal code violations. This has, in turn, led to reports of increased policing in migrant communities.<sup>36</sup> To that end, legal immigrants, including lawful permanent residents, may also be subject to ICE-initiated removal proceedings if they have run afoul of the criminal law. The Anti-Drug Abuse Act of 1988 enabled immigration authorities to deport lawful permanent residents if they were convicted of aggravated felonies, which then included only murder, drug trafficking, and firearms trafficking.<sup>37</sup> The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") expanded the number of crimes that constitute "aggravated felonies," effectively broadening the class of immigrants available for deportation and detention.<sup>38</sup> As discussed *infra* in Part II.A, this complaint animates the radical abolitionist movement.

The ERO's Removal Division is made aware of unauthorized migrants and other immigrants who might be eligible for removal through a variety of information channels, some of which underscore concerns amongst both factions of the Abolish ICE movement that the agency is transforming to a muscular fixture of an anti-immigrant police state, discussed *infra* Part II.A. For example (and least controversially) some unauthorized migrants will be the direct target of an investigation by the Removal Division's fugitive operations sub-group. The fugitive operations sub-group reacts to a breakdown in the legal and management order: fugitives are those individuals ordered to

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34. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). See also *Fong Yue Ting v. United States*, 149 U.S. 698, 728—30 (1893) (noting that deportation adjudications contain "all the elements of a civil case" and that deportation is not a "sentence for a crime or offense").

35. See Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 130-44 (2012), discussed *infra* Part II, Section A.

36. See César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1361—72 (2014).

37. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (1988).

38. Illegal Immigration Reform and Responsibility Act of 1996, 21 U.S.C. 1501 (1996). Today, the definition of "aggravated felony" appears in the Immigration and Nationality Act and includes the following offenses: murder, rape, sexual abuse of a minor, drug trafficking, firearms trafficking and other firearms-related offenses, money laundering, offenses relating to explosive materials, felony crimes of violence, felony theft or burglary, ransom-related offenses, child pornography-related offenses, RICO offenses, sex and human trafficking offenses, espionage-related offenses, immigration-related offenses, certain fraud offenses, perjury, obstruction of justice, and certain failure to appear offenses. See Immigration and Nationality Act, *supra* note 33.

appear for a removal proceeding (or the removal itself) that failed to do so. The Removal Division's work is defined by more clear identifying and demographic information because fugitives have already been identified by ICE authorities.

Other channels and practices are more indirect and contentious. ICE officers will "encounter" people they believe to be unauthorized. Sometimes these encounters are facilitated by local law enforcement offices that might encounter a noncitizen in the course of a traffic stop. Other times, these encounters are staged based on assumptions that unauthorized migrants will be present at a certain place at a certain time. Operations targeting workplaces, public transportation systems, courthouses, and schools are all attempts at staging encounters against those individuals within the interior who have thus far evaded detection by immigration enforcement authorities.<sup>39</sup> Local law enforcement authorities are also frequently implicated in the federal effort to apprehend immigrants in the country, who are here with or without authorization, through ICE's detainer program. Through detainers, ICE essentially requests that local law enforcement agencies notify the agency "before a removable alien is released from criminal custody and then briefly maintain custody of the alien for up to 48 hours" while DHS initiates removal proceedings against them.<sup>40</sup>

Enforcement operations have increased commensurate with increases in both the number of unauthorized migrants living in the United States, the number of individuals deemed removable through class-expansions in the underlying substantive law, and expanded cooperation with local law enforcement agencies. In 1990, 3.5 million unauthorized migrants lived in the United States.<sup>41</sup> That number nearly quadrupled by 2007, when it peaked at 12.2 million.<sup>42</sup> Unsurprisingly, since its inception, ICE's removals, arrests, and detentions have grown to keep up with the influx of unauthorized migrants into the country.<sup>43</sup> In FY 2017, with

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39. See Katie Shepherd, *ICE Arrested an Undocumented Immigrant Just Outside a Portland Hospital: It's the Third Case in Portland Where Federal Immigration Agents Likely Broke Their Own Rules*, WILLAMETTE WEEK (Oct. 31, 2017), <https://www.wweek.com/news/courts/2017/10/31/ice-arrested-an-undocumented-immigrant-just-outside-a-portland-hospital/>; Andrea Castillo, *Immigrant Arrested by ICE After Dropping Daughter Off At School, Sending Shockwaves Through Neighborhood*, L.A. TIMES (Mar. 03, 2017), <http://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html>.

40. IMMIGRATION AND CUSTOMS ENFORCEMENT, DETAINERS – OVERVIEW, <https://www.ice.gov/detainers> (last visited Oct 23, 2019).

41. *Facts on U.S. Immigrants, 2016: Statistical Portrait of the Foreign-Born Population in the United States*, PEW RESEARCH CENTER (Sept. 14, 2018), <http://www.pewhispanic.org/2018/09/14/facts-on-u-s-immigrants/#fb-key-charts-unauthorized-line>, ("[N]ation's unauthorized immigrant population grew rapidly between 1990 and 2007, reaching a peak of 12.2 million. Since then, the population declined to 10.7 million. Unauthorized immigrants from Mexico make up half of all unauthorized immigrants and have been a driver of the group's population decline – the number of unauthorized immigrants from Mexico fell from a peak of 6.9 million in 2007 to 5.4 million in 2016.")

42. *Id.*

43. The ERO's budget has similarly responded to the increased population of unauthorized migrants. In FY 2004, Congress awarded the sub-agency a \$3.5 billion budget. For FY 2018, Congress appropriated \$4.1 billion for ERO's enforcement and removal operations, or nearly 58% of the entire agency's \$7.1 billion budget. *Id.*

143,470 arrests,<sup>44</sup> ERO arrested more individuals through its administrative arrest powers than it had in the preceding three years.<sup>45</sup> Table 1 helps illustrate ICE's growing enforcement operations.

TABLE 1: TOTAL POPULATION FIGURES, NUMBER OF REMOVALS, AND ANNUAL POPULATION OF IMMIGRANT DETAINEES

Year	Est. No. of Unauthorized Population	No. of Removals	Annual. Pop. of Immigrant Detainees <sup>46</sup>
2005	11.1 million	208,521	233,417
2007	12.2 million	319,000 <sup>47</sup>	311,169
2011	11.5 million <sup>48</sup>	396,906	421,312
2013	12.1 million <sup>49</sup>	368,644	440,540
2015	11.0 million	235,413	307,342
2017	data unavailable	226,119	323,591 <sup>50</sup>

As the foregoing discussion indicates, ICE is performing its *core* job with increased prowess. Its expanded operations parallel legislative additions to the class of individuals it can operate against: people eligible for deportation. Of course, ICE is not performing other tasks that ensure migrant safety and well-being that fall to the periphery of its core functions with as much success.<sup>51</sup>

44. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 1 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> (noting ICE's administrative arrest powers).

45. *See id.* (demonstrating in Figures 1 and 2 ICE's administrative arrests over time between FY 2015 and FY 2017).

46. J. Rachel Reyes, *Immigration Detention: Recent Trends and Scholarship*, CENTER FOR MIGRATION STUDIES, <http://cmsny.org/publications/virtualbrief-detention/> (noting in Table 3 the annual total population of immigrant detainees from FY 2001-2016).

47. U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2007 1 (Dec. 2018), [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2007.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2007.pdf).

48. Jie Zong et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INSTITUTE (Jan. 8, 2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized>.

49. U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2014 3 (July 2017), [https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202014\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202014_1.pdf).

50. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 31, at 11.

51. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., *supra* note 7, at 1 (finding that ICE officials violated detention standards). *See also* U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-18-32, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES (2018), *available at* <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf> (finding "problems that undermine the protection of

There is a dearth of legislation codifying the detention standards for immigrant detainees,<sup>52</sup> and ICE is able to promulgate its own detention standards.<sup>53</sup>

For ICE Abolitionists, ICE's success at performing its core function and its failure to perform its peripheral functions of ensuring the well-being of those it detains forms the point of departure for the movement's two factions. As explained below, each faction's platform revolves around either ICE's success or ICE's failure. It is a seemingly small difference of enormous consequence for the kind of immigration system that each abolitionist group envisions for the country.

## II. TWO KINDS OF ABOLITION: UNDERSTANDING THE RADICAL AND REORGANIZATION PRESCRIPTIONS

The movement to abolish ICE is best conceptualized as comprising two factions, each with different goals. At the vanguard of the movement are those who seek to dismantle the immigration enforcement apparatus. These radical ICE abolitionists,<sup>54</sup> perceiving that the entire immigration enforcement system fails to reflect certain humanitarian values, seek to do away with both the agency and its core functions. While legal academia has been slow to critically examine the Abolish ICE movement,<sup>55</sup> some scholarship is situated squarely within this radical critique of the agency. On the other side of the abolitionist aisle are institutional reformers who seek to abolish ICE through reorganization schemes that correct what it sees as current undesirable agency behaviors while preserving core agency functions. Due to the political difficulties of implementing those proposals associated with the radical critique, this essay proceeds with a critical examination of the reorganization-oriented abolitionist movement.

### A. *Abolishing ICE, Dissolving its Function, and Transforming the Criminal-Immigration System*

Radical ICE Abolitionists seek to dissolve both the agency and its core functions.<sup>56</sup> For some radical abolitionists, the lack of accountability

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detainees' rights, their humane treatment, and the provision of a safe and healthy environment" at several ICE detention facilities).

52. See Kelsey E. Papst, Note, *Protecting the Voiceless: Ensuring ICE's Compliance with Standards that Protect Immigration Detainees*, 40 MCGEORGE L. REV. 261, 267 (2009) for a thoughtful treatment on the detention standards governing ICE's treatment of immigration detainees.

53. *Id.* at 270.

54. I do not use this term pejoratively but to emphasize the extreme disparity between the two camps within the Abolish ICE movement.

55. A recent search of Lexis, Westlaw, HeinOnline, and SSRN revealed that very little scholarship has been conducted on this issue. In fact, only one author to date has attempted to make sense of what the Abolish ICE movement might mean for immigration reform. See Allison Crennen-Dunlap, *Abolishing the ICEberg*, 96 DENV. L. REV. 148 (2019). However, Crennen-Dunlap's project is more concerned with identifying the existence of a radical faction and the general issues that animate it than it is critically examining reorganization proposals. See *id.* at 156-57.

56. Sean McElwee, *It's Time to Abolish ICE: A Mass-Deportation Strike Force is Incompatible With Democracy and Human Rights*, THE NATION (Mar. 9, 2018), <https://www.thenation.com/article/its-time-to-abolish-ice/> (noting that "the goal of abolishing the agency is to abolish the function").

surrounding ICE's activities represents a threat to democracy, while its functions are out of sync with humanitarian ideals.<sup>57</sup> In particular, Radical ICE Abolitionists take issue with ICE's expansive police and surveillance powers,<sup>58</sup> its independence from the Department of Justice,<sup>59</sup> and its deportation functions as inhumane and immoral.<sup>60</sup> This radical critique is born out of a rejection of the criminal law enforcement qualities of the civil immigration enforcement and two different but overlapping premises – mutual economic development and human rights – upon which our immigration system should be based. Both implicitly, or explicitly, would abolish ICE's central function of identifying unauthorized immigrants for deportation, detaining them, and deporting them.

Much about the radical abolitionist movement can be gleaned by surveying its deeper intellectual roots. As it turns out, the radical abolitionist critique of ICE tracks closely with other critiques of the criminal justice dimensions of the civil immigration enforcement apparatus and the faction's proposals mirror the rights-based solutions that other scholars have proposed.<sup>61</sup>

Radical ICE abolitionists like Sean McElwee articulate concerns that the agency's enforcement mission inhibits democratic participation,<sup>62</sup> that deportation is a cruel and inhumane remedy to immigration issues,<sup>63</sup> and that the enforcement mandate, more generally, is steeped in racism and xenophobia.<sup>64</sup> If this sounds familiar, it might be because scholars and activists have long been making the case that criminal and immigration enforcement systems are ineffective at addressing problems and are built on morally dubious values and prejudices.<sup>65</sup>

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57. *Id.* (finding that while McElwee, a leader in the Abolish ICE movement, does not explain how ICE threatens democracy, one might argue to the contrary that ICE preserves democratic integrity by enforcing democratically-enacted laws, namely the Immigration and Nationality Act).

58. *Id.* (noting that the "call to abolish ICE is, above all, a demand for the Democratic Party to begin seriously resisting an unbridled white-supremacist surveillance state.").

59. *Alexandria Ocasio-Cortez's Platform*, ALEXANDRIA OCASIO-CORTEZ 2018 (2018), <https://ocasio2018.com/issues> (noting that "[u]nlike prior immigration enforcement under the INS, ICE operates outside the scope of the Department of Justice and is unaccountable to our nation's standards of due process.").

60. Elaine Godfrey, *What 'Abolish ICE' Actually Means*, THE ATLANTIC (July 11, 2018), <https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752/> (noting that some activists believe that the movement's rhetorical success has meant that "there is some idea of a world in which we don't deport people."). *See also* McElwee, *supra* note 11 (stating that "[n]ext to death, being stripped from your home, family, and community is the worst fate that can be inflicted on a human, as many societies practicing banishment have recognized.").

61. *See, e.g.*, McLeod, *supra* note 35, at 130-44.

62. McElwee, *supra* note 11. McElwee does not fully develop his contention that ICE imperils democracy but I suspect his argument would be that ICE's enforcement practices make citizen-activists in migrant communities fearful of participating in political processes lest they draw the attention of ICE agents toward deportation-eligible members of their communities.

63. *Id.*

64. Julianne Hing, *What Does it Mean to Abolish ICE?*, THE NATION (July 11, 2018), <https://www.thenation.com/article/mean-abolish-ice/>.

65. *See generally* Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1446–47 (2011) (noting that consideration of undocumented status in trials for the purposes of sentencing and impeachment can function as a proxy for race-based considerations); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign*

As Professor Allegra McLeod argues, the criminal-immigration convergence fails as a regulatory model because it “relies upon an inaccurate indicator of un-belonging, criminal law contact.”<sup>66</sup> McLeod identifies three particular regulatory failures in support of her argument. First, criminal law contact is a poor proxy to determine “un-belonging” because many noncitizens coming into contact with law enforcement aren’t removed.<sup>67</sup> Though the government may deport lawful permanent residents for criminal activity, McLeod argues that deportation and its attendant costs are an optimal penalty only when not outweighed by the disruptive costs shouldered by communities and families.<sup>68</sup> In practice, Congress acknowledges that cost-benefit balancing should govern removal decisions for lawful residents.<sup>69</sup> Second, and relatedly, deportation remedies are not cost-efficient because the cost to deport exceeds the cost of the offense. McLeod incisively turns our attention to community costs that are often peripheral in the government’s cost-benefit analysis calculations. That is, deportation remedies subject the government, deported individuals, and their employers, families, and communities to unjustifiably high costs compared to the harm of the offense.<sup>70</sup>

Radical ICE abolitionists echo this concern that migrant communities are being unfairly taxed by deportation regimes and the concern for unaccounted-for costs is among the primary arguments for dissolving the agency. Consider the following call from an ICE abolitionist:

Who does [deportation] benefit? Certainly not communities that are torn apart by these actions. . . . Deportation is a form of exile. If [author’s husband] is deported, he will be permanently refused entry to the US. He will never be able to return to our home, to our community, to his job, to the people who have held us up during this long struggle. And we are one family among thousands.<sup>71</sup>

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Power, 56 AM. U. L. REV. 367—413 (2006) (arguing that the criminal-immigration convergence is predicated on a system of “inclusion and exclusion” that creates “distinct categories of people” often identifiable by race and class); and Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 661—670 (2004) (observing that the expansion of the criminal-immigration convergence sweeps hundreds of thousands of immigrants living otherwise peaceful lives and affects, perhaps disproportionately, immigrants of color).

66. McLeod, *supra* note 35, at 131.

67. *Id.* at 131.

68. *Id.* at 135. (“The conclusion to be drawn from this is that criminal-immigration enforcement ought to be applied to lawful permanent residents, if at all, only where the egregiousness of their conduct is such that it overcomes their claims to belonging, and where the sanctions of removal is roughly proportional as a remedy to the criminal wrong at issue.”).

69. *Id.* at 134. (“Precisely because of these substantial ties on the part of lawful permanent residents, Congress has retained a discretionary waiver available to certain lawful residents facing deportation.”).

70. While deportation is an available remedy to all non-citizens when they commit crimes, the government does not consistently distribute penalties, like deportation, in response to criminal activity across all categories of immigrants.

71. Amy Gottlieb, *It is Time to Abolish ICE. It Cannot Be Reformed*, THE GUARDIAN (June 23, 2018), <https://www.theguardian.com/commentisfree/2018/jun/23/it-is-time-to-abolish-ice-it-cannot-be-reformed>.

Third, McLeod argues that the criminal-immigration system does not adequately filter out individuals, like U.S. citizens, for whom such cost-benefit balancing should not apply as a matter of right.<sup>72</sup> This argument is perhaps especially salient with respect to undocumented immigrants who have lived in the United States since early childhood, and are American along cultural and social dimensions, but lack the formal markings of societal membership (*i.e.*, regular immigration status or citizenship).<sup>73</sup>

To solve these problems, McLeod suggests that we fundamentally reorganize the immigration system around different premises, and, in doing so, largely do away with certain functions. Importantly, extracting prevailing narratives of the immigration system, underscoring problems associated with the criminal-immigration convergence, and “conceptually resituat[ing] immigration in terms of human rights and development”<sup>74</sup> is critical to this system-altering effort. Of equal importance, an immigration model situated within the context of development economics would be organized to “minimize the associated harms in sending and receiving states, and achieve fair distribution of any associated gains”<sup>75</sup> by “creating incentives to return for immigrants in primary receiving states, and working to better and more equitably manage the complicated structural factors that lead individuals to permanently re-settle in certain states in large numbers.”<sup>76</sup> In this system,

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72. McLeod *supra* note 35, at 135. See also Tyche Hendricks, *U.S. Citizens Wrongly Detained, Deported by ICE*, S.F. CHRON. (July 27, 2009), <http://www.sfgate.com/cgi-bin/articles.cgi?f=/c/a/2009/07/26/MNGQ17C8GC.DTL> (regarding the wrongful detention of U.S. citizens by ICE).

73. Joseph H. Carens, *Who Gets the Right to Stay?*, BOSTON REVIEW (Jan. 23, 2018), <http://bostonreview.net/global-justice/joseph-h-carens-who-gets-right-stay>. As Carens argues:

The later years of childhood are the most important ones from society’s perspective—the formative years of education and wider socialization. Human beings who have been raised in a society become members of that society: not recognizing their social membership is cruel and unjust. It is morally wrong to force someone to leave the place where she was raised, where she received her social formation, and where she has her most important human connections, just because her parents brought her there without official authorization. Yet current legal rules in North America and Europe threaten many young people in just this way.

Joseph H. Carens, *Who Gets the Right to Stay?*, BOSTON REVIEW (Jan. 23, 2018), <http://bostonreview.net/global-justice/joseph-h-carens-who-gets-right-stay>.

Connecting Carens’ appeal to McLeod’s critique, if some undocumented immigrants are American in all but name, rationalizing deportation, which causes immense harm to our societal and “American” peers, for reasons that typically justify comparatively little punishment on legal Americans is effectively to stretch the formal distinction to unjust lengths. To put this in concrete terms, simple drug possession at the hands of an undocumented DREAMER is not substantively more harmful than when done by an American citizen, making the banishment of the former a disproportionate remedy to the harm she caused.

74. McLeod *supra* note 35, at 178. (“Human rights accounts are most productive in their potential to morally ground a reconception of immigration regulation, centering concern for fundamental racial equality and universal human dignity outside a crime-centered framework.”)

75. Costs associated with sending states, or the states which migrants leave, include brain drain and reduced economic, social, and cultural capital. Receiving states, or those states to which migrants migrate, bear additional costs associated migration, including societal integration and increased use of infrastructure, among others. However, as McLeod notes, cyclical migration might yield benefits to both sending and receiving states in the form of “infrastructure for health, education, and investment for sending states and optimal labor resources for receiving states.” *Id.* at 173-76.

76. *Id.* at 176.

deportation—and the entire law enforcement apparatus constructed around it—is unnecessary because cyclical flows of migration are both desired and managed.<sup>77</sup> Similarly, an immigration system premised on a “moral right to freedom of movement” might similarly find “restrictive immigration policies” unjust. Except in instances of extreme, violent criminality, deportation would be inherently unjust. This contention serves as a primary pillar for the philosophical justification of the radical abolitionist movement.<sup>78</sup>

But while McLeod acknowledges that deportation and detention are “enmeshed” with the criminalized trappings of our current immigration system,<sup>79</sup> she fails to explain where, if at all, current deportation and detention tactics would fit in this re-imagining of the immigration system if it were not to function as designed.<sup>80</sup> For example, does deportation have a role in addressing “market failures” when mutually beneficial economic development incentives fail to adequately govern cyclical migration cycles? Would there be no market failures in this new system, and would enough people voluntarily leave as part of a structured immigration cycle such that expenditures on a deportation apparatus would be too costly to justify? If there are market failures, can deportation and detention function be divorced from the criminal-immigration convergence that McLeod and the radical abolitionist movement have indicted? And, if they could be, then might such functions play a valuable role in enforcing a different reform scheme, albeit one predicated on “compassionate” and “temporary” detention and “swift” deportation? These outstanding questions give reorganization-oriented abolitionists pause about following other abolitionists’ full calls to abolish the agency and its functions.

### B. *Reorganization-Oriented Abolitionists*

A second set of ICE abolitionists offer a more modest critique of the immigration system. Instead of questioning the principle of interior immigration enforcement—and therefore deportation as a remedy for unauthorized immigration—these abolitionists wish to reassign ICE’s core

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77. However, McLeod concedes that “[f]urther research and analysis is required to determine whether incentivizing cyclical flows would actually function as a win-win model for migration regulation” while also defending the “reconceived orientation of this model toward addressing underlying concerns regarding labor, migration, distributive-justice, and socio-economic development.” *Id.*

78. Shikha Dalmia, *Abolish ICE: America’s Immigration Roundup Squad Must Go*, REASON MAG. (July 2018), <https://reason.com/archives/2018/06/11/abolish-ice> (“Except for capital punishment, a government has no more awesome a power than to pluck people from their homes, tear them away from their loved ones, and send them into exile.”).

79. McLeod, *supra* note 35, at 115-19.

80. In keeping with the radical abolitionist movement, McLeod suggests that modest institutional reforms are unlikely to mitigate the current system’s damage or remedy its structural flaws. *See, id.* at 154 (“Although the government may justify isolated criminal removals in terms of these sorts of serious violent crimes committed by noncitizens, there is an insufficient number of such offenses for a limited approach along these lines to serve as a meaningful enforcement model, so long as some substantial level of deportations is maintained as a priority. In other words, this accommodation would fundamentally change the structure of U.S. immigration enforcement.”).



functions to other agencies.<sup>81</sup> In many respects, we can see these elements at play in Representative Alexandra Ocasio-Cortez's (D-NY) critique of ICE and current legislative proposals to abolish the agency. Like other reorganization-oriented abolitionists, Representative Ocasio-Cortez seeks to use reorganization as a means to enhance accountability and humanize ICE's functions.<sup>82</sup> Likewise, proposed legislation explicitly envisions a future for ICE's primary functions but seeks to use reorganization as a means of curbing abuse and controversy. While this discussion will help elucidate the murky dynamics of the reorganization-oriented abolitionist faction, this paper devotes considerably less attention to the theoretical underpinnings of the more moderate abolitionist movement because such critics seek to preserve the fundamental character of our current immigration system.

That said, a basic review of the reorganization-oriented abolitionist faction is in order. Abolitionist programs rooted in a reorganization strategy generally seek to accomplish two goals: effective implementation of peripheral goals like meeting agency detention standards and increased accountability.

Contrary to popular belief, Representative Alexandra Ocasio-Cortez represents a reorganization-oriented abolitionist concerned with improving the agency's willingness to meet its peripheral goals, like humanely treating those whom it detains, and increasing accountability.<sup>83</sup> Ocasio-Cortez's comments suggest that she believes that a reorganization strategy premised on heightened accountability will lead to agency improvements in the area of detainee treatment. Consider the following comment:

When we talk about abolishing ICE, we're talking about ending family detention. We're talking about ending an agency and ending a practice and a structure that is not accountable to the U.S. Department of Justice . . . So to have an enforcement agency that operates outside of the accountability of the Department of Justice, it's no surprise to see the violations of civil and human rights that we're seeing right now.<sup>84</sup>

In this statement, Ocasio-Cortez seems to identify ICE's institutional placement outside of the Department of Justice as a causal factor in the

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81. See, e.g., Raul Reyes, *End ICE's Reign of Terror Over Immigrants and Latinos. Abolish it or Turn it Around*, USA TODAY (July 3, 2018), <https://www.usatoday.com/story/opinion/2018/07/03/abolish-ice-end-reign-terror-latinos-immigrants-column/751742002/>.

82. See, e.g., Faris Bseiso, *Ocasio-Cortez Suggests Eliminating Department of Homeland Security*, CNN (July 11, 2019), <https://www.cnn.com/2019/07/11/politics/alexandria-ocasio-cortez-department-of-homeland-security/index.html>; see also Jeremy Scahill, *White Fear: As the GOP Veers Toward Fascism, Establishment Democrats Face a Grassroots Insurgency*, THE INTERCEPT (May 30, 2018), <https://theintercept.com/2018/05/30/white-fear-as-the-gop-veers-toward-fascism-establishment-democrats-face-a-grassroots-insurgency/> (then-candidate Alexandria Ocasio-Cortez providing her vision for immigration reform).

83. Chantal Da Silva, *Ocasio-Cortez Calls for Occupation of Airports, ICE Offices: 'We Have to Mobilize'*, NEWSWEEK (July 17, 2018), <https://www.newsweek.com/ocasio-cortez-calls-occupation-airports-ice-offices-we-have-mobilize-1028387>.

84. *Id.*

agency's controversial detention policies, as well as its mistreatment of immigrants and detainees. Implicit in Ocasio-Cortez's diagnosis is that ICE's penchant for violating civil and human rights is the result of insufficient accountability mechanisms or cultural norms. If only, the thinking goes, ICE was subject to greater bureaucratic oversight from within the executive branch and integrated into a culture that values rules, the new agency would terminate morally-concerning detention practices and adopt better, more humane practices. If Ocasio-Cortez is right, then reorganizing ICE under a different parent agency, like the Department of Justice, might be the one stone to kill two birds by strengthening accountability and, thereby, reforming an agency culture that permits abuse.

This diagnosis is in keeping with those offered by other reorganization-oriented abolitionists. As one newsroom editorial board put it, this facet of the abolish ICE movement:

seeks to phase out the agency and create a replacement with the same duties and responsibilities – just without the incompetence and cruelty that's characterized its behavior in recent years. We know this because that's exactly what the bill offered by House Democrats seeks to do. The bill backed by Rep. Mark Pocan of Wisconsin and others would be more about reorganizing government than abolishing anything. The legislation recognizes the necessity of federal law enforcement agents combating drug smuggling, human trafficking, and other border-related security needs.<sup>85</sup>

As the synopsis above suggests, the defining feature of reorganization-oriented ICE abolitionists is that they propose organization-based solutions to perceived issues in the institution's structure that interfere with the agency's ability to humanely execute some of its functions.<sup>86</sup>

The reorganization-oriented abolitionist movement's commitment to ICE's core functions underscores its fundamental ideological departure with the radical abolitionist movement despite shared concerns of the agency's perceived abuses. Like their more radical peers, the reorganization-oriented

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85. *Abolish ICE? Maybe 'Purge' is a Better Word*, THE BALTIMORE SUN (July 12, 2018), <https://www.baltimoresun.com/news/opinion/editorial/bs-ed-0713-abolish-ice-20180711-story.html>.

86. See, e.g., Matt Ford, *OK, Abolish ICE. What Then?*, THE NEW REPUBLIC (July 18, 2018), <https://newrepublic.com/article/149945/ok-abolish-ice-then> (noting that "Congress could also move the office to the Justice Department, either as a standalone agency or to be absorbed by the FBI," or it could be reorganized into another parent agency). Other reorganization-oriented ICE abolitionists seem to think that abolishing subdivisions like the ERO and transferring interior enforcement tasks to HIS will result in substantive changes to immigration enforcement. See, e.g., Alex Nowrasteh, *A Moderate Two-Point Plan for Reducing ICE's Power*, CATO INSTITUTE (July 2, 2018), <https://www.cato.org/blog/moderate-two-point-plan-reducing-ices-power> ("ERO's responsibility for apprehending and removing the one-third of its arrests who have committed crimes . . . should be transferred to HSI. Thus, part of the resources allocated to ERO every year should be transferred to HSI . . . This reorganization will focus immigration enforcement on criminals and national security threats."). It's not entirely clear how Nowrasteh arrives at this conclusion, unless he's suggesting that institutional culture or more limited resources would alter enforcement priorities.

abolitionists who crafted the Establishing a Humane Immigration Enforcement System Act, or the bill to abolish ICE, identify ICE's contracts with private, for-profit prison companies, inhumane detention conditions; compliance issues, the sexual abuse of immigrant detainees, and transparency and accountability concerns as reasons why the current immigration enforcement system is in need of reform.<sup>87</sup> However, the legislation is representative of the reorganization-oriented abolitionist approach to dissolve one agency and transfer its functions to a new one. Indeed, the very title of the Establishing a Humane Enforcement System Act conveys that the *enforcement* function will remain. The proposed Act's goals are not to abolish the enforcement function that radical abolitionists decry but to dismantle an inhumane enforcement agency and establish a humane enforcement agency. Accordingly, the Establishing a Humane Immigration Enforcement System Act explicitly envisions a future for ICE's "essential functions."<sup>88</sup>

The radical abolitionist critique overlooks real concerns about punting immigration enforcement to state and private-actors. The few general proposals offered by the faction's intellectual compatriots do not adequately address the potential need for an enforcement mechanism should "immigration markets" fail. There are additional concerns about the political plausibility of passing statutes that radically reshape the immigration system. By contrast, the reorganization-oriented abolitionist movement's implicit support for the precepts of the immigration system, including an interior enforcement function, make it more politically palatable. However, as the reorganization history for ICE's predecessor, the INS, suggests, there is ample reason for academics and policy experts to view this reorganization effort with caution.

### III. IS PAST PROLOGUE? MAKING SENSE OF THE INS'S COMPLICATED HISTORY WITH REORGANIZATION

Before there was ICE there was the INS, and a review of its history underscores both the promises and perils of reorganization. The INS's reorganization into three separate bureaucracies offers insight as to when reorganization is appropriate. Two themes that emerge from this history are important for our consideration. On the one hand, reorganization might serve as a useful problem-solving mechanism when an agency's composition facilitates internal competition that inhibits realization of institutional objectives. The INS contained two contradictory missions—one that permitted certain immigrants to enter the country and another that removed immigrants—that pitted different subdivisions of the agency against one another. Reorganization created independent agencies around each mission. On the other hand, reorganization

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87. Humane Immigration Enforcement System Act, H.R. 6361, 115th Cong. § 2(18) (2018) (referred to the Subcomm. on Immigration and Border Sec., Aug. 6, 2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/6361/text?q=%7B%22search%22%3A%5B%22ICE%22%5D%7D&r=13>.

88. *Id.* §3(b)(1).

efforts that bifurcate agencies may create new bureaucratic borders if agencies with overlapping, complementary tasks are organized into new silos. Hence, logistical and institutional competence issues arose when the reorganization process produced two separate immigration enforcement agencies: ICE, which took on interior enforcement, and CBP, which enforces the border. As discussed *infra* in Part IV, these case studies contain important lessons for the reorganization-oriented abolition movement.

#### A. *The INS: One Agency, Two Divergent Purposes*

Like ICE, the INS faced calls for abolition—and eventually it was abolished. Importantly, the INS’s abolition was part of a broader reorganization effort that reshaped large parts of the federal bureaucracy in the wake of a national tragedy and growing security threat. In the wake of the September 11<sup>th</sup> terrorist attacks, INS was the subject of heightened scrutiny for its role in ensuring national security and economic imperatives.<sup>89</sup> In April of 2002, after months of resistance, the White House unexpectedly endorsed legislation abolishing the INS.<sup>90</sup> The move was not precipitated by sustained activism calling out the injustices of an agency that detained asylum seekers in prison-like settings, though such critics certainly existed.<sup>91</sup> Instead, the White House backed the measure in response to considerable bipartisan agreement that the INS was beleaguered by poor morale, inadequate funding, mismanagement, and, most importantly, internally contradictory missions.<sup>92</sup> Indeed, INS had done little to curb the influx of illegal border crossings, which had risen dramatically in the preceding decade.<sup>93</sup> At the same time, INS struggled to efficiently distribute immigration-related services like visas, permanent legal resident cards, and the like. Reorganization addressed some of these problems. Whereas the INS had previously been a sub-department within the Department of Justice and attempted to function as a one-stop shop for immigration enforcement and immigration services,<sup>94</sup> DHS disaggregated the INS’s functions into three separate agencies: Customs and Immigration Services (CIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).

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89. *Id.* at 100.

90. Eric Schmitt, *Bush Endorses Abolition of Immigration Agency*, N.Y. TIMES (Apr. 25, 2002), <https://www.nytimes.com/2002/04/25/us/bush-endorses-abolition-of-immigration-agency.html>.

91. See Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197 (1999).

92. MILTON MORRIS, IMMIGRATION: THE BELEAGUERED BUREAUCRACY (1985).

93. Jack Herrera, *The Government’s Numbers Show Increasing Border Arrests. Does that Mean that the U.S. is Facing an Illegal Immigration Crisis?*, PAC. STANDARD (May 9, 2019), <https://psmag.com/news/increasing-border-arrests-is-the-us-facing-an-illegal-immigration-crisis>.

94. Susan Martin, *Immigration Reorganization: Separating Services and Enforcement*, 25 DEF. ALIEN 99, 102 (2002).

Critics saw the INS's dual-pronged and contradictory mission as the focal point for agency dysfunction.<sup>95</sup> For example, INS dedicated resources to help the many eligible foreigners stay in the United States,<sup>96</sup> but also devoted considerable resources to keep ineligible foreigners out of the country and deport those ineligible to stay.<sup>97</sup> Mission-based entanglement and estrangement raised worries of institutional competence that DHS attempted to circumvent by establishing more singularly-driven subsidiary agencies.<sup>98</sup>

INS's *restrictive enforcement mission* was executed by customs officials focusing on the border and removal officials focused on the interior; like ICE today, both sets of operators sought to remove ineligible persons from the country. INS's *permissive services mission* provided visas, conducted interviews, determined asylum eligibility and conferred other statuses that enable non-citizens to legally enter the United States.<sup>99</sup> These two service missions can be organized into two broader policy categories. The INS's restrictive enforcement mission was premised on removing unauthorized persons from society. By contrast, the INS's permissive services mission served as a gatekeeper for immigration-related benefits, namely granting status authorizing entry. Practically, this resulted in operational contradictions as an increasing number of immigrants overstayed their visas, thereby adding to the enforcement arm's workload.<sup>100</sup> These internal contradictions<sup>101</sup> are noteworthy because critics of the agency often complained that its enforcement arm received disproportionate attention and funding,<sup>102</sup> with one commentator

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95. See LISA M. SEGHEITTI, CONG. RESEARCH SERV., RL31388, IMMIGRATION AND NATURALIZATION SERVICE: RESTRUCTURING PROPOSALS IN THE 107<sup>TH</sup> CONGRESS 15 (2002).

96. RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33319, TOWARD MORE EFFECTIVE IMMIGRATION POLICIES: SELECTED ORGANIZATIONAL ISSUES 5 (2007).

97. *Id.*

98. The Homeland Security Act sought to remedy these institutional ailments, and others, by creating the Department of Homeland Security. DHS absorbed 22 already existing federal agencies and a complex array of legal duties and management tasks, ranging from transportation security, border policing, complex criminal investigations, and immigration management. Some of the 170,000 newly-minted DHS employees migrated from the INS. See Tanya N. Ballard, *Homeland Security Department Absorbs Agencies*, GOV'T EXEC. (Feb. 28, 2003), <https://www.govexec.com/defense/2003/02/homeland-security-department-absorbs-agencies/13531/>.

99. These qualifiers are derived from a Congressional Research Service report on the newly-formed Department of Homeland Security that contrasts "generous" and "restrictive" immigration policies. See JENNIFER E. LAKE, CONG. RESEARCH SERV., RL31549, DEPARTMENT OF HOMELAND SECURITY: CONSOLIDATION OF BORDER AND TRANSPORTATION SECURITY AGENCIES 5-6 (2003).

100. RUTH ELLEN WASEM, CONG. RESEARCH SERV., RS22446, NONIMMIGRANT OVERSTAYS: BRIEF SYNTHESIS OF THE ISSUE 1 (2014).

101. See *CBP and ICE: Does the Current Organizational Structure Best Serve U.S. Homeland Security Interests? Hearing Before the Subcomm. on Management, Integration, and Oversight of the H. Comm. on Homeland Sec.*, 109th Cong. 7 (2005) [hereinafter *Organizational Hearing I*] (statement of Rep. Christopher Cox) ("Abolishing the INS and moving its functions into this new department was meant to correct the fundamental problems that existed within the INS itself. The old INS had multiple and sometimes conflicting roles as provider of immigration services and enforcer of immigration laws. The Homeland Security Act abolished the INS and split immigration services from immigration enforcement.")

102. Demetrios Papademetriou et al., *Reorganizing the Immigration Function: Toward a New Framework for Accountability*, 75 INTERPRETER RELEASES 501, 504 (1998) (explaining that INS's dual mission is criticized on account that "enforcement goals always seem to take precedence over service goals").

describing the dual-hatted agency as offering “two very compelling missions” that competed against one another for resources.<sup>103</sup>

Equally troubling, INS’s integrated (but competing) missions raised concerns of institutional competence. As one former official explained, the old bureaucracy’s organization required those responsible for providing immigration services to make administration and policy decisions regarding immigration enforcement matters:

I could recall sitting down with some of the former INS Commissioners and one minute we were talking about the naturalization backlogs and the next minute we were talking about a national security case. As much as you wished to say yes, they are all immigration related, they are at the same time distinct issues. You do have at times conflicting priorities in there and it does put the person in charge facing the challenge of having to decide which issues we are going to focus on.<sup>104</sup>

As the former official’s remarks suggest, INS’s dual pronged mission generated concerns about institutional competence and skewed priorities.

Recognizing the tension and risks between INS’s restrictive and permissive missions, the Homeland Security Act created and delineated agencies based on a broad categorization of their tasks. Hence, permissive service operators work within CIS, whereas DHS’s enforcement operators are largely divided between ICE and CBP.<sup>105</sup> In this respect, federal reorganization was a means to address an underlying, clearly identifiable institutional problem. Federal reorganization did not so much change the tasks of enforcement officers executing the restrictive program or the services officers executing the permissive program, so much as it organized these operators into agencies with missions and management structures reflective of their actual work.

### B. *Creating Bureaucratic Borders by Bifurcating Duties*

When discussing the virtues of INS’s reorganization, it is equally important to consider its vices. While reorganization can produce optimal results when agencies are subdivided along broad categorical dimensions, increased subdivision amongst agencies with overlapping missions and tasks can undermine institutional efficiency when artificial borders are erected between agencies. As discussed *infra* in Part IV, this lesson from the INS’s reorganization

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103. Victor X. Cerda, *The New Face of Immigration in the Department of Homeland Security*, 19 ST. JOHN’S J. LEGAL COMMENT 1, 4 (2004). However, notwithstanding Cerda’s observations, I should note that while creating two separate agencies might not reduce the overall competition for resources, giving each agency a designated head to lobby Congress and the White House for funds might result in better agency representation.

104. *Id.* at 4.

105. See JENNIFER E. LAKE, CONG. RESEARCH SERV., RL31549, DEPARTMENT OF HOMELAND SECURITY: CONSOLIDATION OF BORDER AND TRANSPORTATION SECURITY AGENCIES 7-9 (2003).

history problematizes the reorganization-oriented abolitionist strategy as applied to ICE, where the detention and deportation functions work hand in glove.

Internal competition and questions of institutional competence permeated INS's enforcement apparatus, spurring downstream reorganization efforts. Prior to the creation of DHS, INS was tasked with all immigration enforcement operations, including the apprehension of unauthorized immigrants, border inspection, immigration law violation investigations, and prosecutions of immigration law violators. Its counterpart along the border was the Treasury Department's U.S. Customs Service, which was tasked with the targeting, inspection, regulation, and investigation of goods going in and out of the country.<sup>106</sup> Within INS's enforcement arm, border security and interior immigration enforcement missions, such as workplace immigration enforcement operations or immigration detention, were merged under a single management structure. Accordingly, resource allocations internal to INS largely reflected the operational priorities of a single manager. Consider the following testimony:

In my office in San Diego, for example, there were a lot of times where detention removal resources and funds were used to support the inspections on border operations. Our western region director had a background in Border Patrol and would use those resources to help Border Patrol operations. As a result, interior enforcement and fugitive operations were greatly diminished. We weren't going out and finding fugitives to the scale we needed to.<sup>107</sup>

However, and importantly for the reorganization proposals today, border security and internal immigration enforcement operations largely consisted of discrete but similar tasks differentiated primarily by region. When DHS's creation spurred the downstream creation of CBP and ICE, neither agency was tasked with the full gamut of tasks associated with their newly created jurisdictions in customs, border, and immigration enforcement. For example, CBP assumed inspection functions previously performed by both INS and the U.S. Customs Services, as well as the Border Protection, whereas ICE assumed INS and Customs investigatory functions, intelligence functions, and INS's detention and removal apparatus.<sup>108</sup>

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106. U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GEN., OIG-06-04, AN ASSESSMENT OF THE PROPOSAL TO MERGE CUSTOMS AND BORDER PROTECTION WITH IMMIGRATION AND CUSTOMS ENFORCEMENT 2-4 (2005).

107. *Organizational Hearing I*, *supra* note 101, at 26 (Statement of Randy Allen Callahan).

108. *CBP and ICE: Does the Current Organizational Structure Best Serve U.S. Homeland Security Interests? Part II and III, Hearing Before the Subcomm. on Management, Integration, and Oversight of the H. Comm. on Homeland Sec.*, 109th Cong. 6 (2006) [hereinafter *Organizational Hearing II*] (Statement of Robert L. Ashbaugh, explaining the history of ICE and CBP and coordination problems between the two agencies).

The bifurcation of these various, overlapping discrete tasks resulted in foreseeable problems. As the former Assistant Inspector General for Inspections and Special Reviews for DHS explained:

Under the new structure, the organizations depended on each other's assistance to complete enforcement actions. For example, if CBP inspectors interdicted an individual for a customs law violation, the investigation of the matter would have to be turned over to ICE or another law enforcement agency. Similarly, ICE now depended on case referrals from CBP inspectors. For their part, CBP Border Patrol agents had to rely on ICE detention and removal resources to deport the aliens whom they apprehended.<sup>109</sup>

The erection of institutional barriers exacerbated poor articulations of operational tasks,<sup>110</sup> leading interior enforcement operators within the newly formed respective agencies isolated and confused from their counterparts along the border.<sup>111</sup> These issues were compounded by outdated technologies that failed to deliver the communication resources necessary to coordinate apprehension, intelligence, detention, and removal operations implicating border personnel.<sup>112</sup>

In this respect, federal reorganization may have produced more problems than it solved.<sup>113</sup> Whereas reorganization proved sound when the separated agencies were driven by different *missions*, it produced complications for CBP and ICE, which enjoy both mission overlap and enforcement-related tasks. For our purposes, it is important to note that federal reorganization did not so much change the tasks of interior enforcement officers and border patrol officers, so much as it realigned those tasks based on geographic (i.e., the border) and categorical (i.e., investigations) areas of perceived institutional competence. The lessons for reorganization-oriented abolitionists who seek to abolish ICE but reassign its functions is clear: assigning separate agencies tasks related to the same mission can produce logistical impediments that undermine the overarching mission.

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109. *Id.* at 6.

110. *Id.* at 11 (Statement of Stewart Baker, noting that "ICE personnel have just gone through a couple of years of great turmoil in which no one knew for sure what their job was, who they were going to report to, what their organizational prerogatives were, where the borders were with other organizations.").

111. *Id.* at 6 ("Employees at both ICE and CBP [reported] that enforcement units in CBP and ICE suffer from breakdowns in cooperation, competition, and, at times, interference with each other's duties.").

112. *Id.* at 8.

113. Assessing the broad overall success of the federal reorganization scheme is beyond the scope of this paper.



#### IV. WHY WE CAN'T REORGANIZE OUR WAY OUT OF ICE'S PROBLEMS

Reorganization-oriented abolitionists conceivably might want to abolish ICE's detention function or transfer it to another agency ICE's without impeding the agency's general enforcement mission to deport immigrants eligible for removal. But, just as border and interior enforcement are more integrated and related than ICE's separation from CBP suggests, detention and deportation cannot be so easily severed. ICE's detention function facilitates its deportation function. Abolishing the detention function would significantly impede the deportation function, which reorganization-oriented abolitionists seek to preserve. Similarly, reassigning the function might yield logistical difficulties comparable to those that CBP and ICE faced when their enforcement functions were split among the two agencies following INS's abolition and reorganization. This should give us significant pause when we consider reorganization proposals. This section will focus on two observations reform actors must acknowledge if they are to effectively wield their political capital to shepherd meaningful change. On a macro-level, reformers must understand that the peculiar organizational symbiosis between ICE's deportation and detention subgroups identified *supra* in Section I is not by mistake because enforcement begets detention. Second, on a micro-level, ICE's institutional logic and incentive structures favor detention-based remedies to alternatives. Unless this underlying logic changes, detention is likely here to stay. Finally, there is little reason to think that other federal agencies could actually detain persons in a humane way who are eligible for removal better than ICE.

##### A. *Enforcement Begets Detention*

As discussed in Section I, ICE's deportation mandate is sourced to legislation passed by a duly-elected legislature: the United States Congress.<sup>114</sup> To that end, ICE is charged with identifying and removing unauthorized immigrants and other classes of immigrants deemed deportable.<sup>115</sup> However, deportation is not instantaneous: unauthorized immigrants are entitled to an adjudication of their status that complies with the basic tenets of due process.<sup>116</sup> This policy scheme necessitates a detention program for three reasons. First, there will always be individuals deemed too dangerous to release back into society on their own recognizance as they await removal proceedings. This fear of violence leads to a second factor: professional status concerns incentivize ICE operators to detain unauthorized immigrants. Third,

114. 8 U.S.C. § 1231 (2012).

115. 8 U.S.C. § 1357 (2012). See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826—33 (2015) for a thoughtful review of ICE's arrests powers and the role they play in shaping removal priorities.

116. See Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 HARV. LATINX L. REV. 135 (2018) for a clear review of the complicated process through which immigration claims are adjudicated.

adjudications are inefficient and current institutional capacities are incapable of processing the sheer number of cases in need of adjudication in a timely manner. This bottlenecking effect incentivizes detention to prevent individuals from absconding.

1. *Detention is Sometimes Necessary for Public Safety Reasons*

There is little debate that dangerous individuals prone to violence should be isolated from society. This basic tenet of social welfare applies to the detention of unauthorized immigrants charged or convicted with violent crimes, too. In FY 2017, ICE arrested 56,694 unauthorized immigrants with violent crime or sex offense convictions.<sup>117</sup> These convictions comprised 15% ICE's arrests for immigrants with criminal convictions; when factoring in arrests of immigrants with criminal charges, immigrants accused of violent crimes comprised 18% of all such ICE arrests for FY 17.<sup>118</sup> In total, some 82,813 individuals were arrested in connection with violent offenses. So long as unauthorized immigrants, like any other demographic, commit violent crimes, society will mandate that the federal government detain them.<sup>119</sup>

2. *ICE operators are professionally incentivized to detain unauthorized immigrants*

Moreover, the risk that non-detained individuals will commit violent crimes provides ICE officers with a professional incentive to detain unauthorized immigrants. ICE managers are professionally incentivized to detain unauthorized immigrants through a kind of self-preservation instinct.<sup>120</sup> As Professor Michele Pistone explained when detailing similar institutional incentives within the INS, managers “prefer[ed] to make the mechanical decision of whether or not to parole an individual asylum seeker based on the available bed space rather than to apply the various detention considerations in a discretionary manner because of the greater potential for blame to be assessed individually when a discretionary decision goes awry.”<sup>121</sup> These spatial calculations illustrate the line-level officer's motivation to apply

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117. As previously noted, there is a lot of debate as to what constitutes a violent crime. I classified the following offenses as violent: assault, weapon offenses, sex offenses (not involving assault or commercialized sex), family offenses, sexual assault, homicide, kidnapping, and commercialized sex offenses. See Fiscal Year 2017 ICE Enforcement and Removal Operations Report, *supra* note 44, at Table 2.

118. In FY 17, ICE arrested 26,119 immigrants charged with the aforementioned violent crimes. ICE arrested a total of 147,141 immigrants charged with criminal offenses. *Id.*

119. In the immigration context, detention for other, non-violent offenses might also be justified. Driving under the influence, trafficking drugs, engaging in fraud, invading privacy, stealing vehicles, engaging in robbery, forgery, and other forms of theft, to name but a few of the offenses deported immigrants were charged and convicted with, are all activities that impose social costs, damage communities, and suggest a failure to integrate into law-abiding society. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007), for a defense of using criminal law as a proxy to gauge integrationist success.

120. Pistone, *supra* note 91, at 243.

121. *Id.*

discretionary standards in the least professionally risky way possible. As was the case with the INS, ICE officers view non-detained immigrants as ripe with potential to commit crimes, violent or otherwise. This suspicion<sup>122</sup> and skepticism that “there is always a possibility that someone who is released from [custody] could pose a danger to the community” animates the institution’s preference for detention, from the political appointee down to the line officer.<sup>123</sup> To be sure, the fear of political scrutiny is not unfounded. ICE officers, their superiors, and political appointees have faced professional repercussions if a released immigrant commits acts of violence.<sup>124</sup>

### 3. *Immigration adjudication backlogs incentivize detention practices*

Delays stemming from the immigration adjudication system further incentivize detention.<sup>125</sup> The average period of time to adjudicate an individual on the detained docket is about forty days, a marked contrast to the average 501 days it takes to adjudicate a case for an individual on the non-detained docket.<sup>126</sup>

The adjudication delays associated with the non-detained docket frustrate ICE’s central enforcement and deportation mission.<sup>127</sup> With a 700,000-case backlog, individuals on the non-detained docket might wait for years before their cases are fully adjudicated. This might increase the likelihood that they will abscond, and thereby increase the institutional costs associated with locating and apprehending the unauthorized individual.<sup>128</sup> However, costs

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122. Professor McLeod is right to identify racism as one of the toxic forces permeating through the immigration system. See McLeod, *supra* note 31, at 160-68.

123. Pistone, *supra* note 91, at 243.

124. See e.g., *Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics, Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 43 (2013) (exchange between Rep. Lofgren and former Director of ICE Morton after ICE released unauthorized immigrants charged or convicted with non-violent criminal offenses in the wake of a congressional sequester).

125. Removal proceedings represent a process inelegantly attempting to strike a balance between providing due process rights to unauthorized immigrants and efficiently removing them from American society. Consider for example, this rough sketch of a removal proceeding: Once ICE encounters an individual deemed deportable, it will initiate removal proceedings against them in accordance with section 240 of the Immigration and Nationality Act (INA). At or around this juncture, ICE will determine if it should detain such an individual throughout their removal proceedings. Current policy dictates that individuals on the detained docket – that is, already in an ICE operated or associated detention facility – will return to their detention prior to being deported. Individuals on the non-detained docket are released back into society and ordered to reappear for their deportation, which typically results at the conclusion of a 30-day appeal period. If the administrative law judge in the removal proceeding issues a final order of removal, or deportation order, unauthorized individuals will have a thirty-day time period to file an appeal. Only after the expiration of the appeal period or the conclusion of the appeal process will ICE’s deportation officers (DOs) begin the oft-cumbersome process of obtaining the necessary travel documents for repatriation.

126. Syracuse Univ., *Immigration Court Backlog Jumps While Case Processing Slows*, TRAC IMMIGRATION (June 8, 2018), <http://trac.syr.edu/immigration/reports/516/> (noting that “cases that ultimately result in a removal order are taking 28 percent longer to process than last year – up from 392 days to an average of 501 days – from the date of the Notice to Appear to the date of the decision”).

127. Adjudication delays also plagued the INS. See Pistone, *supra* note 91, at 235 (explaining that significant backlogs in the adjudication of asylum claims enabled applicants to legally work throughout the delay, irrespective of the claim’s merit. This system, in turn, incentivized frivolous claims).

128. It’s unclear how effective pilot programs offering enhanced supervision of non-detained immigrants are at reducing rates of absconding because ICE has not effectively measured participants’

may increase even if unauthorized individuals do not abscond when subject to a removal order due to adjudication delays for individuals on the non-detained docket.<sup>129</sup> ICE's flagship alternative to detention ("ATD") program cost an average of \$10.55 per day in FY 13, compared to the average daily cost of \$158 to detain immigrants. However, the GAO performed one study finding that if participants in the ATD stayed more than 435 days then the cost of the program would exceed the cost of detention. Given that cases on the non-detained docket may take years to conclude, ATD programs might actually be costlier than detention programs.<sup>130</sup> If the government were to assign a cost to community disruption stemming from removal proceedings, then the cost-burden analysis might encounter further complications.<sup>131</sup>

Processing delays born out of an underfunded adjudication system, the possible heightened risk that non-detained individuals will abscond, and the increased administrative costs associated with managing non-detained individuals undermine ICE's central mission of removing unauthorized individuals from society. In short, from ICE's institutional perspective, every dollar that goes to fugitive operations or alternatives to detention programs is a dollar not going to already underfunded deportation efforts.

#### B. *Reorganization cannot remove the incentives for a detention program*

Reorganization-oriented ICE Abolitionists might hope that separating ICE's detention responsibilities – which it neglects to perform in accordance with its own standards – from its apprehension and removal functions might partially cure our country of its current abuses against detained migrants. But reorganization is a problem-solving tool to be used in furtherance of a solution; it is only effective when an agency is confronted with specific problems that lend themselves to organizational solutions. Reorganization is unlikely to solve ICE's problems because the agency does not suffer from the macro-level fracturing that plagued the INS. Likewise, Reorganization-oriented abolitionists should be cautious of using reorganization as a task-transferring

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compliance "throughout their immigration proceedings." U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-15-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION (REVISED) (2015).

129. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-701T, PROGRESS AND CHALLENGES IN THE MANAGEMENT OF IMMIGRATION COURTS AND ALTERNATIVES TO DETENTION PROGRAM (2018).

130. *Id.*

131. If we take seriously Professor McLeod's suggestion that criminal-immigration enforcement should be limited to lawful permanent residents only where the egregiousness (or cost) of the offense merits the costs associated with detention and deportation proceedings due, in part, to social costs incurred when individuals integrated into communities are suddenly removed, *see* McLeod, *supra* note 35, at 134-35, then why should we restrict our cost analysis to lawful permanent residents? Unauthorized immigrants also integrate into communities, and communities incur costs when they are deported. *See* David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 419, 426 (2015) ("Given time, a critical mass of the citizenry tends to accommodate to the undocumented in their communities" and noting that local resistance to immigration enforcement "is at its height when enforcement is brought to bear on long-resident noncitizens who have solid roots in the community.").

mechanism, as there is no evidence to suggest that other agencies could more competently discharge detention tasks. Furthermore, reorganization might be politically implausible; the political conditions that formed the impetus for the massive reorganization that culminated in the formation of DHS are absent today. Finally, while reorganization efforts are unlikely to successfully address the problems that reorganization-oriented abolitionists seek to fix, they may cause operational problems that undermine enforcement operations.

Reorganization may be appropriate where competing, antithetical missions produce a kind of institutional schizophrenia, such as when the INS was fractured along competing permissive and restrictive immigration missions. In this respect, reorganization is used to improve the on-the-ground execution of tasks by removing intra-institutional barriers to sound policymaking and fundraising. ICE does not suffer from such macro-level institutional fracturing. Instead, ICE's sub-divisions are unified by a common mission of identifying unauthorized migrants (and other deportation-eligible immigrants) and removing them from society through deportation. Unlike INS's permissive immigration services operations, intra-institutional competition between departments with competing missions does not impede an ICE officer's ability to perform his task. Hence, reorganization would not address a macro-level institutional defect that impedes task execution at the operator level.

Reorganization might instead be used as a tactic to transfer tasks – like managing a detention program – from ICE to another agency. In this respect, reorganization might be thought of as a competency-enhancing mechanism by assigning tasks to those operators and institutions with the most competence to execute them.<sup>132</sup> Those considering the reorganization-oriented project should be skeptical of any suggestion that another federal agency, like Health and Human Services, would be able to develop the institutional competence in detention treatment necessary to allay concerns.<sup>133</sup> Certainly, reformers should be skeptical of any suggestion that the Bureau of Prisons, which specializes in criminal detention, would be able to successfully provide humane civil detention services.<sup>134</sup>

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132. Mere discussion of this policy measure undercuts a central pillar of the radical abolitionist faction, which seeks to end the expansive detention program itself. For radical abolitionists, transferring detention management duties to a different federal agency might make sense if the problem wasn't detention management itself.

133. Reports of HHS's struggles to shelter unaccompanied minors abound. *See generally* Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Level Ever*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>.

134. *See, e.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., EVALUATION AND INSPECTIONS DIVISION 18-05, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INMATE POPULATION (Sept. 2018) (concluding that the Bureau of Prisons did not strategically manage its female inmates, failed to meet their needs, and did not comply with federal regulations and agency policies governing strip searches); U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., EVALUATION AND INSPECTIONS DIV. 17-05, REVIEW OF THE FEDERAL BUREAU OF PRISONS' USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS 18-05 (July 2017) (concluding that inmates diagnosed with mental illness were

There is ample reason to suspect that, even if a reorganization scheme could ameliorate some of the issues plaguing ICE, current political conditions do not offer a viable path for Congress to abolish ICE. The last major reorganization to the federal immigration bureaucracy occurred in 2002 with the passage of the Homeland Security Act of 2002, which established the Department of Homeland Security.<sup>135</sup> The Homeland Security Act enjoyed broad, bipartisan support with 90 senators voting in favor of the bill.<sup>136</sup> When President George W. Bush signed the Homeland Security Act little over thirteen months after the September 11<sup>th</sup> terrorist attacks, he noted that the “restructures and strengthens the executive branch of the Federal Government to better meet the threat to our homeland posed by terrorism” – hardly a controversial legislative goal.<sup>137</sup> Polling from before the Act’s passage highlights its comfortable base of support and the lack of controversy surrounding it, despite its serving as the vehicle for the single largest federal reorganization effort in U.S. history. In June of 2002, just shy of five months before President Bush signed the Act into law, nearly 75% of Americans supported the effort to create the Department of Homeland Security.<sup>138</sup> An immigration-specific reorganization effort today is unlikely to attract the levels of support that aided the 2002 reorganization effort. For starters, Congress has been unable to pass an immigration reform bill this century, with major efforts ending in defeat in 2005, 2007, and 2013.<sup>139</sup> With a divided Congress, the prospects for substantive reform remain dim.<sup>140</sup> Equally important is that reorganization-oriented abolitionists lack the support that provided Congress and the White House with their political mandate to form the Department of Homeland Security. Recent polling shows that the majority of American voters support keeping ICE as an agency.<sup>141</sup>

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inappropriately housed in single-cells for extended periods, isolated from other inmates and denied human contact); U.S. DEP’T OF JUSTICE, OFFICE OF INSPECTOR GEN., EVALUATION AND INSPECTIONS DIV. 16-07, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ RELEASE PREPARATION PROGRAM (Aug. 2016) (concluding that the Bureau of Prisons did not effectively manage its offender re-entry program).

135. Homeland Security Act of 2002, 6 U.S.C. § 101 (2016).

136. Roll Call Vote 107<sup>th</sup> Congress – 2<sup>nd</sup> Session, U.S. S., [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=107&session=2&vote=00249](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00249). (last visited Jan. 1, 2019).

137. Statement on Signing the Homeland Security Act of 2002, 38 WEEKLY COMP. PRES. DOC. 2092 (Dec. 2, 2002).

138. *Americans Approve of Proposed Department of Homeland Security*, GALLUP (June 10, 2002), <https://news.gallup.com/poll/6163/americans-approve-proposed-department-homeland-security.aspx>.

139. A 2005 effort spearheaded by late Senators Edward Kennedy (D-Mass.) and John McCain (R-Ariz.) to pass comprehensive immigration reform died in the House of Representatives after Republican lawmakers declined to negotiate from their enforcement-heavy proposals. Similar efforts failed in 2007 and 2013. See Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), [https://www.washingtonpost.com/news/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/?utm\\_term=.ae02ef2a3af1](https://www.washingtonpost.com/news/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/?utm_term=.ae02ef2a3af1).

140. In addition to divisions on the issue between the Republican and Democratic parties, each party must navigate internal divisions. See Priscilla Alvarez, *Don’t Bet on Comprehensive Immigration Reform in the New Congress*, THE ATLANTIC (Nov. 24, 2018), <https://www.theatlantic.com/politics/archive/2018/11/democrats-are-divided-immigration-reform/576457/>.

141. Steven Shepard, *Poll: Voters Oppose Abolishing ICE*, POLITICO (July 11, 2018), <https://www.politico.com/story/2018/07/11/immigration-ice-abolish-poll-708703>.

The INS's reorganization history proves instructive in one final respect. Just as ICE's divorce from CBP yielded genuine logistical concerns, reassigning detention tasks to another agency might undercut accountability regimes and result in logistical and operational confusion that further exacerbate poor conditions in detention facilities. Reorganization likely cannot solve the problem abolitionists and other reformers seek to redress, but it could make it worse. Assuming that interior enforcement operations are here to stay,<sup>142</sup> it looks like detention will remain as well. The question, then, is how to limit the applicability of its function using other tools and strategies.

## V. SOLUTIONS

The preceding section discussed why federal reorganization would be an ineffective, and inappropriate, solution to remedy problems born out of ICE's detention function. I acknowledge that it may currently be an exercise in futility to discuss options for ICE's reformation. There's certainly something to this given that there is no indication that the current administration views its enforcement regime as problematic. Yet, no political reality is fixed. Where hands may be tied in the present, they will be free to grapple with the institutional issues discussed above in the future.

If federal reorganization is not a viable option, reformers have two additional avenues available to achieve their goals. Most obviously, reformers could champion legislation that limits the kinds of immigrants eligible for deportation. However, as discussed above, there is ample reason to doubt the likelihood of Congress passing a legislative solution. Barring a legislative fix, the means of shaping the substantive law that generates issues of shared concern amongst radical and reorganization-oriented ICE abolitionists are limited to executive action.

To that end, reformers might instead agitate for sources of law through the Executive Branch that require officials to consider the costs communities absorb when members are deported or limit the government's prosecutorial powers to only certain categories of immigrants. After all, some critics of the current immigration enforcement apparatus believe that community costs should be factored into our policy development processes<sup>143</sup> and cost-benefit analysis methodologies give the appearance of political neutrality – a trait that might be especially useful when responding to such a politically divisive issue. Expanding the parameters of cost considerations might benefit society, and immigrants, in several ways by channeling resources to apprehending deportation-eligible immigrants convicted of criminal offenses, offering institutional cover to integrated immigrants, and reducing the immigrant detainee population. However, while the application of cost-benefit analysis tools to deportation and detention issues might, at first glance, seem

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142. See *supra* 2.

143. McLeod, *supra* note 35; see also Cuauhtémoc García Hernández, *supra* note 36.

politically neutral, normative judgements about the valuations of different lives inescapably inform the analysis. Predicating executive immigration-policymaking on the cost-benefit methodology is morally precarious and should not be done lightly.

A new administration might instead try to limit immigration enforcement actions to a smaller subset of immigrants, as opposed to the current practice in which every deportation-eligible immigrant is an enforcement priority.<sup>144</sup> Fewer immigrants in the deportation pipeline means fewer immigrants subject to detention and fewer costs absorbed by communities. That said, revamping the prosecutorial discretion practices embraced by prior administrations might seem equally dissatisfying in light of the fact that prior exercises of executive power have not solved our immigration problems.<sup>145</sup> Examining how the Obama administration institutionalized enforcement discretion powers offers valuable lessons going forward.

#### A. *Sources of Law: the Legislative Branch or the Executive?*

A cost-benefit regime factoring in community costs born out of deportation practices or restrictions on the categories of immigrants eligible for removal could conceivably be instituted by either the legislative or executive branches. Legislative action would be preferable to executive action because Executive Orders can be easily repealed and replaced.<sup>146</sup> However, as explained *supra* in Section IV, the political probability of a legislative solution remains low. Similarly, it is equally unlikely that the current administration will reverse course from its blanket enforcement-focused immigration policy and consider the social costs absorbed by communities after their members are removed, detained, and deported. One month after President Trump's inauguration, then-Secretary of the Department of Homeland Security John Kelly issued a memorandum rescinding the enforcement priorities articulated in the Morton Memorandum.<sup>147</sup> This move enabled ICE authorities to apprehend, detain, and remove deportation-eligible immigrants irrespective of their criminal history. The administration has offered no evidence to suggest that it wishes to change course.

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144. Memorandum from John Kelly, Secretary of Homeland Security, to Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection, Thomas D. Homan, Acting Director, U.S. Immigration and Customs Enforcement, Lori Scialabba, Acting Director, U.S. Citizenship and Immigration Services, Joseph B. Maher, Acting General Counsel, Dimple Shah, Acting Assistant Secretary for International Affairs, and Chip Fulghum, Acting Undersecretary for Management, Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), available at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

145. Relatedly, how our immigration problems are defined and framed might change based on who heads the Executive Branch.

146. President Trump has rescinded a number of Executive Orders introduced by President Obama. See, e.g., Juliet Eilperin & Darla Cameron, *How Trump is Rolling Back Obama's Legacy*, WASH. POST (Mar. 24, 2017), [https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm\\_term=.fe19aa51135e](https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.fe19aa51135e). In addition, executive initiatives cannot provide legal status to the immigrants who benefit from curtailed enforcement action. See Cox and Rodriguez, *supra* note 32, at 171.

147. Kelly, *supra* note 144.



In the absence of legislative action and any reasonable likelihood that the Executive Branch will champion less restrictionist immigration reform, these proposals are best tabled until the political winds change. For now, my analysis proceeds under the assumption that it is more probable that a reform-minded President will be elected to office in the coming years than it is that Congress will pass immigration legislation. Accordingly, I assume that an Executive Order is the more likely source of law for this regime than a statute, even though statutory change is more desirable.

### B. *Can Cost-Benefit Assessments Reshape Enforcement Priorities?*

The Executive Branch has not shied away from promulgating Executive Orders that graft cost-benefit analysis methodologies onto pre-existing regulatory regimes. The cost-benefit model is seductively simple: assess the expected outcomes of a program and quantify those outcomes in terms of costs and benefits while keeping in mind that some outcomes will be hard to predict and even harder to monetize.<sup>148</sup> This model might be a useful tool in crafting enforcement policies because it asks policymakers to consider costs that too often fall outside the bounds of consideration. An Executive Order that expands the parameters of a cost-benefit analysis to more accurately reflect the scope of real costs and benefits wrapped up in a deportation program might indirectly restrict removal actions to the costliest immigrants in society, such as those who commit violent crimes. Applying the cost-benefit rubric to immigration enforcement might also benefit immigrants who have been present in society long enough to establish community ties and otherwise integrate; under this regime, enforcement operations, by necessity, would focus on removing new arrivals who have not had time to integrate and build the social capital necessary to tilt the cost-benefit analysis in their favor. However, there are serious reasons to doubt the cost-benefit model's ability to generate solutions to our immigration issues. The cost-benefit methodology offers no inherent answers to questions concerning which community voices should be elevated – a defect that makes it vulnerable to nativist capture. Moreover, the method asks us to monetize aspects of our existence that defy both simple categorization and quantification. Finally, the methodology's facial neutrality, which by all means makes it an attractive tool to apply to politically divisive problems, obscures the normative political questions that drive the debate surrounding immigration enforcement.

#### 1. *Executive Orders and Cost-Benefit Analysis, Generally*

Various Executive Orders have helped usher in the paradigm of cost-benefit balancing in the federal regulatory apparatus. Presidents Reagan, Bush, and Clinton each used Executive Orders to economize the federal

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148. Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 YALE L.J. F. 263, 264 (2015).

regulatory apparatus. These mandates required agencies to perform regulatory impact analyses that weigh the costs and benefits of significant rules and agency action.<sup>149</sup> Functionally, cost-benefit orders serve as both substantive and procedural rules that govern all downstream rulemaking within the federal agencies, cutting across (or above) the specific mandates of any one given agency-specific statute.<sup>150</sup> Substantively, they require agencies to focus their cost-benefit balancing by considering constituencies in the national economy<sup>151</sup> and reflect on agency contribution to the market or social problem in need of redress.<sup>152</sup> Procedurally, these orders centralize the regulatory review process by requiring agencies to submit pre-proposed rules for pre-approval from OIRA before formal submission or adoption.<sup>153</sup>

Like any mandate, these orders reflect a program of values; the cost-benefit orders unsurprisingly reflect the value that efficiency is good and that costs are only justified by their benefits.<sup>154</sup> There are three primary components to a cost-benefit analysis: (1) to quantify the anticipated consequences of an action and (2) “to monetize those consequences in terms of benefits and costs subject to (3) a feasibility constraint, which is meant to acknowledge that some consequences may be hard or impossible to quantify or monetize.”<sup>155</sup> As Professor Heinzerling further explains, cost-benefit analysis generally:

tries to determine the monetary value of a particular regulatory outcome . . . by asking what the outcome is worth, in dollar terms, to the people who will enjoy it. To do this, the cost-benefit analyst can ask one of two more specific questions: how much money is the recipient of the regulatory benefit willing to pay to receive the benefit, or, how much money would this person demand in exchange for foregoing the benefit? If an agency were trying to figure out the benefits of a rule protecting consumers against an unsafe product, for example, the cost-benefit analyst would ask how much those consumers would be willing to pay to avoid the risk posed by the product or how much they would

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149. Robert W. Hahn et al., *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J. L. & PUB. POL’Y 859, 860 (2000).

150. Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 270 (1996).

151. Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (requiring that the federal government take “into account affected industries [and] the condition of the national economy”).

152. Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (“Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.”).

153. See Patrick A. McLaughlin & Jerry Ellig, *Does OIRA Review Improve the Quality of Regulatory Impact Analysis: Evidence from the Final Year of the Bush II Administration*, 63 ADMIN. L. REV. 179, 180 (2011).

154. See Exec. Order No. 12, 291, *supra* note 151; see also Exec. Order No. 12,866, *supra* note 152.

155. Sunstein, *supra* note 150.

be willing to accept in exchange for being exposed to the risk.<sup>156</sup>

With these two frameworks in mind, a cost-benefit methodology applied to immigration enforcement might consider (1) the cost of the enforcement regime; (2) the monetized benefits of the enforcement regime; and (3) the community's willingness to pay to retain its members and forgo the costs of their removal.

## 2. *Applying the Cost-Benefit Method to Immigration Enforcement*

Of course, anyone applying cost-benefit tools should want an accurate assessment of the full range of costs and benefits attached to any particular policy, which might make the methodology especially attractive for reformers cognizant of the social costs stemming from deportation and detention regimes. As Professor McLeod and others have observed, deportation regimes impose significant costs on communities.<sup>157</sup> What kinds of social costs do communities incur when the federal government deports promising, college-bound soccer stars,<sup>158</sup> parents of American children,<sup>159</sup> and community organizers?<sup>160</sup> Whatever the costs and benefits, they have largely gone unaccounted for in studies attempting to apply the cost-benefit methodology to the issue of illegal immigration.<sup>161</sup> These studies tend to focus on a limited set of factors, including the amount of tax revenue generated, the cost of supplying public services to the population in question, and the cost of deportation.<sup>162</sup> Methodologies restricting the value of community members to the

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156. Lisa Heinzerling, *Cost-Benefit Jumps the Shark*, GEORGETOWN LAW FACULTY BLOG (June 13, 2012), [https://gulcfac.typepad.com/georgetown\\_university\\_law/2012/06/cost-benefit-jumps-the-shark.html](https://gulcfac.typepad.com/georgetown_university_law/2012/06/cost-benefit-jumps-the-shark.html).

157. McLeod, *supra* note 35; see also Cuauhtémoc García Hernández, *supra* note 35.

158. Camilo Montoya-Galvez, Kervy Robles, and Daniella Silva, *After Being Deported, Two Former Maryland Soccer Stars Started Over in El Salvador*, NBC NEWS (July 14, 2018), <https://www.nbcnews.com/news/latino/after-being-deported-two-former-maryland-soccer-stars-started-over-n890926>.

159. Daniella Silva, *Michigan Father Deported to Mexico After Living in U.S. for Three Decades*, NBC NEWS (Jan. 16, 2018), <https://www.nbcnews.com/news/us-news/michigan-father-deported-mexico-after-living-u-s-three-decades-n838211>.

160. Michael E. Miller, *She Fought to Keep Immigrants from Being Deported. Now She Faces the Same Fate*, WASH. POST (Sept. 29, 2016), [https://www.washingtonpost.com/local/she-fought-to-keep-immigrants-from-being-deported-now-she-faces-the-same-fate/2016/09/29/96066036-7b91-11e6-bd86-b7bbd53d2b5d\\_story.html?utm\\_term=.85d5e2684db8](https://www.washingtonpost.com/local/she-fought-to-keep-immigrants-from-being-deported-now-she-faces-the-same-fate/2016/09/29/96066036-7b91-11e6-bd86-b7bbd53d2b5d_story.html?utm_term=.85d5e2684db8).

161. See, e.g., STEVEN A. CAMAROTA, CENTER FOR IMMIGRATION STUDIES, DEPORTATION VS. THE COST OF LETTING ILLEGAL IMMIGRANTS STAY (Aug. 3, 2017), <https://cis.org/Report/Deportation-vs-Cost-Letting-Illegal-Immigrants-Stay#2> (examining the costs of removal programs against the cost of providing deportation-eligible immigrants government benefits and finding that deportation is more cost-efficient than letting unauthorized immigrants stay in society); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-95-133, ILLEGAL ALIENS: NATIONAL NET COST ESTIMATES VARY WIDELY (1995) (determining the cost of illegal immigration by weighing the tax revenue generated by illegal immigrants against the cost of providing social services to them).

162. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 129, at 2-3. *But see* ROBERT WARREN & DONALD KERWIN, CENTER FOR MIGRATION STUDIES, MASS DEPORTATIONS WOULD IMPOVERISH US FAMILIES AND CREATE IMMENSE SOCIAL COSTS, <http://cmsny.org/publications/mass-deportations-impoverish-us-families-create-immense-costs/> (looking at how deportations affect household economy and finding that the mass deportation program supported by President Trump would cost the national economy more than \$1 trillion over ten years).

amount of tax revenue they generate are unlikely to reflect, in their outcomes, the multi-faceted benefits that any single person may offer society.

With this in mind, the cost-benefit methodology might justify, in politically neutral terms, an enforcement agenda that prioritizes the removal of violent criminals above all other removal-eligible immigrants. We might hypothesize the following: (1) violent criminals, by virtue of their violent criminality, have imposed steep costs—be they social, material, or psychological—on their communities; (2) these costs, as reflected in criminal justice expenses and society’s willingness to pay to live without violent criminals, likely outweigh the offender’s benefits, as measured by tax revenue generated and the amount friends and family would pay for the offender to not be removed from society; (3) non-violent persons do not impose the same costs on their communities; and, therefore, (4) an immigration enforcement apparatus that prioritizes removing the costliest individuals will direct its attention foremost to apprehending and deporting violent criminals.

If an actual, quantitatively-informed cost-benefit analysis validated these operating assumptions, another group might stand to benefit: immigrants who have integrated into society over time.<sup>163</sup> As Professor David A. Martin explains, interior enforcement is “more likely to be effective if [officers] focus on relatively recent arrivals – on the future rather than the past” because [l]ocal resistance is at its height when enforcement is brought to bear on long-resident noncitizens who have solid roots in the community.”<sup>164</sup> Professor Martin’s comments suggest that the social costs associated with deporting long-standing community members are higher than those attached to removing recent additions to the community. From this we might conclude the following in accordance with Professor Heinzerling’s cost-benefit model: community members will be more willing to pay to retain long-standing, integrated members than they would relatively new members or strangers. Hence, a cost-benefit analyst might say the social benefits generated by the longstanding immigrant community member might mitigate her costs and make her a lower removal priority in the eyes of the enforcement apparatus. This might have monumental implications for our enforcement system as it currently operates. The vast majority of deportation-eligible immigrants have lived in the United States for more than a decade.<sup>165</sup> As of March 2018, only one deportation case filed in ten involved new arrivals.<sup>166</sup> By shifting enforcement priorities away from long-term residents, in accordance with costs, fewer integrated immigrants would be subject to deportation

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163. Martin, *supra* note 131, at 426.

164. *Id.*

165. Lori Robertson, *Illegal Immigration Statistics*, FACTCHECK.ORG (June 28, 2018), <https://www.factcheck.org/2018/06/illegal-immigration-statistics/>.

166. Clara Long, *U.S. Deporting More Long-Term Residents*, HUMAN RIGHTS WATCH (Apr. 21, 2018), <https://www.hrw.org/news/2018/04/21/us-deporting-more-long-term-residents>. However, it is unclear how many long-term residents involved in deportation proceedings would be classified as law-abiding, deportation-eligible immigrants.

proceedings, fewer still would be detained in ICE facilities, and communities would forgo the expense of losing valued members.

### 3. *Problems with the Cost-Benefit Regime*

While cost-benefit methodologies can cast political decisions in politically neutral terms like “cost” and “benefits,” policymakers would be wise to resist the urge to monetize the rich social dimensions of human and community life. There are two central problems with applying a cost-benefit framework to immigration enforcement. Far from being politically neutral, the cost-benefit methodology is subject to morally objectionable political capture. When assessing a community’s willingness to pay to keep its members, there is no politically neutral principle to discount the views of nativists who might be willing to pay to exile members along racial lines. This issue leads to the second primary problem with using cost-benefit methodologies to shape immigration enforcement policies: we might reject the very suggestion that we can, or should, qualify our social relationships in monetary terms.<sup>167</sup> Finally, the cost-benefit model obscures the fundamental political questions that drive this debate – and that we should not shy away from engaging with.

That the cost-benefit model is vulnerable to ideological capture should give policymakers pause when considering the role cost-benefit analysis should play in shaping immigration enforcement policies. The very model that can elevate the costs absorbed by marginalized communities at the hands of deportation regimes can also elevate the social preferences of nativists, racists, and other people espousing anti-immigrant views. If a community’s willingness to pay for a removal-eligible immigrant is a factor in the cost-benefit analysis, there is no politically neutral principle to restrict the community along racial, ethnic, migrant-status lines, ideological, political, or moral lines. For example, we are surely all aware that nativists and racists live amongst us and would be willing to pay to live in a racially homogenous society. Yet, a cost-benefit analysis does not answer the question of whether an immigrant’s removal, in and of itself, should be considered when performing the analysis. In a sense, this opens the floodgates for a wellspring of morally dubious ideologies to wash out all semblance of political neutrality and objectivity in the calculus. To that end, a cost-benefit analysis method might raise fewer red flags when employed by certain administrations that devalue nativist and other anti-immigrant views. However, the method’s facial neutrality might cloak a different administration’s efforts to include or elevate such voices in its cost-benefit assessment. We should therefore be cautious when employing morally fungible systems of analysis when trying to answer normative questions about belonging, membership, and exile.<sup>168</sup>

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167. Lisa Heinzerling, *Discounting Life*, 108 YALE L. J. 1911, 1913 (1999).

168. *Id.* at 1915.

Just as cost-benefit analysis cannot, itself, tell us *how* to use it, it also cannot tell us when we *should* use it to assess and solve the problems society faces. We might reject the notion that the value of our social and community relationships can be reduced to monetary valuations. If we each have but one life before us, how can we measure the value of relationships – of our friends on the soccer team,<sup>169</sup> our parents,<sup>170</sup> or the activists<sup>171</sup> in our communities agitating for social change – in monetary terms? These relationships might form the fabric of a rich life. Or, more specifically, they might form the basis of life's value. Asking individual and community members to assign a numerical value to the very elements that make our own lives worth living to quantifiably segregate them for the purposes of retention or removal is to request a kind of self-factionalism.

These issues aside, cost-benefit analysis, as applied to immigration enforcement, cannot escape the political issues that make its facial neutrality attractive to begin with. We might only resort to seemingly objective methods of analysis precisely because we cannot easily answer questions about who we want in our society – and why – and who we wish to exclude. Professor Heinzerling powerfully addresses the dangers of using cost-benefit analysis to obscure normative judgments by reminding us that “[i]t changes the apparent nature of the decision itself, and permits politics and ideology to hide behind a mask of technical expertise.”<sup>172</sup> Applying cost-benefit analysis to the normative questions before us is not going to generate politically neutral answers, but it might layer a political dialogue with additional, and needless, complications.

In sum, cost-benefit analysis tools are attractive because they offer a facially neutral way to exercise extraordinary political power by exempting certain categories of “more beneficial” immigrants from enforcement actions. But while this might very well result in fewer detained and deported law-abiding immigrants with long-standing community ties, its morally fungible methodology makes it vulnerable to extreme ideological capture. Moreover, cost-benefit analysis can disrupt our relationships and obscure the normative questions that it cannot solve.

### C. *Past is Prologue: Using Executive Power to Enforce a New Normative Agenda*

Many of the problems we seek to address in the immigration enforcement context, such as those stemming from ICE's detention apparatus, are difficult to disentangle from the agency's broader enforcement function, which most moderates seek to keep. Given the difficulties associated

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169. Montoya-Galvez, *supra* note 158.

170. Silva, *supra* note 159.

171. Miller, *supra* note 160.

172. Heinzerling, *supra* note 167, at 1915.

with this institutionalist genre of reform, including the unavailability of reorganization-based solutions and the problems associated with factoring in community costs, one would be forgiven for thinking that the future of reform looks bleak. However, examining the normative goals of the cost-benefit project detailed above in light of past executive policy-making practices sheds some hope. A recurring theme in both radial and reorganization-oriented abolitionist circles is the desire for an enforcement regime that imposes fewer costs on marginalized, migrant-heavy communities. One way to do this might be to exempt the categories of immigrants the Morton Memos deemed “low enforcement” priorities from the enforcement process altogether.<sup>173</sup> But if we are to look to the past for solutions, we must also learn from past failures. To that end, important lessons concerning the institutionalization of prosecutorial discretion can be gleaned from the Obama administration’s failed attempt to meaningfully shape prosecutorial discretion through the Morton memos. Instead, I suggest that the next administration adopt the Obama administration’s efforts to centralize prosecutorial discretion in the Deferred Action for Childhood Arrivals (DACA).<sup>174</sup>

The purpose of applying a cost-benefit methodology to immigration enforcement would be to elevate marginalized voices, better understand the social harm associated with deporting long-standing community members and develop a scheme that results in fewer detentions and disruptive deportations. These are admirable goals that should be promoted transparently so that society can participate in the political conversation that permeates discussions of prosecutorial discretion in the immigration setting. Rather than justify normative decisions by sanitizing them in the language of monetary value, the next administration might thrust the question to the forefront of political considerations by categorically exempting individual migrants meeting certain criteria from the detention and removal process.

Adopting the Morton Prosecutorial Discretion Memo’s enforcement guidelines might inform this approach. For example, the next administration might consider exempting immigrants with longstanding “ties and contributions to the community,” who are the “primary caretaker of a person with a mental or physical disability,” or who have spouses suffering from “severe mental or physical illness,” to name but a few, from the

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173. The Morton Memos are inclusive of the Morton Priorities Memorandum, *supra* note 5, and Memorandum from John Morton, Dir., Immigration and Customs Enforcement (ICE), to Field Office Directors, Special Agents in Charge & Chief Counsel (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter Morton Prosecutorial Discretion Memo]. See Cox and Rodriguez, *supra* note 32, for an informative analysis of the Morton Memos’ role in influencing prosecutorial discretion.

174. An extension discussion of the constitutionality of DACA and the separation of powers issues the program may – or may not – implicate is beyond the scope of this paper. More importantly, Professors Adam Cox and Cristina Rodriguez have already taken up this formidable task. In light of their study, I proceed under the assumption that executive policies that exempt certain categories of immigrants from the removal process are constitutional. See Cox and Rodriguez, *supra* note 32.

removal process.<sup>175</sup> In light of the fact that the majority of deportation-eligible immigrants have resided here for at least a decade,<sup>176</sup> exempting individual immigrants who meet this criteria might significantly reduce the costs communities must absorb when their members are deported.

How such criteria are institutionalized is important for meaningfully shaping enforcement discretion. To this end, important lessons can be gleaned from the Obama administration's unsuccessful attempt to guide the exercise of prosecutorial discretion through the Morton Memos. As Professor Adam Cox and Professor Cristina Rodriguez detail in their thorough and incisive study on presidential administration in the immigration domain, the Morton Memos lacked an enforcement mechanism.<sup>177</sup> Rather than exempting categories of immigrants from the removal process, the Morton Memos functioned as a guidance document by informing line agents that they *could* exempt certain immigrants from removal proceedings.<sup>178</sup> As Cox and Rodriguez explain, "[t]he memos only articulated priorities; they did not indicate an intention not to remove low-level priority targets, nor did they identify the means by which the priorities would inform the actual judgments of line agents scattered across the country."<sup>179</sup> In other words, by acting as a set of guidance documents the Morton Memos kept the discretionary powers within the hands of line-level ICE agents – and line-level agents declined to exercise much prosecutorial discretion.<sup>180</sup>

This unsuccessful attempt to manage discretion can be contrasted with the Obama administration's efforts to centralize the exemption process for DACA-eligible immigrants.<sup>181</sup> In effect, the Obama administration transferred discretionary powers from line-level enforcement personnel to higher-level bureaucrats more accountable to politically-appointed overseers.<sup>182</sup> Cox and Rodriguez also note that DHS officials during the Obama administration removed DACA decision making processes from the "enforcement arm of the immigration bureaucracy and handed it over to personnel in USCIS, the arm of DHS responsible for conferring immigration benefits."<sup>183</sup>

Any effort to wield executive power to offer immigrants relief should heed these important lessons about the centralization of enforcement discretion. Finally, while these solutions lack the finality of legislative fixes, they have the potential to positively impact the lives of millions of our community members, peers, and colleagues. In centralizing discretion and exempting from removal those within our society who have lead peaceful, lawful lives,

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175. Morton Prosecutorial Discretion Memo, *supra* note 5, at 4.

176. Robertson, *supra* note 165.

177. Cox and Rodriguez, *supra* note 32, at 187-91.

178. *See id.* at 191.

179. *Id.* at 186.

180. *Id.* at 191-92.

181. *Id.* at 193.

182. *Id.* at 193-94.

183. *Id.* at 193.



the next administration has an opportunity to offer a radical but workable vision of a new immigration system.

#### CONCLUSION

The movement to abolish ICE reflects two different visions of immigration reform. Whereas the radical abolitionist faction sees ICE's abolition as part-and-parcel of an overhaul of the immigration system, reorganization-oriented abolitionists hope that breaking up ICE into separate agencies while preserving their core functions will reduce the number of abuses immigrants face, especially while detained, and otherwise reduce the costs that migrant communities absorb when their members are deported. Neither the radical or reorganization-oriented vision has a foreseeable future in politics, but reorganization-based reforms are the most palatable. Nevertheless, ICE's institutional structure and the underlying immigration problems present in the United States do not lend themselves to reorganization-based solutions. Barring any legislative solutions, executive power is the most realistic vehicle of change that ICE reformers might have available in the near-term. While the issue of unaccounted-for-community-costs might make an Executive Order requiring agency officials to base enforcement priorities off of an expanded view of social costs attractive, the cost-benefit methodology is vulnerable to ideological capture, imposes a monetized system of values onto complex social relationships, and obscures the normative political questions that drive the debate surrounding immigration enforcement. Rather than abandoning the promise of executive policymaking, reformers should embrace the sensibilities behind past efforts to shape the exercise of enforcement discretion, and learn from past failures, by categorically exempting some immigrants from the enforcement process.