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The End of Deportation

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ABSTRACT

This Article introduces to legal scholarship a new horizon for pro-immigrant scholarship and advocacy: deportation abolition. The ever-present threat of deportation shapes the daily lives of noncitizens. Instead of aiming for a pathway to citizenship, most noncitizens must now contend with dodging the many pathways to banishment. Despite growing threats to immigrant survival, most pro-immigrant scholarship and advocacy that aims to reduce migrant suffering assumes deportation as inevitable. The focus remains on improving individual outcomes by aligning the process of deportation with due process and the rule of law. But considered from the point of view of those facing deportation, even a fairly adjudicated deportation can prove devastating. Moreover, none of the improvements in deportation management can eliminate the racialized violence that defines the practice. While post-entry social control and extended border control purportedly justify deportation, the stated goals of deportation law obfuscate its true character as an indefensible act of violence. The underlying assumption that deportation can and should continue indefinitely currently demarcates the outer limits of the arguments for addressing deportation—limits that a commitment to deportation abolition would abandon. In an effort to denaturalize the common sense of deportation, this Article explores the fundamental failures that characterize the practice. By questioning commonly held assumptions about its inevitability, critiquing reform proposals that reify its logic, and providing examples of interventions that point toward the possibility of its demise, this Article opens the door to the end of deportation. Decarceral demands made by social movements.

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INTRODUCTION

In the summer of 2018, abolition entered the national conversation on immigration. In response to the spectacular violence of the separation of migrant parents and children at the U.S.-Mexico border, the call to “Abolish ICE” began to gain steam.¹ For the first time, the dissolution of U.S. Immigration and Customs Enforcement (ICE), the agency created in 2003 and tasked with internal enforcement of immigration laws, became a matter of public debate.² Members of U.S. Congress picked up the call, with at least one bill introduced to dismantle ICE within one year, and with candidates for office aligning themselves with or against the message.³ When pressed about their support for “Abolish ICE,” progressive politicians tended to quickly distance themselves from the idea that abolishing ICE meant abolishing deportations.⁴ Despite the sudden and startling purchase the “Abolish ICE” campaign appeared to garner, the call was instantly restricted and clarified to an ask for the reorganization of the deportation function under a kinder, gentler bureaucracy.⁵ This debate exposed that while the tactics

1. See Tina Vasquez, *Abolish ICE: Beyond a Slogan*, N.Y. REV. BOOKS (Oct. 10, 2018, 7:00 AM), <https://www.nybooks.com/daily/2018/10/10/abolish-ice-beyond-a-slogan> [https://perma.cc/8XJU-3CFM]; Alexandra Yoon-Hendricks & Zoe Greenberg, *Protests Across U.S. Call for End to Migrant Family Separations*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html> [https://perma.cc/FP6J-5WJE].
2. See, e.g., Matt Ford, OK, *Abolish ICE. What Then?*, NEW REPUBLIC (July 18, 2018), <https://newrepublic.com/article/149945/ok-abolish-ice-then> [https://perma.cc/HZ5U-SG37]; Ron Nixon, *Agents Seek to Dissolve ICE in Immigration Policy Backlash*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/politics/ice-immigration-eliminate-agency.html> [https://perma.cc/G98Q-HN78]; Paul Waldman, Opinion, ‘*Abolish ICE*’ Is a Good Thing. Even if Some Democrats Fear It and Republicans Demagogue It, WASH. POST (June 29, 2018, 11:19 AM), <https://www.washingtonpost.com/blogs/plumline/wp/2018/06/29/abolish-ice-is-a-good-thing-even-it-scares-some-democrats-and-republicans-demagogue-it> [https://perma.cc/EX9V-56F2].
3. Establishing a Humane Immigration Enforcement System Act, H.R. 6361, 115th Cong. (2018); see also Ella Nilsen, *The List of Democrats Calling to Abolish ICE Keeps Growing*, VOX (June 30, 2018, 2:26 PM), <https://www.vox.com/policy-and-politics/2018/6/29/17518176/democrats-to-abolish-ice-movement-gillibrand-de-blasio-ocasio-cortez> [https://perma.cc/3SE9-ZE66]; Alex Seitz-Wald, ‘*Abolish ICE*’ Is the New Rallying Cry for Progressive Democrats, NBC NEWS (June 22, 2018, 6:41 AM), <https://www.nbcnews.com/politics/elections/abolish-ice-new-rallying-cry-progressive-democrats-n885501> [https://perma.cc/N2GS-S9RR].
4. See, e.g., Molly Hensley-Clancy & Lissandra Villa, *Kamala Harris Wants You to Know She’s Definitely Not Calling for Abolishing ICE*, BUZZFEED NEWS (July 3, 2018, 3:38 PM), <https://www.buzzfeednews.com/article/mollyhensleyclancy/kamala-harris-abolish-ice> [https://perma.cc/9D8Z-NS5S].
5. See, e.g., Alexandria Ocasio-Cortez (@AOC), TWITTER (Aug. 21, 2018, 8:31 AM), <https://twitter.com/aoc/status/1031926879752802304> [https://perma.cc/E9CR-H7US]

ICE uses to apprehend, incarcerate, and deport immigrants have grown increasingly unpopular, the underlying logic—that the U.S. government should have the right to continue deporting noncitizens—remains uninterrogated. By the summer’s end, it was clear that while ICE’s continued existence was debatable, deportation remained unimpeachable political common sense, even in the face of the most explicit state violence and human suffering.

This is what I term the common sense of deportation. Found in both scholarship and advocacy around deportation, it is the consensus that some level of deportation is inevitable. Even pro-immigrant advocates take for granted the continued existence of deportation as a necessary mechanism for enforcing immigration laws.⁶ This common sense includes the idea that a functioning immigration system requires deportation—that if a country wants to admit noncitizens lawfully, then it must demonstrate its power to expel them.⁷ It also includes the notion, prevalent among many immigrant rights advocates and attorneys, that saving some (deserving immigrants) from deportation presumes continuing the deportation of (undeserving, unsafe) others.⁸ Because of the legal

(“#AbolishICE means not having an agency that incarcerates children and sexually assaults women with impunity. It does not mean abolish deportation.”); Elaine Godfrey, *What ‘Abolish ICE’ Actually Means*, ATLANTIC (July 11, 2018, 12:32 PM), <https://www.theatlantic.com/politics/archive/2018/07/what-abolish-ice-actually-means/564752> [<https://perma.cc/752X-VZEB>] (“Now, it is time to do what Americans overwhelmingly want: abolish the cruel, dysfunctional immigration system we have today and pass comprehensive immigration reform (quoting Senator Bernie Sanders) That will mean restructuring the agencies that enforce our immigration laws, including ICE.” (quoting Senator Kamala Harris)); Zaid Jilani & Aida Chávez, *Calls to Abolish ICE Are Becoming More Mainstream. Is Washington Ready for the Conversation?*, INTERCEPT (June 27, 2018, 1:49 PM), <https://theintercept.com/2018/06/27/abolish-ice-alexandria-ocasio-cortez> [<https://perma.cc/Q2YW-5A9G>] (“We’re not saying that you have to abolish all functions of ICE, but we used to have all those functions before ICE got created [W]hat we’re trying to say is that this is a moment when we’re seeing the abuses of ICE with no accountability, with more and more money that is being wasted instead of *really looking at the most cost-effective and humane ways*” (emphasis added) (quoting Representative Pramila Jayapal)).

6. See, e.g., Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 465 (2015) (“Substantial interior immigration enforcement will undoubtedly continue in the United States, whether or not the legislative and executive branches can craft a legalization program.”). This concession by Daniel Kanstroom, one of the most trenchant critics and scholars of the modern U.S. deportation regime, exemplifies the reach of the common sense of deportation.
7. See, e.g., *The Right Way to Deport People*, ECONOMIST (Mar. 2, 2017), <https://www.economist.com/leaders/2017/03/02/the-right-way-to-deport-people> [<https://perma.cc/3HNW-99WZ>] (“In principle, deporting people who fall foul of immigration rules is wise, even liberal. It is the corollary of a generous immigration system—proof that rules can be upheld and that a country can open its doors without losing control.”).
8. See *infra* notes 341–357 and accompanying text.

and political common sense of deportation, lawmakers interpreted the activist call to “Abolish ICE” as calling not for the end of deportation, but for the reform of a federal agency.⁹

That the U.S. government must and should deport somebody is a fundamental premise of today’s immigration law, the source of its common sense. Deportation as currently practiced is familiar to any student or practitioner of immigration law: Deportation (known formally as “removal”) can be ordered by an immigration judge after a procedure in which a person is found to trigger one of the grounds of inadmissibility or deportability and cannot prove that they merit relief.¹⁰ These proceedings are considered civil, not criminal, and thus deportation is not considered punishment, but rather, one possible outcome of an adjudication on the propriety of a non-U.S. citizen’s presence within or at the borders of the United States.¹¹

The common sense of deportation dictates that such proceedings should continue into an indefinite future. It limits pro-immigrant efforts to ask for reform that would allow more (but not all) noncitizens to escape triggering the grounds of inadmissibility or deportability, and allow more (but not all) noncitizens to prove they merit relief.¹² The common sense of deportation extends to other forms of expulsions, including those which involve no process or very limited process; these include expedited removal (expulsion of those who are found within 100 miles of the border, within two weeks of their arrival), reinstatement of removals (expulsion of those previously found removable in a formal process), and Title 42 expulsions (expulsion of unauthorized migrants arriving at the U.S.-Mexico border during the COVID-19 pandemic, ostensibly

9. See Dean Obeidallah, ‘Abolish ICE’ Isn’t About Open Borders, CNN (July 2, 2018, 11:07 AM), <https://www.cnn.com/2018/07/01/opinions/abolish-ice-not-open-borders-obeidallah/index.html> [<https://perma.cc/9EM8-ED6X>].
10. T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 895 (8th ed. 2016). This common view of deportation obscures the fact that over 80 percent of deportations now occur outside of a legal proceeding. See *infra* notes 128–140 and accompanying text.
11. See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.”).
12. See *infra* notes 341–357 and accompanying text.

under public health justifications).¹³ Most pro-immigrant advocates have internalized the limits of the common sense of deportation, and it shapes efforts to ameliorate the worsening conditions facing immigrant communities. Arguments across the political spectrum remain locked in on defining whom it is reasonable to deport and what are the appropriately humane technologies for carrying out deportations.¹⁴ The common sense of deportation requires participating in the ideological project of deportation as an acceptable outcome for some portion of the population.¹⁵ It makes clear that in the twenty-first century in the United States, being pro-immigrant does not mean being anti-deportation.

This Article disrupts the common sense of deportation,¹⁶ drawing attention to the limits of assembling scholarship and advocacy efforts around the inevitability of deportation. By introducing deportation abolition as a possible horizon for immigrant scholarship and advocacy, this Article pushes legal scholarship to focus on what might be required to end deportation.¹⁷ In questioning the validity of deportation, the Article analyzes the limits of

13. For a discussion of expedited removals, administrative removals, and reinstatement of deportation, see generally Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 181 (2017). Title 42 removals are explained in this primer: *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Oct. 15, 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [https://perma.cc/D27F-QBTB].
14. See *infra* notes 341–357 and accompanying text.
15. I would argue that Kimberlé Williams Crenshaw's formulation of the illusion of necessity created by law extends to the project of deportation. "Law . . . embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1351–52 (1988).
16. I draw from the Gramscian notion of common sense in positing a common sense of deportation. See KATE CREHAN, *GRAMSCI'S COMMON SENSE: INEQUALITY AND ITS NARRATIVES*, at x (2016) ("A key term here is *senso comune* (common sense), the term Gramsci uses for all those heterogeneous beliefs people arrive at not through critical reflection, but encounter as already existing, self-evident truths."). Citizenship theorist Linda Bosniak engages with the notion of common sense in questioning accepted notions of citizenship, an argument I extend to deportation: "Our dominant common sense continues to regard the status of citizenship as properly rationed by states and, moreover, as legitimately employed by them as an 'instrument of social closure' in the national space." Linda Bosniak, *Status Non-Citizens*, THE OXFORD HANDBOOK OF CITIZENSHIP 314, 322 (Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink eds., 2017) (quoting ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* (1998)) (citation omitted).
17. This Article builds on the modern abolitionist projects that have begun to be introduced to legal scholarship. See, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1156 (2015); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 245–46 (2017); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 405–06 (2018); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1781–82 (2020).

conventional legal scholarship and practice on deportation, and considers whether deportation continues to deserve the presumption of legitimacy it currently enjoys.¹⁸

At the heart of deportation abolition is the notion that deportation only expands and swells the indefensible and illegitimate uses of state force and should be ended. Social movement organizations, such as the national Latinx organization Mijente, have already begun to delineate the legal and policy battles that prefigure the end of deportation.¹⁹ In “Free Our Future: An Immigration Policy Platform for Beyond the Trump Era,” Mijente offers an initial roadmap.²⁰ As a Latinx organization that prioritizes racial justice, Mijente has its roots in the “#Not1More” campaign that sought a moratorium on deportations under the

18. This Article expands on the work of Linda Bosniak, who has denaturalized national conceptions of citizenship in ways that this Article seeks to do for conventional deportation scholarship and practice. *See generally* Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 493 (2000) (“As someone sympathetic to the postnational project, however, I am inclined to turn the tables and ask instead whether national conceptions of citizenship deserve the presumptions of legitimacy and primacy that they are almost always afforded. Posing the question this way denaturalizes conventional political thought by treating the prevailing national presumption as worthy of interrogation in its own right. In practical terms, it shifts the burden of justification to those who assume without question that the national should continue to dominate our conceptions of collective public life.” (footnote omitted)).
19. Mijente is not alone in prefiguring deportation abolition in its work. Detention Watch Network and its member organizations help lead campaigns in line with an abolitionist politic, including Free Them All (demanding the immediate release of all people in immigration custody), Communities Not Cages (demanding that all detention centers be shut down), and Defund Hate (demanding divestment from the immigration enforcement agencies and investment in “education, housing, green infrastructure and health care programs that create thriving communities.”). *See e.g.*, *FreeThemAll*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/freethemall> [<https://perma.cc/E7RX-KDZ5>] (last visited Jan. 1, 2022); *#FirstTen to #CommunitiesNotCages*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/take-action/communitiesnotcages> [<https://perma.cc/YFZ3-MFDJ>] (last visited Jan. 1, 2022); *#DefundHate*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/defundhate> [<https://perma.cc/59XK-8RBL>] (last visited Jan. 1, 2022). The Immigrant Justice Network helps lead the New Way Forward Campaign, which calls “for dismantling the systems that criminalize and incarcerate immigrants.” *See New Way Forward for Immigrant Justice*, IMMIGRANT JUST. NETWORK, <http://immigrantjusticenetwork.org/%newwayforward> [<https://perma.cc/8Z58-6GNW>]. Puente Arizona has led the more than decade-long fight against police–Immigration and Customs Enforcement (ICE) collaborations in that state, calling both for the abolition of ICE and of the “police systems that profile and separate our communities.” *See Chinga La Polimigra Campaign*, PUENTE MOVEMENT, <https://puenteaz.org/chingapolimigra> [<https://perma.cc/V6KG-TLWC>] (last visited Jan. 1, 2022).
20. MIJENTE, FREE OUR FUTURE: AN IMMIGRATION POLICY PLATFORM FOR BEYOND THE TRUMP ERA (2018), https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf [<https://perma.cc/2JR3-T399>]. Prefiguring some of the arguments made in this Article, I served as the primary drafter of this document.

Obama administration.²¹ Mijente's policy platform arose from its efforts in summer 2018 to flesh out the emerging demand to "Abolish ICE"—and to respond to the critique that the demand is vague and unrealistic—with policy proposals.²² The policy platform focuses on the agencies that carry out immigration enforcement, with calls to defund and ultimately dismantle ICE,²³ to defund the Border Patrol,²⁴ to end all forms of immigration detention,²⁵ and to end the export of U.S.-style immigration policing to other countries.²⁶ The document also addresses the Department of Justice's (DOJ) contributions to deportation, with calls to repeal the laws criminalizing border crossing,²⁷ to end "Operation Streamline" (the federal strategy of mass criminal hearings for border crossers),²⁸ and to end all criminal prosecutions of migrants.²⁹ Finally, the document calls for a ban on the use of the military for immigration control purposes,³⁰ for an end to all immigration enforcement contracts between private companies and governmental agencies,³¹ and for the enactment of noncooperation policies at the state and local level that eliminate any enforcement support to federal immigration agencies.³²

The platform brings together diverse sites of implementation of the deportation machinery, while reorienting allegiance away from an unquestioning attachment to the abstraction of the rule of law and toward the populations such abstraction preserves as deportable.³³ These interventions redirect advocacy

21. Tania Unzueta, Maru Mora Villalpando & Angélica Cházaro, *We Fell in Love in a Hopeless Place: A Grassroots History From #Not1More to Abolish ICE*, MEDIUM (June 29, 2018), <https://medium.com/@LaTania/we-fell-in-love-in-a-hopeless-place-a-grassroots-history-from-not1more-to-abolish-ice-23089cf21711> [https://perma.cc/T487-YMEL].
22. See Mijente, *supra* note 20, at 1.
23. *Id.* at 2, 8.
24. *Id.* at 5, 8.
25. *Id.* at 4.
26. *Id.* at 6.
27. *Id.* at 3, 9–10. For an overview on the call to decriminalize border crossings, see, generally, Ingrid Eagly, *The Movement to Decriminalize Border Crossings*, 61 B.C. L. REV. 1967 (2020).
28. *Id.* at 3, 11–12.
29. *Id.* at 2.
30. *Id.* at 6.
31. *Id.* at 5.
32. *Id.* at 4.
33. This realignment toward people impacted by deportability and away from the rule of law builds on the work of others across disparate fields of legal scholarship. See, e.g., DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 224 (2011) (positing that relief for the violence facing the most vulnerable transgender people will come from mass mobilization "led by those living on the sharpest intersecting edges of multiple systems of control" and avoiding compromises that leave the most vulnerable behind); Sameer M. Ashar, *Deep Critique and Democratic Lawyering*

efforts toward those defined by their deportability, a population whose magnitude is far greater than commonly assumed. The platform models an allegiance toward those already living on U.S. territory (from recent arrivals to longtime lawful permanent residents), those on their way (including those apprehended by Mexican security forces and other U.S.-funded and trained border forces before ever entering the United States), and those yet to come (including those whose displacement has not yet occurred). The form of moral and ethical allegiance that characterizes deportation abolition refuses arbitrary geographic and temporal restrictions that the common sense of deportation both takes for granted and reproduces. The Mijente policy platform is unabashed in its willingness to envision the actual steps necessary to dismantle deportation, and creates a pragmatic path toward the end of deportation.

By deportation abolition, I mean ending the practice of expulsions on the basis of national origin. By extension, abolishing deportation would mean abolishing deportability—the susceptibility to deportation that generates various forms of migrant precarity, even if a person is never expelled.³⁴

Diagnosing the roadblocks to imagining an end to deportation is a necessary precursor to deportation's downfall. This Article thus seeks to flesh out the theoretical framework of deportation abolition necessary to support policy demands that prefigure an end to the practice of expulsions on the basis of national origin. Deportation abolition undoubtedly has implications for broader debates, and as the first law review article exclusively devoted to this subject, this will by necessity be an incompletely theorized argument.³⁵ This is, in

in Clinical Practice, 104 CALIF. L. REV. 201, 218 (2016) (arguing that legal educators are required “to develop in ourselves and in our students the capacity of deep critique, of thinking beneath and beyond liberal legalist approaches to social problems” and that such work can only happen “through collaborative work with people, communities, and thinkers at the margins of our social structure”); Akbar, *Toward a Radical Imagination of Law*, *supra* note 17, at 407–08 (focusing on the contribution of the Movement for Black Lives platform, grounded in the experience of Black people impacted by police violence, and observing that “the larger movement configuration in which the chapter-based Black Lives Matter network functions . . . was having a far richer and more imaginative conversation about law reform than lawyers and law faculty”); McLeod, *supra* note 17, at 1219 (describing a preventive justice framework focused not on addressing challenges to rule of law values, but rather “prevention of interpersonal harm, along with other social problems, that might operate without enlisting criminal law enforcement”).

34. Nicholas De Genova & Ananya Roy, *Practices of Illegalisation*, 52 ANTIPODE 352, 355 (2020) (“Deportability is inseparable from the disposability of migrant lives. There is the constant threat of removal, of being coercively forced out and physically removed from the space of the nation-state. This is an expulsion from life and living itself.”).
35. Ayelet Shachar, *The Multiple Sites of Justice: A Reply*, in THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY: AYELET SHACHAR IN DIALOGUE 215, 258 (Ayelet Shachar ed., 2020) (“Incompletely theorized arguments,’ to draw on Cass

fact, the point. Positing the end of deportation as a desirable goal forces many urgent questions, among them the question of the ideal function of national borders in the twenty-first century.³⁶ While providing a definitive answer to this question is beyond the scope of this Article, injecting deportation abolition more explicitly into the conversation necessarily opens up space for new answers, and especially for questions we have yet to imagine could be asked. For example, when deportation is no longer taken for granted, a debate on whether the nation-state survives an encounter with limits to its exclusion and expulsion powers becomes possible.³⁷

In order to open the door to the end of deportation, this Article proceeds in four parts. Part I describes the need for a deportation abolition framework and politics by describing the ways that deportability, as much if not more than the possibility of inclusion, has become the central paradigm for the modern immigrant experience in the United States. Part 0 examines deportation itself, arguing that violence is at the heart of the practice. Moving past debates of whether deportation constitutes punishment, this Part catalogues the forms of violence inherent to the project, from the violence of the deportation process, to the violence of the moment of deportation itself, to the violence that defines the life of the deported.³⁸ The cataloguing of violence supports the conclusion that violence is not incidental to deportation, but rather that deportation is violence. Confronting deportation as inseparable from violence interrogates our common sense that deportation serves legitimate moral and political ends. When violence is understood to be deportation's ultimate purpose, it focuses scholarship and advocacy on ending it, not merely mitigating it.

Questioning deportation's inevitability involves tackling the goals most commonly associated with the process of deportation. The belief that deportation is needed to maintain social control over noncitizen populations admitted to the

Sunstein's terminology, are vital for producing results and motivating action under conditions where we lack full information or have not yet fully theorized all aspects of the studied phenomenon." (footnote omitted)).

36. For a book-length treatment on the function of borders across political, social, cultural, and economic systems in the twenty-first century, with an analysis aligned with deportation abolition, see HARSHA WALIA, BORDER & RULE, GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM (2021).
37. These debates are already happening in various disciplines. See, e.g., Sarah Fine, *Monsters, Inc.: The Fightback*, in THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY: AYELET SHACHAR IN DIALOGUE, *supra* note 35, at 99, 117 ("Here, then, is another seditious doctrine: we do not have to believe in the state's right to exclude. And to follow it up with one more: without the right to exclude, the whole edifice would not collapse, just as it has not collapsed in the absence of a belief in the state's sovereign right to prevent its own citizens from leaving and returning.").
38. See discussion *infra* Part II.

country, and that safety for the United States depends on the ability to deport those who are dangerous to the wellbeing of the nation, constitutes part of the common sense of deportation.³⁹ Additionally, the belief that deportation is required in order to retain control over the United States's territorial borders, and by extension, to maintain sovereignty, underlies the common sense of deportation.⁴⁰ These two beliefs are frequently framed as the two primary goals of deportation: extended border control and post-entry social control.⁴¹ As such, Part III addresses them, arguing that neither sovereignty nor safety justify continuing the project of deportation.

In dismantling the logic of safety as requiring deportation, Subpart III.A questions the stability of "crime" as a category for the distribution of deportation.⁴² Along these lines, Subpart III.A suggests reorienting anti-deportation advocacy to refuse the disposability of people who have had contact with the criminal justice system, a proposition that has implications for challenging forms of banishment beyond deportation.⁴³ In addressing sovereignty, Subpart III.B challenges the authority of the state-centered framework⁴⁴ that justifies deportation, drawing attention to arguments being developed in Indigenous studies,⁴⁵ as well as in international law scholarship⁴⁶ that defy the coherence and stability of U.S. constructions and interpretations of territorial sovereignty.

Part IV pushes back on the notion that deportation abolition constitutes an unattainable utopia, arguing that the severity of deportation's violence requires a practical exploration of its end, an exploration that has already begun with local

39. See discussion *infra* Subpart III.A.

40. See discussion *infra* Subpart III.B.

41. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 5 (2007) ("For an appreciation of the complexity of the deportation system, it is useful to note that there are two basic types of deportation laws: extended border control and post-entry social control." (emphasis omitted)).

42. See discussion *infra* Subpart III.A.

43. Cf. Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 750 (2015) ("State and local actors throughout the United States have demonstrated a creative ability to pair criminal justice system mechanisms with novel civil law tools to regulate and limit the movement of their residents in ways that actually mimic deportation."). Kelly Lytle-Hernández, *Amnesty or Abolition? Felons, Illegals, and the Case for a New Abolition Movement*, BOOM: J. CAL., Winter 2011, at 54, 66 ("Today it is the criminal justice system that renders the substance of citizenship, itself, unpredictable. In other words, a path to citizenship for undocumented immigrants in an era of mass incarceration may not be as valuable as it seems if pursued without a challenge to the inequities of mass incarceration . . .").

44. See Bosniak, *supra* note 18, at 507 ("[B]oth the pervasiveness and the authority of the state-centered framework in which we live radically limit our capacity to conceive of concrete alternative arrangements.").

45. See *infra* notes 271–329 and accompanying text.

46. See *infra* notes 296–305 and accompanying text.

experiments to challenge deportability.⁴⁷ Part IV identifies ongoing struggles that prefigure the end of deportation, focusing on an effort in Chicago to delete a gang database that marks hundreds of thousands as potential targets for criminalization and deportation.⁴⁸ It contrasts this effort with a commonly suggested reform to address deportation's harms, the injection of proportionality review into deportation adjudication.

Theorizing the end of deportation is not a comfortable project, as it flies in the face of established norms and deeply rooted logics. But the current paradigm of endless deportation commits us, at best, to facial improvements in a long term project of managing the migration of the racialized poor through banishment. Another horizon is possible, and this Article invites scholarship and advocacy that move in a new direction, one which reorganizes responses to deportation toward the goal of its downfall.

I. IMMIGRATION LAW IS DEPORTATION LAW

A. The Possibility of Exclusion Defines Immigration Law

Traditionally, immigration law as a subject of legal inquiry has been understood as the study of the acquisition of membership and its corresponding rights and privileges. One common approach is presented by a leading immigration casebook, which embraces two related heuristics to describe immigration law's relationship to membership.⁴⁹ The first models membership as a series of concentric circles, with U.S. citizens in the innermost ring and categories of noncitizens filling out the outer rings; it situates noncitizens seeking entry at the farthest ring, followed by unauthorized migrants already in the United States, various categories of temporary visa holders, and lawful permanent residents in the circle closest to U.S. citizens.⁵⁰ Membership rights are distributed according to a person's assigned category.

The second model theorizes membership as existing along a chronological, procedural continuum, with immigrants outside the United States seeking visas at one end of the spectrum, and those who have achieved U.S. citizenship through the process of naturalization at the other end of the line, with stops involving

47. See McLeod, *supra* note 17, at 1239 (“Abolition as an ethical and institutional framework—as an aspirational horizon for reform—is not unduly or merely utopian, but orients critical thought and reformist efforts toward meaningful and just legal, ethical, and institutional transformation to which we might commit ourselves.”).

48. See *infra* notes 358–365 and accompanying text.

49. ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON & STUMPF, *supra* note 10, at 49.

50. *Id.*

nonimmigrant visas and lawful permanent residence along the way.⁵¹ Each of these stops is thought to correspond with a further accumulation of the privileges of membership.⁵²

These models have a common endpoint in mind: U.S. citizenship.⁵³ Questions of membership arise among those who question in which circle, or along which point in the linear model, certain rights and privileges associated with membership should attach to noncitizens. The daily practice of immigration law consists of moving people from one point on the linear model to the next—from having no visa to having a visa granted at a U.S. consulate abroad, or from having a nonimmigrant visa to having lawful permanent residence, or from having lawful permanent residence to becoming a naturalized U.S. citizen. For those concerned with laws about immigrants (rather than laws about immigration), the question that arises is which group of immigrants should receive the rights and privileges associated with membership—for example, state-issued driver's licenses, access to public education, or access to state-funded food, housing, and medical benefits.⁵⁴

In line with these two models, the construction of the United States as a nation of immigrants tends to focus on those who have successfully achieved U.S. citizenship.⁵⁵ But the flipside of membership that culminates in U.S. citizenship, at least in the immigration sphere, has always been deportation. Models of membership take for granted that there is an edge to membership, beyond which lie the excluded and the deported. The practice of immigration law has thus also been the practice of sorting noncitizens between those who can be properly kept in

51. *Id.*

52. *Id.*

53. *See id.*

54. *See, e.g.*, NAT'L IMMIGR. L. CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATES (2013), <https://www.nilc.org/news/special-reports/inclusive-policies-advance-2013> [https://perma.cc/DK8-5U2K].

55. *See, e.g.*, THE NAT'L ACADS. OF SCI., ENG'G, & MED., THE INTEGRATION OF IMMIGRANTS INTO AMERICAN SOCIETY 1 (Mary C. Waters & Marisa Gerstein Pineau eds., 2015) ("The United States prides itself on being a nation of immigrants, and the nation has a long history of successfully absorbing people from across the globe."); *Immigrant Contributions, Sacrifices Underscore That U.S. Is a 'Nation of Immigrants'*, NAT'L IMMIGR. F. (Feb. 22, 2018), <https://immigrationforum.org/article/immigrant-contributions-sacrifices-underscore-u-s-nation-immigrants> [https://perma.cc/YWE5-ALEJ] ("Embracing our identity as a nation of immigrants is a fundamental part of what makes America great." (quoting Ali Noorani, Executive Director of the National Immigration Forum)); Mary Giovagnoli, *Removal of 'Nation of Immigrants' From USCIS Mission Ignores Agency's Mandate and American History*, IMMIGR. IMPACT (Feb. 26, 2018), <http://immigrationimpact.com/2018/02/26/removal-nation-immigrants-uscis-mission> [https://perma.cc/EK5H-EZUP] ("USCIS is, at its heart, in the business of creating new Americans, and if it forgets that, then it forgets a critical part of its mission.").

an outer circle, far from U.S. citizenship, and those who can be included in the inner circles. Immigration lawyers are thus concerned not just with moving someone along from a less secure status to a more secure one, but with defending those who face being removed from the possibility of U.S. citizenship altogether.

The sheer realities facing immigrants in recent decades, with historic numbers of deportations, and a seemingly permanent population of undocumented people numbering in the millions, lead to a notion of the United States not as a nation of immigrants, but as a “deportation nation,”⁵⁶ or perhaps more precisely, as a nation of deportables.⁵⁷ A model that more accurately captures the experience of noncitizens in the United States in the twenty-first century might replace the concentric circles model of membership with one in which there are two side-by-side circles—one consisting solely of those who are U.S. citizens since birth, and one circle that holds everyone else, including naturalized U.S. citizens, those with no status, those headed to the United States, and those with lawful permanent residence.⁵⁸ This conception makes clear that for everyone but those born a U.S. citizen, the possibility of exclusion and deportation defines their relationship to the United States as much as, if not more than, the possibility of membership.⁵⁹ Likewise, the linear/procedural model might be amended under this conception to show all the different locations where movement along the continuum from less status to more status can also result in a very different result: deportation.

This inversion of the usual inclusion model to one focused on exclusion is more than just a descriptive tool; it is borne out by the history of immigration enforcement in the U.S., by the actions of the Trump administration, which brought to bear increasing deportation infrastructure developed since the 1990s, and by the Biden administration’s continuation of the Trump agenda, particularly

56. KANSTROOM, *supra* note 41.

57. See Miriam Jordan, *Is America a ‘Nation of Immigrants’? Immigration Agency Says No*, N.Y. TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/us/uscis-nation-of-immigrants.html> [https://perma.cc/84MQ-G53R].

58. Indigenous scholar and historian Roxanne Dunbar-Ortiz problematizes the notion of a “nation of immigrants” altogether, arguing that “[t]he nation of immigrants myth erases the fact that the United States was founded as a settler state from its inception and spent the next hundreds years at war against the Native Nations in conquering the continent.” ROXANNE DUNBAR-ORTIZ, NOT “A NATION OF IMMIGRANTS”: SETTLER COLONIALISM, WHITE SUPREMACY, AND A HISTORY OF ERASURE AND EXCLUSION xxii (2021).

59. In pointing to the possibilities of buying one’s way into membership in the United States (and other migrant-receiving nations) through visas that cater to the wealthy, Ayelet Shachar introduces an important exception to this rule. Ayelet Shachar, *Beyond Open and Closed Borders: The Grand Transformation of Citizenship*, 11 JURIS. 1, 6 (2020) (“[W]ealthy migrants wishing to deposit their capital in these very same countries find fewer and fewer restrictions to fast-tracked admission.”).

in regard to border expulsions.⁶⁰ The call for deportation abolition is a call to disrupt this enduring pattern.

In *The Deportation Machine*, scholar Adam Goodman presents the case for U.S. history as one of expulsions, with deportation in its various forms “a central feature of American politics and life since before 1900, and particularly in the post-World War II era.”⁶¹ Based on extensive archival research, he estimates that nearly 57 million people have been deported from the United States since 1882, problematizing the notion of the United States as “a nation of immigrants” given that the United States deported a greater number of people in the twentieth century than it welcomed permanently.⁶² Goodman estimates that over 90 percent of deportations in the United States have been via voluntary departure, a euphemistically-named administrative process that parallels the criminal system’s reliance on plea bargains,⁶³ and which typically occurs after an immigration enforcement agent encounters an individual, coerces them into agreeing to leave, and then physically removes them or confirms their imminent departure.⁶⁴

While voluntary departures have dominated the United States’s history of expulsions, in recent decades they have been far outstripped by formal deportations (or removals). The number of formal deportations rose from 23,000 in 1986 to a record 433,000 in 2013, even as voluntary departures drastically decreased (from 1.58 million in 1986 to under 179,000 in 2013).⁶⁵ Even as the practice of voluntary departure as a practice of expulsion decreased, the consequences of formal deportations have become more dire, with

60. Carly Goodman, *Angry That ICE Is Ripping Families Apart? Don’t Just Blame Trump. Blame Clinton, Bush and Obama, Too*, WASH. POST (June 11, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/11/angry-that-ice-is-ripping-families-apart-dont-just-blame-trump-blame-clinton-bush-and-obama-too> [https://perma.cc/CL3B-CFMN].
61. ADAM GOODMAN, THE DEPORTATION MACHINE: AMERICA’S LONG HISTORY OF EXPELLING IMMIGRANTS 6 (2020).
62. GOODMAN, *supra* note 61, at 1. See also TORRIE HESTER, DEPORTATION: THE ORIGINS OF U.S. POLICY 181 (2017) (estimating that “[b]etween 1966 and 2011, the federal government voluntarily removed or, under the nomenclature of today, ‘returned,’ over forty-one million people. For more than four decades, the United States had consistently deported close to one million people per year”).
63. In the criminal system, researchers estimate that 90 percent of cases are resolved through plea bargains, an “informal and unregulated process by which prosecutors and defense counsel negotiate charging and sentencing concessions in exchange for guilty pleas and waivers of constitutionally guaranteed trial rights.” RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 1 (2020), <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf> [https://perma.cc/3LQX-H789].
64. GOODMAN, *supra* note 61, at 1–4.
65. *Id.* at 167.

incarceration in the form of immigration detention becoming a central part of the process of expulsion for many. Scholars have traced the origin of the modern deportation regime to 1988, with the passage of the Anti-Drug Abuse Act and the creation of the “aggravated felony” category, which subjects noncitizens to almost-assured deportation if they are convicted of a broad category of offenses.⁶⁶ Two 1996 laws, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Responsibility Act of 1996 (IIRIRA), cemented the targeting of so-called “criminal aliens,”⁶⁷ expanding the category of aggravated felony to encompass many more offenses. This had the effect of rendering immigrants with minor convictions related to stop-and-frisk policing practices and the War on Drugs subject to detention and deportation, in part by making detention retroactively mandatory for persons with certain convictions.⁶⁸ These laws drastically inflated the deportation machinery: the creation of mandatory detention laid the groundwork for the dramatic expansion of the immigration detention system, while the removal of discretion from immigration judges, the foreclosure of access to federal courts, and the creation of deportation procedures that bypassed the immigration courts laid the groundwork for the increased numbers of formal removals.⁶⁹

The creation of the Department of Homeland Security (DHS) in 2003, a response to the events of September 11, 2001, reorganized the deportation function under a new agency, one which received vast influxes of funding, in part by merging national security and domestic immigration policy.⁷⁰ The merger of

66. KANSTROOM, *supra* note 41, at 227–29.
67. Throughout this Article, I use the term “criminal alien” to refer to the population of noncitizens whose contact with the criminal justice system renders them a priority for deportation. As with my previous work, this Article seeks to problematize the unquestioning use of the concept of the “criminal alien”, and the use of quotes contributes to that goal. See Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594 (2016).
68. WALIA, *supra* note 36, at 52. Since the passage of the 1996 laws, immigrant communities impacted by the laws have organized in resistance, with “Fix 96” a consistent rallying cry. See, e.g., ACLU Joins “Fix ‘96” Campaign for Justice for Immigrants, ACLU (July 28, 1999), <https://www.aclu.org/press-releases/aclu-joins-fix-96-campaign-justice-immigrants?redirect=immigrants-rights/aclu-joins-fix-96-campaign-justice-immigrants> [https://perma.cc/JV8J-PGKK]; Fix ‘96: End the Mass Criminalization of Immigrants, IMMIGRANT DEF. PROJECT (Apr. 28, 2016), <https://www.immigrantdefenseproject.org/fix-96-end-mass-criminalization-immigrants> [https://perma.cc/FC8E-N4EY].
69. See generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936–38 (2000) (discussing impact of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA)); see also Koh, *supra* note 13, at 196–99 (describing effect of the 1996 laws on expedited removal).
70. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441–462, 116 Stat. 2135, 2192 (2002).

immigration and security led to the federal government empowering local law enforcement to act as immigration agents through expanded use of 287(g) agreements (wherein DHS deputized non-federal police officers), and to the creation of the “Secure Communities” program.⁷¹ Secure Communities, created under Bush and vastly expanded during the Obama years, fully merged immigration databases with criminal legal system databases.⁷² This combination of factors contributed to the rise of formal removals, which reached a peak under President Obama (he was subsequently dubbed “the deporter-in-chief” by activists seeking to bring attention to the high rates of arrests and deportations).⁷³ The 1996 laws found their full expression during the Obama years, bolstered by the unprecedented funding that led immigration enforcement budgets to outpace the budgets of all other federal enforcement agencies combined.⁷⁴ By 2015, the immigration enforcement machinery was a well-honed tool of mass expulsion, and it was this “turbocharged” tool which was handed to the Trump administration.⁷⁵

President Trump ran his 2015 campaign on explicit anti-immigrant rhetoric,⁷⁶ and returned to this rhetoric repeatedly during the 2018 midterm

71. WALIA, *supra* note 36, at 58 (2021); *see also* Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1257–73 (2018) (explaining 287(g) agreements and use under Bush and Obama administrations).
72. See NAT'L IMMIGR. L. CTR., UNTANGLING THE IMMIGRATION ENFORCEMENT WEB 4–5 (2017), <https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf> [<https://perma.cc/LHE6-LC22>].
73. RANDY CAPPs, MUZAFFAR CHISHTI, JULIA GELATT, JESSICA BOLTER & ARIEL G. RUIZ SOTO, REVVING UP THE DEPORTATION MACHINERY: ENFORCEMENT AND PUSHBACK UNDER TRUMP 14 (2018) (noting that “[p]eak removals from the U.S. interior occurred during FY 2009–11 (exceeding 200,000 annually), while ICE arrests peaked at more than 300,000 each year during FY 2010–11.”). *See FY 2015 ICE Immigration Removals*, U.S. IMMIGR. & CUSTOMS ENFT’ (Jan. 7, 2021), www.ice.gov/removal-statistics/2015 [<https://perma.cc/9WSC-4VJ7>].
74. AM. IMMIGR. COUNCIL, THE COST OF IMMIGRATION ENFORCEMENT AND BORDER SECURITY 2 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf [<https://perma.cc/S8XX-B6RD>] (noting that since the creation of the Department of Homeland Security (DHS) in 2003 the agency’s budget has nearly tripled, from \$3.3 billion to \$8.3 billion).
75. Marisa Franco & Carlos Garcia, *The Deportation Machine Obama Built for President Trump*, NATION (June 27, 2016), <https://www.thenation.com/article/archive/the-deportation-machine-obama-built-for-president-trump> [<https://perma.cc/GBC2-QMTV>].
76. *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid> [<https://perma.cc/F5XR-V84C>] (“When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”).

elections.⁷⁷ The rhetoric was matched with action from Trump's very first days in office, with attempts to implement changes at every level of the immigration bureaucracy rolled out at a relentless pace, as discussed below.⁷⁸

Pro-immigrant advocates met many of the changes with swift action, with the courts becoming a bulwark against some of the more blatantly unconstitutional attempts.⁷⁹ In part as a result of the legal pushback, a large proportion of the forty-three million foreign-born people in the United States did not technically have their ability to stay in the country legally compromised by the changes. But the changes nonetheless heightened their precarity, rendering clear that the relationship between foreign-born people in the United States and the country in which they reside is defined as one between an always potentially deportable subject and DHS—the most highly armed and resourced federal law enforcement agency in recent U.S. history.⁸⁰

While a global review of Trump's immigration policies is beyond the scope of this Article, it is useful to briefly discuss how Trump-era deportation policies further revealed deportation (rather than potential membership) as the central organizing premise of immigration law.⁸¹ Three practices exemplify this trend: the

77. John Fritze & David Jackson, *Donald Trump Hammers on Immigration, Caravan in Final Rallies Before Midterm Election*, USA TODAY (Nov. 3, 2018, 10:30 PM), <https://www.usatoday.com/story/news/politics/elections/2018/11/03/midterm-elections-2018-donald-trump-hammers-immigration-message/1881561002> [https://perma.cc/4B3C-QR7P]; Michael D. Shear & Julie Hirschfeld Davis, *As Midterm Vote Nears, Trump Reprises a Favorite Message: Fear Immigrants*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/us/politics/trump-immigration.html> [https://perma.cc/6GFK-EWAN].
78. See Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 254–67 (2017).
79. Ana Campoy, *Pro-immigrant Americans Are Beating Trump Back With a Flood of Lawsuits*, QUARTZ (July 28, 2018), <https://qz.com/1330683/adlu-and-other-organizations-are-shaping-donald-trumps-immigration-policy> [https://perma.cc/5EQV-KRUT]; e.g., *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018); *Darweesh v. Trump*, No. 17 Civ. 480, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017).
80. Marisa Franco & Paromita Shah, Opinion, *The Department of Homeland Security: The Largest Police Force Nobody Monitors*, GUARDIAN (Nov. 19, 2015, 6:15 AM), <https://www.theguardian.com/commentisfree/2015/nov/19/the-department-of-homeland-security-the-largest-police-force-nobody-monitors> [https://perma.cc/W8QC-A77L]; see AM. IMMIGR. COUNCIL, *supra* note 74; see DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, *IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 2–3 (2013).
81. For one review of immigration-related executive actions during the Trump era (which numbered in the hundreds) through the summer of 2020, see SARAH PIERCE & JESSICA BOLTER, *DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY* (2020), <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency> [https://perma.cc/53CJ-PNPG].

creation of a denaturalization office staffed by dozens of attorneys charged with stripping U.S. citizenship from foreign-born U.S. citizens;⁸² the placement of people who apply for lawful status into removal proceedings;⁸³ and the refusal to exempt any noncitizens in the United States from potential deportation.⁸⁴

1. Ramp to Deportation: Denaturalization of U.S. Citizens

Ground level immigration officers proved themselves ready to implement a deportation-first agenda even before Trump took office. The unions that represent Border Patrol and ICE employees took the unprecedented step of endorsing the presidential candidacy of Trump,⁸⁵ and on-the-ground reports noted an increase in repressive immigration enforcement activity immediately following Trump's election.⁸⁶ The synergy between the Trump administration's deportation policies and the willingness of the immigration workforce to carry out the policies rendered them particularly effective in increasing deportability. While the Trump era has ended, DHS's workforce remains essentially unchanged, with only political appointees shifting while frontline agents committed to a deportation-first mission remain in place.⁸⁷

The 2002 reorganization of the Immigration and Naturalization Service into DHS officially divided the benefits-granting branches of the immigration bureaucracy from those focused on enforcement.⁸⁸ The benefits-granting functions were reorganized under U.S. Citizenship and Immigration Services

82. See *infra* notes 91–100 and accompanying text.

83. See *infra* notes 101–110 and accompanying text.

84. See *infra* notes 114–118 and accompanying text.

85. *National Border Patrol Council Endorses Donald Trump for President*, NAT'L BORDER PATROL COUNCIL (Mar. 30, 2016), <https://bpunion.org/press-releases/national-border-patrol-council-endorses-donald-trump-for-president> [https://perma.cc/X3ZV-SQ9T]; *ICE Union Endorses Trump*, POLITICO (Sept. 26, 2016, 8:12 AM), <https://www.politico.com/story/2016/09/immigration-customs-enforcement-union-endorses-trump-228664> [https://perma.cc/EV59-GPWR].

86. Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772> [https://perma.cc/M834-Z2E9] (“When Trump prevailed in the election, the soon-to-be-named head of ICE triumphantly declared that it would finally have the backing of a president who would let the agency do its job. He’s ‘taking the handcuffs off,’ said Thomas Homan, who served as ICE’s acting director under Trump until his retirement in June [2018] . . .”).

87. See Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948 (2021); Robert Knowles & Geoffrey Heeren, *Zealous Administration: The Deportation Bureaucracy*, 72 RUTGERS U. L. REV. 749, 753–55 (2020); Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 209–25 (2014).

88. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441–462, 116 Stat. 2135, 2192 (2002).

(USCIS), which processes applications for, among other things, lawful permanent residence and naturalization.⁸⁹ The function of enforcing the immigration laws at the border and in the interior was redistributed between Customs and Border Protection (CBP) and ICE, respectively. However, the division between these two wings of the immigration bureaucracy (benefits-granting and enforcement) has been porous since DHS's founding. For example, one common way long term lawful permanent residents face deportation is by applying for naturalization through USCIS, having some long-ago criminal infraction disqualify them from citizenship, and then being referred by USCIS to ICE for deportation processing.⁹⁰ But the Trump administration's actions further contributed to the collapse of the wall between the functions of granting status to noncitizens and deporting noncitizens.

Nowhere was this clearer than in the creation of a USCIS denaturalization task force, focused on the revocation of U.S. citizenship. The denaturalization office reviews people whose citizenship presumably exempts them from the harms of deportability—naturalized U.S. citizens.⁹¹ While denaturalization is not new in

89. For those residing abroad and seeking to enter the United States, the Department of State's consular offices perform a similar function. *See, e.g.*, *Immigrant Visa Process*, U.S. DEP'T STATE: BUREAU CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process.html> [https://perma.cc/A7JD-2CKN] (last visited Jan. 3, 2022).
90. *See* Hassan Ahmad, *A Quiet Change in US Policy Threatens Immigrants Who Apply for a Change in Status*, QUARTZ (July 20, 2018), <https://qz.com/1323136/a-uscis-immigration-policy-change-threatens-non-citizens-with-deportation-if-they-lose-status> [https://perma.cc/658S-SPX].
91. Amy Taxin, *US Launches Bid to Find Citizenship Cheaters*, AP NEWS (June 11, 2018), <https://apnews.com/1da389a535684a5f9d0da74081c242f3> [https://perma.cc/6N6Z-XQKV] ("Cissna said the cases would be referred to the Department of Justice, whose attorneys could then seek to remove the immigrants' citizenship in civil court proceedings. In some cases, government attorneys could bring criminal charges related to fraud [Cissna] declined to say how much the effort would cost but said it would be covered by the agency's existing budget, which is funded by immigration application fees."); *see also* Masha Gessen, *In America, Naturalized Citizens No Longer Have an Assumption of Permanence*, NEW YORKER (June 18, 2018), <https://www.newyorker.com/news/our-columnists/in-america-naturalized-citizens-no-longer-have-an-assumption-of-permanence> [https://perma.cc/W2ZN-GWG2] ("[T]he new task force doesn't reflect a change in the law [I]t builds on the legacy of the Obama Administration, which set in motion the process of reexamining old naturalization files."); Patricia Mazzei, *Congratulations, You Are Now a U.S. Citizen. Unless Someone Decides Later You're Not*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/us/denaturalize-citizen-immigration.html> [https://perma.cc/23KD-MRJ7] ("The number of denaturalization cases . . . has also gone up: They averaged 11 a year from 1990 to 2017 and rose to approximately 15 in 2016 and about 25 in 2017, according to the Justice Department. About 20 cases have been filed so far this year"); Brittny Mejia, *Under Trump, the Rare Act of Denaturalizing U.S. Citizens on the Rise*, L.A. TIMES (Aug. 12, 2018, 7:30 AM), [https://www.latimes.com/local/california/la-me-ln-denaturalization-20180812-](https://www.latimes.com/local/california/la-me-ln-denaturalization-20180812)

the practice of U.S. immigration law, only 305 denaturalization cases were pursued between 1990 and 2017, with the DOJ filing an average of eleven cases per year.⁹² In 2017 and 2018, USCIS identified about 2500 cases for possible denaturalization and referred over one hundred cases to the DOJ for prosecution.⁹³ By reviewing thousands of approved naturalization applications for any perceived discrepancies that might trigger denaturalization (and presumably, deportation), USCIS officially signaled the permanent deportability of any foreign-born national, even those who have made it through the gauntlet of naturalization.⁹⁴

The fact that the citizenship application asks a noncitizen whether they have ever violated any U.S. law (whether or not they were arrested) points to the breadth of the denaturalization threat.⁹⁵ When a government official can make a discretionary determination that any violation of any law at any point (even if those laws are no longer in force)⁹⁶ could lead to denaturalization, the instability of naturalized citizenship still constitutes a state of permanent deportability. While the U.S. Supreme Court's decision in *Maslenjak v. United States*⁹⁷ limits the potential impact of the denaturalization task force by holding that citizenship cannot be revoked over minor misstatements, the government's assertion that even a failure to disclose a speeding violation is enough to revoke citizenship years later sends a chilling message, particularly for those who cannot afford to mount a defense.⁹⁸ ICE's 2018 budget request included three hundred extra agents who

story.html [https://perma.cc/7BK9-7UA5] ("A [USCIS] team in Los Angeles has been reviewing more than 2,500 naturalization files for possible denaturalization, focusing on identity fraud and willful misrepresentation. More than 100 cases have been referred to the Department of Justice for possible action.").

92. Adiel Kaplan, *Miami Grandma Targeted as U.S. Takes Aim at Naturalized Immigrants With Prior Offenses*, MIA. HERALD (July 12, 2018, 5:45 PM), <https://www.miamiherald.com/news/local/immigration/article214173489.html> [https://perma.cc/3PAM-RVS2].
93. Frank Cissna, *Remarks at Annual Immigration Policy Conference*, C-SPAN, at 29:25 (Oct. 1, 2018), <https://www.c-span.org/video/?452248-3/frank-cissna-remarks-annual-immigration-policy-conference> [https://perma.cc/U8RA-MNG7].
94. See Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration's War on Immigration?*, N.Y. TIMES MAG. (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html> [https://perma.cc/2LGP-VUNY].
95. See U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., FORM N-400, APPLICATION FOR NATURALIZATION 14 (2019), <https://www.uscis.gov/sites/default/files/document/forms/n-400.pdf> [https://perma.cc/8UTA-SM8U].
96. See Gessen, *supra* note 91.
97. 137 S. Ct. 1918 (2017).
98. Adam Liptak, *U.S. Can't Revoke Citizenship Over Minor Falsehoods, Supreme Court Rules*, N.Y. TIMES (June 22, 2017), <https://www.nytimes.com/2017/06/22/us/politics/supreme-court-citizenship.html> [https://perma.cc/AS23-65Q5] ("A government lawyer, in

would be tasked with, among other things, rooting out “citizenship fraud,”⁹⁹ an addition of resources that sought to further entangle USCIS and ICE in the joint task of targeting foreign-born U.S. citizens. Whatever the outcome of denaturalization processes, their existence is enough to strike fear into the hearts of the approximately twenty-three million foreign-born U.S. citizens¹⁰⁰ and serve as a constant reminder of those individuals’ proximity to deportability.

2. Ramp to Deportation: Referrals to ICE of Applicants for Lawful Status

The expansion of deportability was also extended to those who believed that they might qualify for a route to eventual citizenship under the existing limited pathways. In June 2018, a policy memorandum entitled “Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens” was sent to field office directors who supervise the adjudication of the hundreds of thousands of applications for lawful permanent residency and other benefits received by USCIS each year.¹⁰¹ The memo directed USCIS to vastly expand the cases in which they issued a “Notice to Appear,” the charging document that places a noncitizen in removal proceedings.¹⁰² This directive extended to categories of applications previously exempt from such a requirement, including applicants for relief under the Violence Against Women Act of 1994¹⁰³ and applicants for relief under the U visa (a form of relief for people who were victims of a crime and suffered substantial harm).¹⁰⁴

response to questioning, said that failing to disclose a speeding violation could be enough to revoke citizenship even years later.”).

99. Mejia, *supra* note 91 (reporting on ICE’s efforts to “root out citizenship fraud”); Mazzei, *supra* note 91 (explaining that the additional three hundred ICE agents would investigate “marriage, visa, residency and citizenship fraud”).
100. Jeanne Batalova, Brittany Blizzard & Jessica Bolter, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 14, 2020), <https://web.archive.org/web/20200217054005/https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states> [https://perma.cc/2VPV-E6XT].
101. Policy Memorandum from the Off. of the Dir., U.S. Citizenship & Immigr. Servs., PM-602-0050.1, Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> [https://perma.cc/A692-DDA2] [hereinafter NTA Memo].
102. *See id.* at 3.
103. Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1796, 1902–55 (repealed 2019).
104. *See USCIS to Continue Implementing New Policy Memorandum on Notices to Appear*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 8, 2018), <https://www.uscis.gov/news/alerts/uscis-continue-implementing-new-policy-memorandum>

For those applying for lawful status—particularly those who have had no previous contact with immigration authorities—the process has always been fraught, precisely because USCIS was presumed connected to ICE and because applications for status were a known pathway to deportation.¹⁰⁵ But with the immigration agencies making clear that referral to deportation would be the likely outcome of denied applications, deportability increasingly defined the experience of even noncitizens who might have the requisite familial or employment relationships or histories of victimization that could facilitate their pathway to citizenship. For populations used to organizing their lives around avoiding deportability, this move may have acted as a deterrent for beginning a legalization process. This step lends credence to the claim that alienage (and its attending deportability), not the possibility of legalization, defines the experience of noncitizens in the United States.¹⁰⁶

The effect of the NTA memo was heightened by the issuance of a second memo in July 2018—one which made clear that any mistake on an application for an immigration benefit, however trivial, could lead to its denial. This second memo rescinded Obama-era guidance, issued in 2013, that directed USCIS to issue a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) in cases when an applicant could cure the deficiency in the application for an immigration benefit by providing further information.¹⁰⁷ The 2013 memo was issued the same fiscal year ICE reached a record 438,421 deportations,¹⁰⁸ exemplifying Obama’s legacy. Even as the Obama administration attempted to facilitate pathways to

notices-appear [<https://perma.cc/Q3WA-9TLG>]; see also NTA Memo, *supra* note 101, at 9 n.20.

105. See Stuart Anderson, *New USCIS Policy Will Carry Harsh Consequences for Applicants*, FORBES (July 11, 2018, 12:15 AM), <https://www.forbes.com/sites/stuartanderson/2018/07/11/new-uscis-policy-will-carry-harsh-consequences-for-applicants/#1f508494615> [<https://perma.cc/GB37-UCFP>] (“In the past, USCIS has generally referred matters of potentially removable foreign nationals to ICE to determine whether removal proceedings should actually be initiated by issuing a Notice to Appear.”) (quoting Jennifer Minear, director of the immigration practice group at McCandlish Holton).
106. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 130 (2006) (“[L]egalization must necessarily be understood as an exception to the norm, a deviation from the usual prerogative of closure.”).
107. Policy Memorandum from the Off. of the Dir., U.S. Citizenship & Immigr. Servs., PM-602-0163, Issuance of Certain RFEs and NOIDs 1–3 (2018), http://web.archive.org/web/20180719202921/https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf [<https://perma.cc/W9VL-ZS23>].
108. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RSCH. CTR. (Oct. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013> [<https://perma.cc/Z98M-PLTL>].

membership to those who might be eligible (hence the opportunity to respond to an RFE or a NOI before being denied an opportunity to obtain lawful status), it simultaneously drastically increased immigration enforcement, building the very infrastructure that the Trump administration subsequently used to great effect.¹⁰⁹

In contrast, the Trump administration had no interest in opening pathways to membership to people born outside the United States, and these two memos showed that impulse in action.¹¹⁰ By denying immigrants the chance to correct even minor mistakes in applications, and then referring denied applicants to removal proceedings, the Trump administration made clear that its priorities were not adding potential new U.S. citizens to this country, but facilitating pathways to removal for all the foreign-born people living in the United States.

Despite the rescission of these memos by the Biden administration, the writing remains on the wall—deportability, as well as the executive branch’s at-will expansion of deportability—is a central feature of the U.S. approach to immigration.¹¹¹ Biden’s entry into office did nothing to erase the Notices to Appear issued during the Trump era, and as a result 1.3 million people had active deportation cases pending before the immigration courts by the start of

109. See *ICE Apprehensions Half Levels of Five Years Ago*, TRAC IMMIGR. (June 12, 2018), <https://trac.syr.edu/immigration/reports/517> [https://perma.cc/HV36-5LSW] (discussing high levels of arrests by ICE during the Obama administration.); see also Kevin R. Johnson, *Lessons About the Future of Immigration Law From the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 350 (2018) (“From the outset of the Obama presidency, the administration sought to demonstrate a firm commitment to immigration enforcement.”); cf. President Barack Obama, *Remarks by the President in Address to the Nation on Immigration*, WHITE HOUSE (Nov. 20, 2014, 8:01 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [https://perma.cc/SRS5-Z3JQ] (“[W]e’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids. We’ll prioritize, just like law enforcement does every day.”).
110. In fact, the Trump administration has actively supported limiting the pathways to lawful immigration status, as exemplified by its support of the RAISE Act, a bill that would create “major cuts to family immigration” according to analysts. Julia Gelatt, *The RAISE Act: Dramatic Change to Family Immigration, Less So for the Employment-Based System*, MIGRATION POL’Y INST. (Aug. 2017), <https://www.migrationpolicy.org/news/raise-act-dramatic-change-family-immigration-less-so-employment-based-system> [https://perma.cc/465C-TKCV].
111. See Memorandum from David Pekoske, Acting Secy’, U.S. Dep’t of Homeland Sec., to Troy Miller, Senior Officer Performing the Duties of the Comm’r, U.S. Customs & Border Prot. et al. 2, 5 (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/ 52H6-6A6B] (stating that “[t]he memoranda in the attached appendix are hereby rescinded and superseded,” and listing the two 2018 Notice to Appear memos).

2021 (542,411 were pending when Trump took office).¹¹² Given the tremendous backlog in the courts, this population exists in a limbo defined in large part by their pending deportation proceedings, which may not be resolved for many years.¹¹³

3. Ramp to Deportation: Continuity Between the Trump and Biden Era

For those who are neither naturalized citizens nor potential applicants for legalization, the Trump administration wasted no time in making clear that deportability should define their lives—that they were deportable for any reason or for no reason at all. As one of his first acts as President, Trump issued a number of punitive executive orders on immigration enforcement. These included a January 25, 2017 executive order¹¹⁴ and a corresponding February 2017 implementing memo¹¹⁵ that expanded the categories of noncitizens considered a priority for deportation and clarified that no noncitizen could be considered immune from deportation efforts. In a change from the enforcement mandates of the Obama administration, the order and memo made clear that the federal government would no longer exempt “classes or categories of removable aliens from potential enforcement.”¹¹⁶ The effect of this memo was an increase in apprehensions, detentions, and attempts to deport noncitizens living inside the United States,¹¹⁷ and an increase in the percentage of people with no previous law enforcement contact (who were previously considered low priority) facing deportation.¹¹⁸ The 2017 order and implementing memo laid bare what many

112. *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, TRAC IMMIGR. (Jan. 19, 2021), <https://trac.syr.edu/immigration/reports/637/#f1> [<https://perma.cc/ZJB3-72XU>] (“When President Donald Trump assumed office, 542,411 people had deportation cases pending before the Immigration Courts. At the start of 2021, that number now stands at 1,290,766—nearly two and a half times the level when Trump assumed office just four years ago. Waiting in the wings are another 300,000+ cases that President Trump’s policy changes have decided aren’t finally resolved, but have not yet been placed back on the active docket.”).

113. *Id.*

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

115. Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot. et al. (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [<https://perma.cc/2CU2-JLZ9>].

116. *Id.* at 2.

117. Kristen Bialik, *ICE Arrests Went Up in 2017, With Biggest Increases in Florida, Northern Texas, Oklahoma*, PEW RSCH. CTR. (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> [<https://perma.cc/H3DK-KKEF>].

118. John Bowden, *ICE Arrests of Immigrants With No Criminal Convictions Rises: Report*, HILL (May 18, 2018, 9:08 AM), <https://thehill.com/latino/388280-ice-arrests-of-immigrants-with-no-criminal-convictions-rises-report>.

immigrants have always known—that they should shape their lives around the possibility of deportation—even as it sharpened deportability by abandoning any semblance of restraint around who is considered appropriately deportable.

It would be tempting to view the Trump era as somehow anomalous in terms of its relationship to expanding deportability. However, such an analysis would require viewing Trump's rhetoric and actions as somehow divorced from the broader continuum of U.S. immigration policy and enforcement. The Trump administration's many actions enhancing deportability were a logical outcome of a decades-long buildup of agency budgets and personnel focused on immigration enforcement, with authority to deport sanctioned by bipartisan statutory reforms that far preceded the Trump administration's arrival on the scene. The end of the Trump era has doubtlessly brought a sense of relief to immigrant communities, but in the words of Mijente in January of 2021, a more radical transformation is needed, given that "Joe Biden's current plan—a de facto return to the Obama years—would mean more desperation, more deportations, and more death."¹¹⁹

The continuity between the Trump and Biden administrations comes into starker relief when considering the use of Title 42—an obscure public health statute dating to the 1940s. In the name of protecting the United States from COVID-19, Title 42 has been used to carry out border deportations, or mass expulsions, throughout 2020 (the end of Trump's administration) and into 2021 (the time of this writing).¹²⁰ At the end of Biden's first hundred days in office, pro-immigrant advocates estimated that his administration had overseen 300,000 deportations, the majority of them under Title 42.¹²¹ Section 265 of U.S. Code

immigrants-with-no-criminal-convictions-higher-year-over-year-report [https://perma.cc/MU4P-8ZAH].

119. *Undoing Trump's Immigration Policies Won't Be Enough. We Must Dismantle the Immigration Caging and Deportation Machine.*, MIJENTE (Jan. 8, 2021), <https://mijente.net/2021/01/undoing-trumps-immigration-policies-wont-be-enough-we-must-dismantle-the-immigration-caging-and-deportation-machine> [https://perma.cc/G4QZ-MQPR].
120. Molly O'Toole, *Biden Promised Change at the Border. He's Kept Trump's Title 42 Policy to Close It and Cut Off Asylum*, L.A. TIMES (Mar. 19, 2021, 5:12 PM), <https://www.latimes.com/politics/story/2021-03-19/a-year-of-title-42-both-trump-and-biden-have-kept-the-border-closed-and-cut-off-asylum-access> [https://perma.cc/ 7MTY-LDV4].
121. See Jake Johnson, *With 300,000 Deported in First 100 Days, Rights Group Warns Biden 'Well on Track to Repeat' Obama Failures*, COMMON DREAMS (Apr. 27, 2021), <https://www.commondreams.org/news/2021/04/27/300000-deported-first-100-days-rights-group-warns-biden-well-track-repeat-obama> [https://perma.cc/ C56C-S7WA]; *ICE and CBP Abuse Tracker*, UNITED WE DREAM, <https://unitedwedream.org/protect-immigrants-now/biden-stop-deportations-now> [https://perma.cc/CF5L-QJAQ] (live

Title 42 permits the director of the Centers for Disease Control and Prevention to prohibit entry into the United States when the director believes that “there is serious danger of the introduction of [a communicable] disease into the United States.”¹²² The law, as adopted in 1944, was written to apply to anyone arriving in the United States—including U.S. citizens—and was never meant to distinguish between noncitizens who could enter and those who could be expelled.¹²³ Even before the COVID-19 pandemic, Trump’s immigration advisor, Stephen Miller (who has documented white-nationalist sympathies), had pushed the president to use public health laws to facilitate expulsion of migrants arriving at the Southern border.¹²⁴ The pandemic provided the opening to proceed with this expansion of deportability, with the issuance of a March 30, 2020 emergency regulation to implement Title 42 authorizing CBP officers to deport migrants arriving at the U.S.–Mexico border.¹²⁵ The result has been expulsions with virtually no process, echoing the voluntary departures that characterized the beginning of the twentieth century. A leaked memo ordering the implementation of Title 42 by CBP officers states, “[t]o the maximum extent possible all processing will be done in the field,” then goes on to state, “USBP [Border Patrol] will capture a subject’s biographical information and archive data appropriately.”¹²⁶ This memo, which effectively

tracking the number of confirmed deportations and expulsions under President Biden and totaling that number at 484,962 as of May 20, 2021 (last visited Jan. 3, 2022).

122. 42 U.S.C. § 265 (2018).
123. *Q&A: US Title 42 Policy to Expel Migrants at the Border*, HUM. RTS. WATCH (Apr. 8, 2021, 4:15 PM), <https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border> [https://perma.cc/BMV4-RESS].
124. See Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html> [https://perma.cc/SEG4-UPYX]; Katie Rogers & Jason DeParle, *The White Nationalist Websites Cited by Stephen Miller*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/us/politics/stephen-miller-white-nationalism.html> [https://perma.cc/K6BA-U2GC]; Michael Edison Hayden, *Stephen Miller’s Affinity for White Nationalism Revealed in Leaked Emails*, S. POVERTY L. CTR. (Nov. 12, 2019), <https://www.splcenter.org/hatwatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails> [https://perma.cc/B5C9-VK3A].
125. Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559 (Mar. 24, 2020) (to be codified at 42 C.F.R. pt. 71).
126. Memorandum from Dir., Ctrs. for Disease Control & Prevention to U.S. Customs & Border Prot. 1, <https://www.documentcloud.org/documents/6824221-COVID-19-CAPIO.html> [https://perma.cc/B5R6-ZV73]; see also Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law*, PROPUBLICA (Apr. 2, 2020, 6:30 PM), <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

directs border agents to ignore well-established international law norms allowing arriving migrants to request asylum, has contributed to mass expulsions that the Biden administration has not seen fit to halt despite public health experts urging an end to the practice on the basis that “[t]here is no public health rationale for denying admission to individuals based on legal status.”¹²⁷

4. Ramp to Deportation: Expulsions Without Due Process

The continued use of Title 42 by the Biden administration (a virtually procedure-free deportation) demonstrates that beyond laws and policies making deportability the norm for noncitizens, the practices through which individuals are deported themselves call for new paradigms. Pro-immigrant advocates have not yet caught up to the reality that more courtroom process—whether in the form of assigned counsel, of more competent counsel, or of adoption of mandatory proportionality review—will not necessarily address the ways the majority of deportations take place. Efforts to alleviate deportation centered on a more just process make one big assumption—that people facing deportation will have access to a moment when their case will be heard by a judge, and that that moment will be one when an attorney is allowed to stand at their side to help them share those arguments more powerfully. The problem is that in recent years the vast majority of people who have faced deportation have had no corresponding legal

agents-to-send-migrants-back-immediately-ignoring-asylum-law
[<https://perma.cc/6ZRB-8JZY>].

127. *Public Health Experts Urge U.S. Officials to Withdraw Order Enabling Mass Expulsion of Asylum Seekers*, COLUMB. SCH. PUB. HEALTH (May 18, 2020), <https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers> [<https://perma.cc/8VRW-XYMV>] (publishing a letter signed by over fifty public health experts, sent to Alex Azar, the secretary of the Department of Health and Human Services, and Robert Redfield, MD, the director of the Centers for Disease Control and Prevention); *see also* Joanna Naples-Mitchell, *There Is No Public Health Rationale for a Categorical Ban on Asylum Seekers*, JUST SECURITY (Apr. 17, 2020), <https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers> [<https://perma.cc/5TU8-XZDD>]; Lucas Guttentag & Stefano M. Bertozzi, Opinion, *Trump Is Using the Pandemic to Flout Immigration Laws*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/2020/05/11/opinion/trump-coronavirus-immigration.html> [<https://perma.cc/5XZN-FJT4>]; Yael Schacher & Chris Beyrer, *Expelling Asylum Seekers Is Not the Answer: U.S. Border Policy in the Time of COVID-19*, REFUGEES INT'L (Apr. 27, 2020), <https://www.refugeesinternational.org/reports/2020/4/26/expelling-asylum-seekers-is-not-the-answer-us-border-policy-in-the-time-of-covid-19> [<https://perma.cc/PZ27-3ZRX>].

procedure that would allow for such an opportunity.¹²⁸ Title 42 is no exception, with Border Patrol officers rounding up recently arrived migrants encountered at the U.S.–Mexico border, fingerprinting them “in the field,” and driving them across the border to Mexico, without a chance to ever see a judge or consult an attorney.

Immigration scholar Jennifer Koh has compellingly laid out the case for focusing on “shadow removals”—her term for the forms of deportation that do not require the person deported to ever step foot in a courtroom, and thus are happening in the shadows of the immigration court.¹²⁹ Koh’s review of data shows that most deportations are happening in forms that Shoba Sivaprasad Wadhia refers to as “speed deportation” (expedited removals,¹³⁰ administrative removals, and reinstatement of removals), in proceedings when noncitizens are subject to swift deportation, usually without access to an attorney, and with severe restrictions on judicial review and few if any checks on due process placed on them by federal courts.¹³¹ Koh found “[e]xpedited removal (for noncitizens seeking entry at the border) and reinstatement of previously executed removal orders, which are implemented entirely by frontline immigration officers with no immigration court oversight, accounted for between eighty-three to eighty-four percent of all removals in fiscal years 2013 and 2014,”¹³² and the numbers went up to 85 percent in 2015 and 2016.¹³³

Koh’s work reveals that the standard narrative of deportation as taking place as part of a legal proceeding—a narrative which currently shapes much of the advocacy, scholarship, and organizing around improving the outcomes for immigrants facing deportations—misses out on the fact that “[i]mmigration court adjudication has . . . become the exception rather than the norm.”¹³⁴ Koh’s work describes the deportation landscape based on what is actually happening to people who face removal rather than focusing on the problem of deportation through the lens of what parts of the process are most amenable to intervention by lawyers. Her assessment calls for a response that rises to the challenges she

128. In 2015 and 2016, nearly 85 percent of all removals were expedited and did not involve courtroom hearings. See BRYAN BAKER, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2016 9 (2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf [https://perma.cc/2S7U-T78W].

129. See generally Koh, *supra* note 13.

130. Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6 (2014).

131. Koh, *supra* note 13, at 194.

132. Jennifer Lee Koh, *Anticipating Expansion, Committing to Resistance: Removal in the Shadows of Immigration Court Under Trump*, 43 OHIO N.U. L. REV. 459, 460 (2017).

133. BAKER, *supra* note 128, at 9.

134. Koh, *supra* note 13, at 193.

describes—one that questions deportation altogether, rather than trying to pull the majority of people facing deportation out of shadow removals and into the formal removal context. Her focus on shadow removals reveals a system of mass deportation that largely avoids contending with the legal advocacy around deportation—most of which focuses on deportation proceedings that happen before an immigration judge. In making the case for the need for engaging with deportation abolition, this reality of modern deportation procedures is a necessary starting point.

The nearly one million noncitizens residing in the United States with a final deportation order pending against them¹³⁵ sit at the toxic intersection of increased policies of enforcing deportability and the lack of deportation procedures that characterize the modern deportation regime. These noncitizens include a mix of former lawful permanent residents and people who have never held lawful status. Some of them have appeared before an immigration judge and lost their cases.¹³⁶ Some never appeared before an immigration judge, either because they never received notice of their hearing, or because they chose not to submit themselves to the court's authority, and received orders of removal in their absence.¹³⁷ Some have been checking in with ICE regularly and were granted deferrals on their removals under previous administrations, while others have been off the federal government's radar for years.¹³⁸ Some cannot be lawfully deported because their birth countries will not issue the necessary authorizations.¹³⁹

What most of them have in common is living with a sentence of deportation that could be executed at any moment. Because they have final removal orders, they are unlikely to ever see a judge before they are taken from their lives and banished to their countries of nationality.¹⁴⁰ This population forms the potential

135. Monique O. Madan, *ICE Targets a Million People Who Have Final Deportation Orders but Remain in the U.S.*, MIA. HERALD (June 18, 2019, 5:31 PM), <https://www.miamiherald.com/news/local/immigration/article231687048.html> [<https://perma.cc/X3XS-UZMP>].
136. Vivian Yee, *Migrants Confront Judgment Day Over Old Deportation Orders*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/us/migrants-facing-old-deportation-orders.html> [<https://perma.cc/V6DR-7YKV>].
137. See 8 U.S.C. § 1229a(b)(5) (providing for removal orders in absentia); *see also* 8 C.F.R. § 1003.26 (2020) (detailing procedure for hearings in absentia).
138. *E.g.*, Shannon Dooling, *Under Trump Administration, Some Vietnamese Immigrants Face Uncertain Fate*, WBUR (Feb. 21, 2019), <https://www.wbur.org/news/2019/02/21/vietnam-immigrants-deportation-rules> [<https://perma.cc/PA4K-KDPB>].
139. *E.g.*, U.S. Dep't of Homeland Sec., Press Release, *DHS Announces Implementation of Visa Sanctions* (July 10, 2018), <https://www.dhs.gov/news/2018/07/10/dhs-announces-implementation-visa-sanctions> [<https://perma.cc/J5PP-NC38>].
140. Wadhia, *supra* note 130, at 5 (“While both ICE and CBP play a significant role in apprehending and processing noncitizens for removal, ICE bears responsibility for executing removal orders.

foundation for a mass deportation strategy, limited only by the resources necessary to track down and physically detain and deport them. From the point of view of this one million (and of their family members, friends, coworkers, and others who count on them continuing to live in the United States), the law has authorized their removal, and more legal process is unlikely to assist them. Legally, they have been deported, but physically they are still here. They require a politics that responds to their reality, and that politics is one of deportation abolition.

II. DEPORTATION IS VIOLENCE

A. Beyond Deportation as Punishment—Deportation as Violence.

Deportation, in the legal sense, is most commonly framed as an administrative process of adjudicating a person's ability to remain present in a country where they were not born, finding that presence unauthorized, and removing that person, most commonly to the country of their birth.¹⁴¹ The case law defining the appropriate procedures to accompany deportation has, for over one hundred years, reinforced that deportation is not to be viewed as a punishment, but rather, the civil end to a civil process.¹⁴² Still, U.S. courts have been unable to deny the harm of deportation, despite their ability to maintain that those deported do not merit the heightened protections assigned to those facing a consequence legally recognized as punishment.¹⁴³ Nearly one hundred years ago, the Supreme Court described deportation as potentially resulting in the loss of “all that makes life worth living.”¹⁴⁴ In 2010, the Court came closest to piercing the fiction that deportation is not a punishment when finding that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”¹⁴⁵

In this way, when ICE apprehends, detains, and processes noncitizens for speed removal, it serves as the police, jailor, and judge.” (footnote omitted)).

141. *See Fong Yue Ting v. United States*, 149 U.S. 698 (1893). The line of cases beginning with *Fong Yue Ting*, which has not been overruled, establishes as accepted precedent that deportation is not considered punishment, but is instead treated as a method of enforcing the return of noncitizens to their countries of origin. *Id.* at 730.
142. *Id.*
143. *See AM. IMMIGR. COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE* 2 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf [https://perma.cc/ A87Z-JN37].
144. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (upholding the nonpunitive nature of deportation while noting that it may take away “all that makes life worth living”).
145. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (footnote omitted).

The debate about whether deportation constitutes punishment rightfully dominates one strain of legal writing and thinking around deportation,¹⁴⁶ given that a Supreme Court holding of deportation as punishment would result in an application of the constitutional protections currently available to criminal defendants to those who live at risk of deportation. Such a holding would surely be a watershed event, which would better reconcile the actual practice of deportation with the governing legal theory, and which might temper of some of the worst excesses of the harms of deportation.¹⁴⁷

The focus on punishment, however, obscures the fact that neither the caselaw nor legal commentary engages with deportation as violence. Such an elision merits examination. Violence is central to deportation, and addressing deportation requires inserting violence, not just punishment, into the debate. The dispute around deportation as punishment limits the discussion to considering whether and to what degree the practice should be tempered to comport with the rule of law. That is, if deportation is a punishment, more process is due, and if it is not, the current lack of protection for those facing deportation suffices. In contrast, the focus on deportation as violence, rather than punishment, allows for questioning the civility of both the process and end of deportation. Reading deportation as violence opens the door to the argument that deportation is no longer a tool of immigration enforcement. Rather, immigration enforcement appears to be the tool by which the violence of deportation is enacted and expanded. In sum, violence is not incidental to deportation—it is not an occasional, or even regular, add-on to deportation. As explained below, deportation *is* violence.

Ruth Wilson Gilmore's description of violence as "the cause of premature deaths" provides a useful starting point for defining the violence of deportation.¹⁴⁸

146. See, e.g., Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261 (2013); *Special Legislation Discriminating Against Specified Individuals and Groups*, 51 YALE L.J. 1358, 1363–64 (1942) (criticizing U.S. Supreme Court decisions holding that deportation is not punishment, and concluding that "[i]n fact deportation is clearly punishment"); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

147. See Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 345 (2000) (saluting the development of courts interpreting deportation as punishment in certain immigration proceedings and therefore applying constitutional limitations that help guarantee the proportionality and necessity of the punitive deportation).

148. Ruth Wilson Gilmore, *Fatal Couplings of Power and Difference: Notes on Racism and Geography*, 54 PRO. GEOGRAPHER 15, 16 (2002). I offer Gilmore's definition for purposes

Defining violence in this manner elucidates the ways in which deportation distributes life chances on the level of populations, and how susceptibility to deportation (deportability) maps on to race, class, gender, and other vectors of identity.¹⁴⁹ Gilmore's definition of racism as "the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death"¹⁵⁰ only highlights the inextricable link between violence, racism, and deportation. Thus, working toward the abolition of deportation necessarily involves a reckoning with deportation as malicious and illegitimate state violence (the subject of this Part). Interrogating, delegitimizing, and ultimately ending deportation will also require a reckoning with the structures and foundation of the United States as a nation-state (a subject introduced—but by no means resolved—in Part III.B.).

Even with Gilmore's definition of violence in hand, describing deportation as violence risks abstraction. Naming the perpetrators of deportation violence helps ground this analysis. There is a specific subset of people who are tasked with carrying out the violence of deportation, and their work can most aptly be described as "[v]iolence work."¹⁵¹ The deportation violence worker relies on the threat of violence to carry out the arrests, detentions, and removals that constitute

of this argument, acknowledging that there is no agreed upon definition of violence, in or outside of legal scholarship. Jonathan Simon explains that:

Violence is "notoriously difficult to define"—it encompasses not only direct assaults leading to injuries, minor or serious, but all circumstances under which force or fear is used to accomplish some other untoward or unlawful end; and yet, at the same time, it "has the ideological value of appearing quite simple, straightforward and clear-cut."

Jonathan Simon, *Law's Violence, the Strong State, and the Crisis of Mass Imprisonment (for Stuart Hall)*, 49 WAKE FOREST L. REV. 649, 655 (2014) (quoting STUART HALL, CHAS CRITCHER, TONY JEFFERSON, JOHN CLARKE & BRIAN ROBERTS, *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 300 (1978)). For another exploration of violence as related to immigration enforcement, see Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019).

149. See RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING 3 (Mary Bosworth, Alpa Parmar & Yolanda Vázquez eds., 2018) ("Historically, constructions of threat and law and order responses to such threats have formed along race lines. Stereotypical notions of suspicion, criminality, and inferiority are assigned to migrants, reinforcing common-sense justifications of racial differences that are already deeply embedded within cultural value systems. Racial profiling, fears about national security and processes of 'othering' convene within concerns about mobility." (citations omitted)).
150. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 28 (2007).
151. Micol Seigel, *Violence Work: Policing and Power*, RACE & CLASS, Apr.–June 2018, at 15, 26 (defining violence work as "work that relies upon violence or the threat thereof It doesn't mean the work is always violent. It is not intended to indict the people who are police officers as bad people, vicious in personality or in their daily routines. It is about what their labour rests upon and therefore conveys into the material world.").

the nuts and bolts of deportation. Deportation violence workers range from the immigration judges whose legal interpretations “signal and occasion the imposition of violence upon others,”¹⁵² to the ICE and CBP agents tasked with carrying out the act of expulsion (often without the immigrant ever making it before an immigration judge, as discussed in the previous Part), to the employers and local law enforcement officers whose interactions with immigrants are infused with the threat of deportation,¹⁵³ and even beyond the United States’s geographic borders, to the foreign agents increasingly tasked with interdicting migrants who will never make it to the United States, but will nonetheless be subject to its enforcement practices.¹⁵⁴

For the most part, the violence of deportation remains hidden in plain sight. Immigration detention facilities dot the landscape, with former Walmarts transformed into camps for children facing deportation,¹⁵⁵ county jails transformed into ICE holding facilities through agreements between county sheriffs and federal officials,¹⁵⁶ and ICE offices situated in anonymous downtown highrises in major cities.¹⁵⁷ In her book *Are Prisons Obsolete?* noted abolitionist Angela Y. Davis speaks of how the ongoing existence of prison is taken for granted, even as people fear facing the realities prisons produce.¹⁵⁸ “Because it would be too agonizing to cope with the possibility that anyone, including ourselves, could

152. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

153. Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1485 (2019) (“The vast majority of the undocumented population . . . are keenly aware that key institutions have the ability to trigger immigration enforcement. Employers wear two hats: they are simultaneously employers and immigration screeners. Police likewise fulfill their community role as police officers while simultaneously wielding the power to trigger immigration screening.”). While Jain considers the interior structure of immigration enforcement a much more salient force in immigrants’ lives than the act of deportation itself (which most immigrants will never experience), I would argue that the threat of deportation, even in the absence of its fulfillment, is part of the violence of deportation.

154. Shachar, *supra* note 35, at 215, 217 (“The shifting-border framework reveals the reach and grip of law and legal institutions engaged in *expanding* the domain of state power in migration control. To preserve their control in a world that is both interdependent and turbulent, states are proactively creating new legal spaces of exclusion and engaging in ever closer cooperation with trusted partners, including other nations, corporate service providers, and supranational and international organizations.”).

155. Manny Fernandez, *Inside the Former Walmart That Is Now a Shelter for Almost 1,500 Migrant Children*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/us/family-separation-migrant-children-detention.html> [https://perma.cc/8N7Y-MJKE].

156. Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1, 39 (2017).

157. See *Protestors Gather Outside ICE Office in Downtown Seattle*, KING 5 NEWS (July 26, 2018, 7:05 PM), <https://www.king5.com/article/news/local/seattle/protesters-gather-outside-ice-office-in-downtown-seattle/281-577635271> [https://perma.cc/HGG5-HWJG].

158. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 15 (2003).

become a prisoner, we tend to think of the prison as disconnected from our own lives.”¹⁵⁹ Similarly, the unbearable reality of deportation, of becoming separated from “all that makes life worth living,”¹⁶⁰ functions to distance the actual, lived violence of deportation from the legal writing and legal practice surrounding it.

Nowhere is this clearer than in the case law discussing the myriad forms of violence facing asylum seekers in their own country.¹⁶¹ These decisions often describe in detail the grisly ends that may befall the asylum seeker, and either regretfully justify returning the asylum seeker to violence or offer a reprieve from the violence with a grant of asylum. But these decisions ignore that it is the very fact of deportation carried out by U.S. officials—the outcome if asylum is denied—that creates the space for violence, that in a sense, is the violence.¹⁶² They also ignore the violence that usually surrounds the asylum seeker, not in some far-off, human rights-violating land, but on U.S. soil, particularly if they are detained as they await adjudication of their claim.¹⁶³

Davis describes the prison functioning “ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers.”¹⁶⁴ The same forces are at work with deportation. While the parameters of which sectors of the noncitizen population should be considered undesirable remains under intense debate, deportation (and its attendant violence) is justified, across the political spectrum, as the proper and fitting end for undesirable noncitizens. In legal scholarship, deportation is rarely described as violence. Instead, terms like the “[i]mmense [s]ocial [c]osts” of

159. *Id.*

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

161. See, e.g., *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (en banc) (detailing the multiple beatings and rape of a Mexican citizen on the basis of his sexual identity); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015) (involving rape and sexual assault by on-duty Mexican police officers and military personnel of a transgender woman of Mexican descent); *Vitug v. Holder*, 723 F.3d 1056 (9th Cir. 2013) (recounting severe beatings and harassment over multiple years by police of a homosexual citizen of the Philippines); *Benyamin v. Holder*, 579 F.3d 970 (9th Cir. 2009) (documenting the female genital mutilation of an Indonesian infant); *Ahmed v. Keisler*, 504 F.3d 1183 (9th Cir. 2007) (discussing jailings and beatings of natives of Bangladesh who participated in organized demonstrations); *Lopez v. Ashcroft*, 366 F.3d 799 (9th Cir. 2004) (finding evidence that a native of Guatemalan was tied up by guerillas and left to die in a burning building).

162. See Eddie Bruce-Jones, *Refugee Law in Crisis: Decolonizing the Architecture of Violence*, in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING, *supra* note 149, at 176, 182–83 (rejecting the notion that refugee law is benevolent and instead explaining that receiving states subject refugees to violence by deporting them).

163. *See id.*

164. DAVIS, *supra* note 158, at 16.

deportation,¹⁶⁵ the “potentially lethal harms,”¹⁶⁶ the “disastrous consequences” or “destabilizing effects” of deportation,¹⁶⁷ the “dire penalties,”¹⁶⁸ and the “aftermath” of deportation¹⁶⁹ are used. In a similarly restrained vein, the suggested remedies to mass deportation tend to be limited to managing and tempering it, not to ending it. This hesitation can be linked not just to pragmatism on the part of academics or policymakers, but to the unwillingness to do as Davis exhorts us to do—to imagine the unbearable reality that we ourselves could face the end of “all that makes life worth living,”¹⁷⁰ to imagine that the power of the state could be used to separate us from our children, our homes, our work, our freedom.¹⁷¹ In other words, actually facing the violence of deportation and deciding that it is unacceptable, as applied to us or anyone else.

The extra step in the deployment of deportation as violence in the separation of parents from their children pierced the facade of civility in the deportation debate.¹⁷² In 2018, this resulted in nationwide protests and news coverage broadcasting recordings of the piercing screams of children separated from their parents.¹⁷³ In brief, it unmasked and rendered unacceptable one aspect of the

165. Robert Warren & Donald Kerwin, *Mass Deportations Would Impoverish US Families and Create Immense Social Costs*, 5 J. ON MIGRATION & HUM. SEC. 1, 1 (2017); cf. MEISSNER, KERWIN, CHISHTI & BERGERON, *supra* note 80, at 134 (“But others argue that these levels of removals have imposed *heavy social costs* on children, families, and communities of those removed, as well as on the individuals themselves” (emphasis added)).
166. Kevin R. Johnson, *The Beginning of the End: The Immigration Act of 1965 and the Emergence of the Modern U.S.-Mexico Border State*, 34 IMMIGR. & NAT’Y L. REV. 3, 18 (2013) (“For obvious reasons, especially the . . . *potentially lethal harms* that may result . . . unauthorized immigration is generally much less preferable than lawful migration for prospective migrants.” (emphasis added)).
167. JOANNA DREBY, CTR. FOR AM. PROGRESS, *HOW TODAY’S IMMIGRATION ENFORCEMENT POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES* 9, 21 (2012).
168. Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 665 (2015).
169. DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012).
170. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).
171. See DAVIS, *supra* note 158, at 15–16.
172. See, e.g., Julie Hirschfeld Davis, *Separated at the Border From Their Parents: In Six Weeks, 1,995 Children*, N.Y. TIMES (June 15, 2018), <https://www.nytimes.com/2018/06/15/us/politics/trump-immigration-separation-border.html> [https://perma.cc/BN67-YRUG]; Laura Bush, Opinion, *Laura Bush: Separating Children From Their Parents at the Border ‘Breaks My Heart’*, WASH. POST (June 17, 2018, 5:45 PM), https://www.washingtonpost.com/opinions/laura-bush-separating-children-from-their-parents-at-the-border-breaks-my-heart/2018/06/17/f2df517a-7287-11e8-9780-b1dd6a09b549_story.html [https://perma.cc/5F6R-PHY4]; Editorial, *Seizing Children From Parents at the Border Is Immoral. Here’s What We Can Do About It*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/opinion/children-parents-asylum-immigration.html> [https://perma.cc/KLY3-QS7F].
173. Ginger Thompson, *Listen to Children Who’ve Just Been Separated From Their Parents at the Border*, PROPUBLICA (June 18, 2018, 3:51 PM), <https://www.propublica.org/article/children->

violence of deportation. This moment marked a break, with people who do not live with the fear of deportation nonetheless able to connect with one aspect of its violence and make calls for the immediate reunification of parents and children. For some, this led to a demand to end altogether the existence of the agency viewed as responsible for enacting such violence, with the call to abolish ICE escalating parallel to the exposure of family separation as a tactic of deportation.¹⁷⁴ It thus exemplifies the possibilities of considering deportation as inextricably linked to violence—such a move opens the door to a radical rethinking of the utility of the very agencies charged with carrying out deportation.

For most deportations, there is some final order of removal issued by a U.S. government authority, and a time and place can be pinpointed to mark any particular individual's deportation. Theorizing deportation as violence invites the reader to look beyond those documents and those specific moments. Defining deportation as violence across both time and space highlights the way in which deportation constitutes an ongoing harm. It is violence that does not stop as long as it remains a possible outcome for a population.

The violence work of deportation can be organized in many ways, but can be broadly divided into the following categories, roughly mapping onto both temporal and spatial divisions: (1) the violence of the deportation process itself and the violence that follows deportation as experienced by those deported and by their families and communities, and (2) the violence that the ongoing threat of deportation creates for disparate populations, including those within and outside the borders of the United States.

1. Deportation as Violence: The Violence of the Deportation Process and Its Aftermath

The violence inherent to deportation includes the violence that accompanies being identified and apprehended by immigration authorities. The death of a sixteen-year-old forced by Border Patrol agents to drink liquid methamphetamine, and 149 cases in which unaccompanied minors reported threatened or actual physical or sexual abuse by border guards, exemplify this

separated-from-parents-border-patrol-cbp-trump-immigration-policy
[<https://perma.cc/7EWQ-SD5D>].

174. See Ron Nixon & Linda Qiu, *What Is ICE and Why Do Critics Want to Abolish It?*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/fact-check-ice-immigration-abolish.html> [<https://perma.cc/8WJE-UW6M>].

violence.¹⁷⁵ Once detained, immigrants face unrelenting violence in various forms, including sexual abuse by guards,¹⁷⁶ medical neglect leading to suffering and in many cases death,¹⁷⁷ failure to provide basic food or minimal hygiene supplies (including toilet paper),¹⁷⁸ and the use of violent carceral techniques, including regular strip-searches and regular use of solitary confinement,¹⁷⁹ a form of torture. Those who protest the violence of deportation through hunger strikes face force feeding, another recognized form of torture.¹⁸⁰ Children detained while facing deportation live under the threat of constant violence, with caretakers threatening punishment and continued incarceration if the children, including siblings, touch or hug each other for comfort.¹⁸¹

Violence permeates the act of deportation itself. The violence of deportation flights was exposed when in December 2017, a plane full of immigrants was returned to the United States after a failed deportation flight to Somalia. Those on the plane reported forty-eight hours of abuse, including being shackled, forbidden from standing or moving, denied use of the bathroom, and instances of ICE agents beating, kicking, choking, pushing, and

175. See Brian Ross, Brian Epstein, John Carlos Frey & Pete Madden, *Life and Death at the Border*, TYPE INVESTIGATIONS (July 29, 2017), <https://www.typeinvestigations.org/investigation/2017/07/29/life-death-border> [https://perma.cc/X4AU-TS4E].
176. Esther Yu Hsi Lee, *Chances Are High That if You're Abused in Immigration Detention, No One Will Care*, THINKPROGRESS (Apr. 12, 2017, 12:01 PM), <https://archive.thinkprogress.org/dhs-33000-complaints-abuse-civic-cf154614c006/> [https://perma.cc/P5JV-W6SG] (stating that ICE "received anywhere between 1,016 and 2,573 sexual abuse complaints from people in DHS detention" in a six year period).
177. AM. CIV. LIBERTIES UNION, DET. WATCH NETWORK & NAT'L IMMIGRANT JUST. CTR., FATAL NEGLECT: HOW ICE IGNORES DEATHS IN DETENTION 3 (2016), https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnijc.pdf [https://perma.cc/43MV-TZL8] (detailing basic failures by medical providers in detention centers which "contribute[] to the death of immigrants in federal immigration custody with alarming frequency").
178. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., CONCERN ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES 7-8 (2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf> [https://perma.cc/4RTP-NLZ3].
179. See *id.* at 4, 6-7.
180. *Report: ICE Force-Feeding El Paso Detainees on Hunger Strike*, DALL. MORNING NEWS (Jan. 31, 2019, 5:49 AM), <https://www.dallasnews.com/news/immigration/2019/01/31/reportice-force-feeding-el-paso-detainees-hunger-strike-nose> [https://perma.cc/BN8U-JQCD].
181. Michael E. Miller, *Immigrant Kids Held in Shelters: 'They Told Us to Behave, or We'd Be There Forever'*, WASH. POST (July 15, 2018, 12:11 PM), https://www.washingtonpost.com/local/immigrant-children-held-in-shelters-they-told-us-to-behave-or-wed-be-here-forever/2018/07/14/635f4cee-86b4-11e8-8f6c-46cb43e3f306_story.html?utm_term=.b15ddb69e1db [https://perma.cc/6EHL-XSKP].

threatening to kill the passengers.¹⁸² One person on the flight described these actions as “inhumane, like we were slaves or something.”¹⁸³ Others have reported being placed in “body bags” during their deportation, and subjected to electric shocks with Tasers.¹⁸⁴

This violence is systemic and unaccountable by design, with 97 percent of the 809 complaints lodged against the Border Patrol in a three-year period resulting in no action taken.¹⁸⁵ Seventy-eight percent of those complaints involved physical abuse or excessive force.¹⁸⁶ ICE failed to keep records of sexual abuse that occurred prior to 2014,¹⁸⁷ and in 2017 the agency asked the National Archives and Record Administration to approve a timetable that would allow it to “routinely” destroy records related to sexual assaults, solitary confinement, and deaths in custody.¹⁸⁸ Under the Obama administration, Secretary of Homeland Security Janet Napolitano ordered CBP to change its definition of corruption to erase sexual assaults and murders from official statistics required to be reported to Congress.¹⁸⁹

182. Amrit Cheng, *ICE Abused Somalis for 2 Days on a Plane and Now Wants to Send Them Into Harm’s Way*, AM. CIV. LIBERTIES UNION (Jan. 10, 2018, 1:00 PM), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/ice-abused-somalis-2-days-plane-and-now-wants> [https://perma.cc/8WYK-KEJA]; Class Action Complaint for Declaratory & Injunctive Relief & Class Petition for Writ of Habeas Corpus at 5, Ibrahim v. Acosta, No. 1:17-cv-24574-DPG (S.D. Fla. Dec. 18, 2017) (“When the flight was [grounded] in Dakar for 23 hours, ICE officers and contract guards beat, kicked, choked, pushed, straightjacketed, threatened to kill, and berated people on the plane. ICE and contract guards also denied Plaintiffs/Petitioners and the others bathroom use, forcing people to try to urinate in bottles or on themselves.”).

183. Cheng, *supra* note 182 (quoting Rahim Mohamed).

184. Aviva Stahl, *South Asian Migrants Say They Were Put in ‘Body Bags’ for Deportation From US*, GUARDIAN (May 27, 2016, 7:00 AM), <https://www.theguardian.com/us-news/2016/may/27/south-asian-migrants-body-bags-deportation-us> [https://perma.cc/BK7U-H8QH] (“According to detainees who witnessed the bags being used, to place a detainee in a so-called body bag, a group of ICE officers would first pin them to the ground, sometimes face-down. The detainee’s body would then be tightly wrapped in the security blanket and fastened with a series of Velcro belts. Limbs restrained, the deportee could then be carried on to the plane.”).

185. DANIEL E. MARTÍNEZ, GUILLERMO CANTOR & WALTER A. EWING, AM. IMMIGR. COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE 1 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf [https://perma.cc/5D44-2XM8].

186. See *id.* at 9.

187. Lee, *supra* note 176.

188. Victoria López, *ICE Plans to Start Destroying Records of Immigrant Abuse, Including Sexual Assault and Deaths in Custody*, AM. CIV. LIBERTIES UNION (May 29, 2018), <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/ice-plans-start-destroying-records-immigrant> [https://perma.cc/HT8M-76ÜG].

189. Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, POLITICO MAG. (Nov.–Dec. 2014), <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220> [https://perma.cc/67CL-L3PP].

Such violence was characterized as “non-mission-compromising.”¹⁹⁰ State attempts to obscure the violence of deportation gives credence to the idea that deportation is violence. When murders and sexual assaults are not considered mission-compromising but part of the cost of doing Border Patrol business, when sexual assaults are not recorded for years, and when the authorities seek to destroy the records of assault that do exist, all the while continuing to deport at high rates, it becomes clear that in the United States violence and deportation are intimately linked.

The violence does not end with the act of deportation. Both those deported and those left behind are subjected to a shortened life span. Children and partners left behind suffer physical and mental breakdowns, as well as the loss of jobs and homes.¹⁹¹ Those deported fare no better, with many deported to violent deaths or other extreme forms of harm.¹⁹² Some are subject to legal or extralegal violence, with harassment by police and gang members common to people deported to Central America, and others incarcerated upon their arrival in their countries of origin.¹⁹³ Many report depression and suicidal thoughts.¹⁹⁴ For others, particularly those living in geographic proximity to the United States, attempted return to the United States is almost a certainty from the moment of removal,

190. *Id.*

191. RANDY CAPPs, HEATHER KOBALL, ANDREA CAMPETELLA, KRISTA PERREIRA, SARAH HOOKER & JUAN MANUEL PEDROZA, URB. INST. & MIGRATION POL'Y INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES, at vi (2015) (finding that children with one or more deported parent suffer from distress that resembles that of children with incarcerated parents, including “psychological trauma, material hardship, residential instability, family dissolution, increased use of public benefits, and, among boys, aggression”); *see also* Luis H. Zayas & Laurie Cook Heffron, *Disrupting Young Lives: How Detention and Deportation Affect US-Born Children of Immigrants*, AM. PSYCH. ASS'N (Nov. 2016), <http://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation> [<https://perma.cc/R9FP-PRJP>] (“Children whose parents were detained or deported (whether the child returned to Mexico or stayed in the U.S.) were more likely to report depressive symptoms, negative mood, physical symptoms and negative self-esteem. All children in the study showed probable anxiety disorders, including separation anxiety disorder.”).

192. Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> [<https://perma.cc/QP4E-DJ9W>] (“In the past decade, a growing number of immigrants fearing for their safety have come to the U.S., only to be sent back to their home countries—with the help of border agents, immigration judges, politicians, and U.S. voters—to violent deaths.”).

193. SUSAN BIBLER COUTIN, EXILED HOME: SALVADORAN TRANSNATIONAL YOUTH IN THE AFTERMATH OF VIOLENCE 154 (2016); *see* Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195, 218–21 (2007).

194. *See* COUTIN, *supra* note 193, at 157; *see also* Beth Caldwell, *Reducing the Deportation's Harm by Expanding Constitutional Protections to Functional Americans*, 37 WHITTIER L. REV. 355, 358–62 (2016) (discussing trauma caused by deportation).

trapping them in an unending cycle of deportation violence as they return, are apprehended, incarcerated, and redeported (often after serving time in federal prison for the crime of unlawful reentry¹⁹⁵).

2. Deportation as Violence: The Violence of the Ongoing Threat of Deportation

Most immigrants in the United States are not facing imminent deportation.¹⁹⁶ And yet, deportability, the susceptibility to deportation that defines the immigrant experience, brings violence into migrants' everyday lives. The state's violence extends far beyond the state's actual capacity to deport to render a much broader swath of people as vulnerable to the violence of deportability. In the words of Nicholas de Genova, susceptibility to deportation renders migrant labor "a distinctly disposable commodity," such that removing the tactic of deportation from the state's arsenal would serve to undermine migrant vulnerability.¹⁹⁷ De Genova and Ananya Roy call deportability "a key dimension of migrant illegality" pointing to the ways in which immigration law ensures "the availability of a workforce who carry, with their very existence, extraordinary encumbrances and always potentially punitive consequences and repercussions, including the ever-loomng horizon of deportation."¹⁹⁸

It is the "ever-loomng horizon of deportation" that enables both public and private actors to increase migrant exposure to harm.¹⁹⁹ Those who are undocumented and employed experience violence in the workplace at much

195. See AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [https://perma.cc/B7A6-FPNB].

196. Eisha Jain, *supra* note 153, at 1474 (describing deportation as the tip of a much larger law enforcement pyramid, explaining that "removal numbers capture the tip of the iceberg, but they do not begin to capture the impact of immigration enforcement on those at the bottom, who remain present and aware of the possibility of removal").

197. NICHOLAS DE GENOVA, WORKING THE BOUNDARIES: RACE, SPACE, AND "ILLEGALITY" IN MEXICAN CHICAGO 247 (2005).

198. De Genova & Roy, *supra* note 34, at 354.

199. CECILIA MENJÍVAR & LEISY ABREGO, CTR FOR AM. PROGRESS, LEGAL VIOLENCE IN THE LIVES OF IMMIGRANTS 3, 6 (2012), <https://cdn.americanprogress.org/wp-content/uploads/2012/12/MenjivarLegalViolenceReport.pdf> [https://perma.cc/4N52-RPKZ] (describing "legal violence" as the fear created by immigration enforcement, and examining the primary sectors of everyday life (the family, the workplace, the school) to examine the production of legal violence through immigration enforcement threats). See also Jain, *supra* note 153, at 1484 (arguing that both public and private actors, beyond ICE and Customs and Border Protection (CBP) agents, play a key role in interior immigration enforcement: "While police and employers are the most common enforcement agents, they are far from alone. Other sites of enforcement include schools and courthouses.").

higher rates than those with legal work status. Undocumented immigrant women in particular are “routinely abused, forced to work hours that are unpaid and subject to other injustices Like other immigrant women, undocumented workers are subject to sexual abuse by employers or male co-workers and often do not feel they are able to take any legal action.”²⁰⁰ Undocumented farmworker women face very high levels of sexual violence, exacerbated by their deportability.²⁰¹ Even beyond these forms of workplace violence, the constant threat of deportation has the impact of ensuring the precarity of migrant labor.²⁰² Thus, the violence of deportation includes the nearly-guaranteed exploitation of undocumented workers, given their employers’ ability to trigger immigration enforcement.²⁰³

The uncertainty and chronic vulnerability of deportability also has devastating health impacts. It affects the short- and long-term health and brain development of children who live with the “toxic stress” of a parent’s deportability.²⁰⁴ Immigrants living with deportability are less likely to seek out services necessary for their survival because of fear of interaction with state agencies, with documented drops in rates of accessing health care and food assistance among deportable populations.²⁰⁵ They are also less likely to seek out

200. ALINA HUSAIN & LESLYE E. ORLOFF, IMMIGRANT WOMEN, WORK, AND VIOLENCE STATISTICS 4 (2015), https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/CULT-RCH-ImmigrantWomenWorkViolence_FactSheet.pdf [https://perma.cc/5UAW-HUFK].
201. See José R. Padilla & David Bacon, Opinion, *Protect Female Farmworkers*, N.Y. TIMES (Jan. 19, 2016), <https://www.nytimes.com/2016/01/19/opinion/how-to-protect-female-farmworkers.html> [https://perma.cc/D47H-2QTC].
202. HARSHA WALIA, UNDOING BORDER IMPERIALISM 66–74 (2013) (discussing labor precarity as “the legalized, state-mediated exploitation of the labor of migrants by capitalist interests” and positing that the denial of lawful status to migrants “ensures legal control over the *disposability* of the laborers, which in turn embeds the *exploitability* of their labor.”)
203. Jain, *supra* note 153, at 1485.
204. Sarah Elizabeth Richards, *How Fear of Deportation Puts Stress on Families*, ATLANTIC (Mar. 22, 2017), <https://www.theatlantic.com/health/archive/2017/03/deportation-stress/520008> [https://perma.cc/FEV5-BNXQ]; see also Olga Khazan, *The Toxic Health Effects of Deportation Threat*, ATLANTIC (Jan. 27, 2017), <https://www.theatlantic.com/health/archive/2017/01/the-toxic-health-effects-of-deportation-threat/514718> [https://perma.cc/2PN8-87H9]; Fernando Stein, *AAP Statement on Protecting Immigrant Children*, AM. ACAD. PEDIATRICS (Jan. 25, 2017), <https://web.archive.org/web/20170128024140/https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAPStatementonProtectingImmigrantChildren.aspx> [https://perma.cc/S3SC-GAWZ] (“Indeed, fear and stress, particularly prolonged exposure to serious stress—known as toxic stress—can harm the developing brain and negatively impact short- and long-term health.”).
205. Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799, 1814 (2010) (“[Staff] in county and city health clinics that provide preventive and

assistance for other forms of violence they experience, including interpersonal violence.²⁰⁶

3. Deportation Violence Is Not an Aberration

The line between the violence of officially sanctioned practices and of unofficial practices that nevertheless pervade deportation processes is fluid, and deportation violence oscillates between these two categories. Sometimes the state attempts a practice such as separating parents from their children at the border, calling it a legitimate and even necessary use of violence.²⁰⁷ Then, following an outcry (when the public finds it unacceptable), the state will reverse course and decide to (at least temporarily) order its replacement with a less obviously violent tactic (in this case, with detention of parents with their children).²⁰⁸ Other times, as in the case of sexual assault, the categorization of sanctioned/unsanctioned depends on how normalized the practice has become. For example, the practice of an armed guard ordering a person who is detained and awaiting a deportation process to strip naked could in any other setting be considered sexual violence, but is considered an accepted practice of confinement within the carceral

nutritional services, such as pre-natal care, immunizations, and Women, Infants, Children dietary supplements,' reported a decline in their immigrant clients. According to several health workers, immigrants were withdrawing from any government-funded services for fear of deportation." (alteration in original) (footnote omitted) (quoting Jacqueline Hagan, Nestor Rodriguez, Randy Capps & Nika Kabiri, *The Effects of Recent Welfare and Immigration Reforms on Immigrants' Access to Health Care*, 37 INT'L MIGRATION REV. 444, 457 (2003))).

206. James Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts*, L.A. TIMES (Oct. 9, 2017, 5:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-undocumented-crime-reporting-20171009-story.html> [<https://perma.cc/5UAN-8HQ8>]; see also Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, N.Y. TIMES (June 3, 2018), <https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html> [<https://perma.cc/4GRK-XC5S>]; Rob Arthur, *Latinos in Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FIVETHIRTYEIGHT (May 18, 2017), <https://fivethirtyeight.com/features/latinos-report-fewer-crimes-in-three-cities-amid-fears-of-deportation> [<https://perma.cc/Z5Z9-2JUK>].
207. See Linda Qiu, *Kirstjen Nielsen Justifies Family Separation by Pointing to Increase in Fraud. But the Data Is Very Limited*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/us/politics/nielsen-family-separation-factcheck.html> [<https://perma.cc/T76H-FCED>].
208. David Nakamura, Nick Miroff & Josh Dawsey, *Trump Signs Order Stopping Family Separation at Border, but Families Won't Be Immediately Reunited*, CHI. TRIB. (June 20, 2018, 11:42 PM), <https://www.chicagotribune.com/news/nationworld/politics/ct-migrant-family-border-separation-20180620-story.html> [<https://perma.cc/U694-MQG2>].

setting.²⁰⁹ By contrast, the well-documented practice of rape of immigrants detained by ICE and CBP is categorized as an unauthorized practice of sexual violence (even as the practice continues).²¹⁰

Naming and categorizing forms of deportation violence runs the risk of precisely the kind of theoretical distancing that this engagement with violence seeks to avoid. The litany of violence above is offered to invoke the idea that the violence of deportation is not an aberration, but rather one of its defining features. Confronting deportation as inseparable from violence interrogates our common sense that deportation serves legitimate moral and political ends.²¹¹ These forms of violence are not merely human rights violations that can be remedied through reforms that create humane management of deportation. When violence is understood to be deportation's ultimate purpose, it focuses scholarship and advocacy on ending it, not merely mitigating it. In considering what it would take to end this and other forms of violence, Soya Jung offers the following: "Surviving the modern world has not demanded much of us in the way of universal empathy. In fact, it has increasingly required us to consent to the inevitability of someone else's dehumanization or absolute elimination."²¹² The catalogue of deportation violence serves as an invitation to refuse this form of consent, and to consider instead the possibility that all of these forms of violence—sanctioned and unsanctioned—could end. While deportation and violence may be inseparable, deportation is not inevitable.

III. CHALLENGING THE GOALS OF DEPORTATION

If deportation is illegitimate state violence coded as legitimate, the question then becomes, what purposes does deportation serve? Questioning the inevitability of deportation thus requires questioning its purported uses. An examination of laws, literature, and the popular rhetoric surrounding deportation reveals concerns with border control (and by extension, sovereignty) and with safety/security animating much of the conversation. Along these lines, leading

209. See *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 330–38 (2012).

210. Letter from Rebecca Merton, Nat'l Indep. Monitor, & Christina Fialho, Co-Founder/Exec. Dir., Cnty. Initiatives for Visting Immigrants in Confinement, to Thomas D. Homan, Dir., U.S. Immigr. & Customs Enf't et al. (Apr. 11, 2017), http://www.endisolation.org/wp-content/uploads/2017/05/CIVIC_SexualAssault_Complaint.pdf [https://perma.cc/LY4B-W8TX].

211. McLeod, *supra* note 17, at 1164 (describing the project of abolition as one of rejecting "the moral legitimacy of confining people in cages"). The project of deportation abolition requires rejecting the moral legitimacy of deportation, in part through exposing deportation as an illegitimate exercise of state violence.

212. Soya Jung, *The Endurance of the Color Line*, 2 OTHERING & BELONGING 50, 61 (2017).

deportation theorist Daniel Kanstroom posits “[e]xtended border control” and “post entry social control” as the “two basic, primary goals for interior enforcement by removal and related mechanisms.”²¹³ While many question the effectiveness of these goals, particularly as measured against the human rights abuses their pursuit engenders, both practitioners and theorists stop short of questioning their legitimacy.²¹⁴ For the most part, those who do address deportation through the lens of these goals bemoan the distance between the stated goals and the reality on the ground. To begin to theorize the end of deportation, it is necessary to theorize not just the limitations of post-entry social control and extended border control, but also their legitimacy as governance goals.

A. Challenging the Goals of Deportation: Post-Entry Social Control

In considering post-entry social control as a goal of deportation, this Part focuses on the logic that makes such a goal necessary—the logic of enhanced safety through deportation. To state plainly the accepted logic: If there are people territorially present in the United States who pose a threat to the homeland, and those people were not born in the United States, then the United States can and should prioritize their apprehension, detention, and deportation. The trend of the last thirty years has been to use an individual’s contact with the criminal justice system as a proxy for their level of threat.²¹⁵

1. “Crimmigration” Scholarship Has Not Yet Renounced the Deportation of “Criminal Aliens”

This increase in distribution of deportations along the lines of migrant criminality has led to a vigorous scholarly response. An entire literature of “crimmigration” has sprung from the convergence of immigration and criminal law regimes.²¹⁶ Among other critiques, this literature tracks the importation of

213. Kanstroom, *supra* note 6, at 474 (emphasis omitted).

214. *E.g., id.* at 475 (“For purposes of this Article, however, I will tacitly accept the basic legitimacy of the nation-state. This acceptance implies the *basic* legitimacy of some forms of border control and therefore of *extended border control removal*.”).

215. See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1128 (2013) (“The deportation of ‘criminal aliens’ is now the driving force in American immigration enforcement.” (footnote omitted)).

216. Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 563 (2017) (“For some time now, scholars, activists and commentators have expressed deep concern about a phenomenon that Juliet Stumpf dubbed a decade ago the ‘crimmigration crisis.’” (quoting Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77, 379 (2006))).

criminal law norms into the immigration sphere (and vice-versa),²¹⁷ the expansion of criminal prosecutions of acts of migration,²¹⁸ the rise of an immigrant incarceration system to house “criminal aliens” awaiting deportation,²¹⁹ and the pitfalls of all of these developments.

Despite the deep critiques of the convergence of immigration and criminal law, the logic of safety through deportation keeps many immigration scholars and advocates from questioning deportation, because for many, there are still people considered indefensible and for whom deportation is thus a desirable outcome.²²⁰ The logic of safety through criminalization of migration also determines how immigration enforcement resources are deployed,²²¹ what legislation is deemed tenable,²²² and how on-the-ground practices of immigration enforcement (and the resistance to them) are shaped.²²³ Thus, confronting this logic is key to opening the door to the end of deportation.

For now, the politically palatable position that deportation is an acceptable outcome for those marked as criminal is the norm, with few full-throated defenses of the “criminal alien.”²²⁴ When the media reports on the murder of a U.S. citizen by a noncitizen (particularly when the noncitizen had precarious status or prior deportations), the usual response is that (most) immigrants are not criminals.²²⁵

217. See Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879 (2015) (describing state-level criminalization of immigrants, with state and local governments punishing conduct linked to the social and economic survival of unauthorized immigrants).

218. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281–83 (2010) (explaining the increase in criminal prosecution of immigration-related offenses in the federal criminal system); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1471–75 (2015) (describing state uses of criminal lawmaking authority to prosecute immigration-related offenses).

219. Hernández, *supra* note 218, at 1453–55 (describing growth in immigration detention, and how detention has become a defining feature of the immigration system).

220. See, e.g., Jason A. Cade, *Essay, Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36, 43 (2015) (“Many noncitizens with serious criminal histories should be deported”).

221. See, e.g., Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [https://perma.cc/TQ6S-LL3N] (establishing guidelines for the exercise of prosecutorial discretion for a subset of immigrants).

222. See Rebecca Sharpless, “*Immigrants Are Not Criminals?*: Respectability, Immigration Reform, and Hyperincarceration”, 53 HOUS. L. REV. 691, 698 (2016).

223. See Inés Valdez, Matt Coleman & Amina Akbar, *Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement*, 21 CITIZENSHIP STUD. 547, 547–49 (2017).

224. Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 372 (1999) (“It is hard to think of any public policy that is less controversial than the removal of criminal aliens.”).

225. E.g., Alan Gomez, *Mollie Tibbitts Murder Case: Here Are the Facts on Immigrants Committing Crimes in US, USA TODAY* (Aug. 22, 2018, 3:54 PM), <https://www.usatoday.com/story/news/nation/2018/08/22/mollie-tibbitts-murder-reignites->

Few are willing to jump into a defense of not deporting the person who has allegedly killed or raped or otherwise caused physical harm to another.²²⁶ Yet for much of U.S. immigration history, this is precisely what happened—noncitizens were arrested and were not deported. As recently as 1984, only one thousand people were deported on criminal grounds,²²⁷ as compared to 138,669 “criminal aliens” deported in 2016.²²⁸ The elaborate mechanisms that have developed in the past three decades to promulgate the deportation of people with criminal system contact have rightly led to a rich and necessary literature decrying this development, a literature that nonetheless accepts deportation of those who are “regarded as legitimately positioned at the crossroads of our criminal and immigration enforcement systems.”²²⁹ This literature tends to concede the inevitability of the distribution of immigration enforcement around alleged criminality, even as it decries the racially biased impact of the criminal system, the immigration system, and the compounded system of deportation the two have created.

Currently, the deportation literature tends to highlight the harms of deportation to those who are considered to have more of a right to be in the United States when pointing to the harms of increased “criminal alien” deportations. While the unlawful deportations of U.S. citizens and the lawful but nonetheless unsettling deportations of longtime lawful permanent residents both shock the conscience, the frequent analyses of the harms of deportation as experienced by these two groups points to a hierarchy of suffering along membership lines.²³⁰ The

debate-over-immigrant-crime/1060792002 [https://perma.cc/6GPH-ZSY3]; Luis Gomez, *Are Crime and Immigration Connected? Not So, Research Says*, SAN DIEGO UNION-TRIB. (Mar. 7, 2018, 3:35 PM), https://www.sandiegouniontribune.com/opinion/the-conversation/sd-are-crime-and-immigration-correlated-20180307-htmlstory.html [https://perma.cc/JGN4-YJXE].

226. See Sharpless, *supra* note 222, at 694 (“[T]hese claims implicitly rely upon a sense of injustice that immigrants and our immigration system have become entangled with criminals and our criminal system. The critique risks being understood as legitimizing the category criminal, the stigma it carries, and the use of deportation as a crime control measure. Largely absent is a defense of people regarded as legitimately positioned at the crossroads of our criminal and immigration enforcement systems.”).
227. MARGARET H. TAYLOR & T. ALEXANDER ALENIKOFF, DEPORTATION OF CRIMINAL ALIENS: A GEOPOLITICAL PERSPECTIVE 1 (June 1998) (unpublished manuscript), https://web.archive.org/web/20210721141731/http://archive.thedialogue.org/PublicationFiles/Deportation%20of%20criminal%20aliens%20a%20geopolitical%20perspective.pdf [https://perma.cc/D9KR-9GDX].
228. *FY 2016 ICE Immigration Removals*, U.S. IMMIGR. & CUSTOMS ENFT (Dec. 5, 2017), https://www.ice.gov/removal-statistics/2016 [https://perma.cc/98V6-WGZY].
229. Sharpless, *supra* note 222, at 694.
230. See, e.g., KANSTROOM, *supra* note 169 (focusing on harms to former lawful permanent residents); Bill Ong Hing, *Re-examining the Zero Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools*, 8 HARV.

more a person is seen to belong to the United States (as demonstrated by their naturalization or obtaining lawful permanent residence), the more outrageous their deportation. This would seem to be accepted as so obvious as to merit limited commentary. The commentary instead focuses on how to roll back the harms of the criminal immigration convergence so that those with formal membership claims can avoid deportation.

For those without formal membership claims, the conversation becomes how to move more of the population into full membership (through deferred action, comprehensive immigration reform, and so on), and how to make sure that in the meantime, any deportation proceeding they face is a fair one. The question of why we are resigning the most criminalized sectors of the immigrant population to banishment is rarely discussed. The idea that U.S. citizens should never face banishment and that noncitizens are never fully exempt from banishment has become common sense—the debate has become how best to expand or limit the deportations of noncitizens, not whether they should be occurring at all.

Thinking outside of deportation—thinking beyond anyone's banishment—requires letting go of an investment in the paradigm of membership through proximity to U.S. citizenship. Membership and belonging are premised on exclusion (and policing the exclusion) of those who do not make it into the inner circle, and such an exclusion, in the United States, has always been distributed with violence, along racial lines.²³¹ In twenty-first century immigration law, the political cost for immigrant inclusion has been accepting the deportation of criminalized others.²³² A politics of deportation abolition would refuse any immigrant's deportation—and thus, would challenge the vision of immigrant integration that has always been premised on not every immigrant being able to integrate, and on the deportation of those who are marked as unsuitable for membership because they are considered a safety threat given their contact with the criminal legal system.

L. & POL'Y REV 141 (2014); Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394 (2013); Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents From the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55 (2007).

231. See generally CHANDAN REDDY, *FREE DOM WITH VIOLENCE: RACE, SEXUALITY, AND THE US STATE* (2011) (arguing that the nation-state's claim to provide freedom from violence depends on its systematic deployment of violence against peoples perceived as nonnormative and irrational).

232. See Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality,"* 52 HARV. J. ON LEGIS. 355, 358–59 (2015).

2. Under Scrutiny: The Category of Crime

Dismantling the logic of safety through deportation begins with confronting the meaning of crime itself. The instability of crime as a category to which we should ascribe meaning, much less organize the bulk of immigration enforcement around, has come under increasing examination. In questioning the concept, Micol Seigel writes:

[W]hat is crime? The concept has sustained intense scrutiny from critical criminologists. They have pointed out that crime—and law, which defines crime—are deeply contingent, reflecting the biases of their time, and they challenge the equation of “harm” and “crime” by pointing out the intense harm inflicted by actions never designated crime such as war, pollution, or systemic medical neglect. These challenges render “crime” conceptually incoherent. It certainly survives as a category of experience for participants or police, but critical thinkers cannot maintain it as a category of analysis.²³³

Likewise, deportation triggered by criminal contact remains an important category of experience for the millions who have been deported as a result of a criminal record, but as Seigel contends, its stability as a category of analysis is limited, precisely because crime itself is an incoherent category.

This line of thinking has begun to permeate immigration scholarship, with Annie Lai and Chris Lasch calling for more scholarship that interrogates “whether strategies of penal control like detention and militarized policing are in fact productive responses to crime, for example, or whether the term ‘criminal threats’ has a definite meaning that has integrity.”²³⁴ Rebecca Sharpless further undermines the concept of crime as a stable category of analysis, drawing attention to the relative underenforcement of white-collar crime (disproportionately committed by white people) and the way that police enforcing drug laws “bypass college campuses and wealthy neighborhoods.”²³⁵

3. Under Scrutiny: Race and Anti-Blackness

The very instability of crime has led to a rich and fruitful critique of how criminal enforcement is meted out, with scholars pointing to how arrest, conviction, incarceration, and, by extension, deportation are distributed in race-

233. Seigel, *supra* note 151, at 17 (footnote omitted).

234. Lai & Lasch, *supra* note 216, at 587.

235. Sharpless, *supra* note 222, at 718.

specific ways, rather than on the basis of conduct.²³⁶ Pointing to post-1965 laws and enforcement programs primarily targeting people from Latin America, Kevin Johnson has argued that “over the last fifty years, the United States replaced the *Chinese* exclusion laws of the 19th and 20th centuries with legislation akin to the *Mexican* exclusion laws of the new millennium.”²³⁷ The statistics on deportation bear this out. Eighty-nine percent of people deported in 2012 were categorized as male.²³⁸ Non-Latin American immigrants, despite constituting 20 percent of the undocumented population, account for less than 2 percent of deportees.²³⁹ Finally, nationals from four countries—Mexico, Guatemala, Honduras, and El Salvador—made up 90 percent of deportees in 2017.²⁴⁰

While the statistics demonstrate that young, Latin American men are disproportionately subject to deportation, understanding the racial distribution of deportation means considering not only the absolute numbers of those deported, but also the way that deportability functions through anti-Blackness and criminalization. Black immigrants, both undocumented and with status, are disproportionately targeted for both criminal and immigration enforcement, with devastating results. While Irish deportations went up 30 percent between 2016 and 2017 (with eight more deportations in 2017 than in 2016), Haitian deportations jumped 1699 percent (from 310 in 2016 to 5578 in 2017).²⁴¹ One out of every twelve Jamaican and Dominican male lawful permanent residents has been deported since 1996,²⁴² the year that laws expanding the deportability of those who have had contact with the criminal system were enacted.²⁴³ Despite being

236. See, e.g., LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION (2d ed. 2013); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599 (2015); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law Into the Criminal Justice System*, 54 HOW. L.J. 639 (2011).

237. Johnson, *supra* note 166, at 11.

238. Tanya Golash-Boza, *Racialized and Gendered Mass Deportation and the Crisis of Capitalism*, 22 J. WORLD SYS.-RSCH. 38, 39 (2016).

239. *Id.*

240. See U.S. IMMIGR. & CUSTOMS ENF’T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 15-18 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> [https://perma.cc/5J49-QVKJ].

241. See John Burnett, *Undocumented Irish Caught in Trump’s Immigration Dragnet*, NPR (Jan. 22, 2018, 5:00 AM), <https://www.npr.org/2018/01/22/578930256/ undocumented-irish-unexpectedly-caught-in-trumps-immigration-dragnet> [https://perma.cc/959L-XGFC]; U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 240.

242. TANYA MARIA GOLASH-BOZA, DEPORTED: IMMIGRANT POLICING, DISPOSABLE LABOR, AND GLOBAL CAPITALISM 264 (2015).

243. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 21, 22, 28, 34, 40, 42, 49 & 52 U.S.C.); Illegal

only 7 percent of the noncitizen population in the United States, Black noncitizens make up 20 percent of those facing deportation on criminal grounds.²⁴⁴ These numbers suggest that while the sheer numbers of Mexicans and Central Americans deported dwarf those of Jamaicans, Dominicans, and Haitians, the experience of deportability is specifically exacerbated by anti-Black bias in the criminal justice system.²⁴⁵

Contending with safety, particularly when discussing safety through deportation of criminals, means contending with the idea that in the United States criminality has historically been defined through proximity to Blackness. Blackness became tethered to criminality in part through non-Black immigrants' claims to whiteness; successive waves of immigrants sought to distance themselves from African Americans and fought to be recognized as white, with successful integration predicated on proximity to whiteness.²⁴⁶ Sharpless has sharply critiqued the "we are not criminals" rallying cry of the immigrants' rights movement, stating "[i]f 'criminal' is code for 'Black,' . . . we can understand the contemporary immigrant/criminal distinction as yet another immigrant claim to whiteness."²⁴⁷ The erasure of Black immigrants makes this point particularly salient. The focus on the disproportionate removal of Latin American immigrants in the deportation literature occludes that many Latin American immigrants, including those from Mexico and Central America, are Black, and that immigrants deported to the Caribbean are disproportionately Black. If the alleged safety produced by deportation can be understood as an expression of racial animus toward immigrants of color, grounded in anti-Black racism, then deportation along the lines of criminality becomes less defensible.

As Alina Das shows in her study of the historical antecedents of criminal deportation, racial animus has always driven deportation.²⁴⁸ Das cites the racial animus at the root of laws initially rendering people with criminal convictions

Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8, 18 & 28 U.S.C.).

244. Jeremy Raff, *The 'Double Punishment' for Black Undocumented Immigrants*, ATLANTIC (Dec. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-double-punishment-for-black-immigrants/549425> [https://perma.cc/P5NK-T8W7].
245. Likewise, transgender people, people with disabilities, and others who live at the intersections of various modes of state surveillance are more likely to be vulnerable to the depredations of both deportability and deportation, whether or not their numbers are reflected in the statistics compiled yearly by ICE. See generally Pooja Gehi, *Struggles From the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS L. REP. 315 (2009).
246. See Sharpless, *supra* note 222, at 739.
247. *Id.*
248. Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 (2018).

deportable, tying that animus to the drafting of laws and their enforcement on working class immigrants of color.²⁴⁹ Yolanda Vázquez brings the analysis up to the present, exploring how the “federal laws enacted and policies put into place [from the 1980s on] not only created the ‘criminal alien’ but developed mechanisms for federal, state, and local courts and law enforcement to assist in the location, arrest, and transfer of non-citizens into ICE custody,” and describing how these mechanisms, while facially neutral, are racially targeted in terms of location, implementation, and enforcement.²⁵⁰ Others have traced how the post-9/11 measures targeting Muslims and Arabs ultimately directed many aggressive enforcement measures at undocumented Mexican immigrants in the name of protecting national security.²⁵¹ The combination of nativism and racial animus continues to contribute to the expansion of the category of whom it is considered appropriate to deport, even when criminal records are not at play.

4. Under Scrutiny: Narratives of “Violence”

Revealing that deportation on the basis of criminality is at its core grounded in racism may not be enough to invite abandoning the fantasy that deportation brings safety. Even those who strongly critique crime-based deportations tend to hedge when considering the figure of the truly “violent” immigrant, conceding that a person with few ties to the United States who has seriously harmed others could be justifiably deported/deportable. These arguments also usually include the proviso that most immigrants do not commit crimes, which is empirically provable, and thus a tempting argument to make.²⁵²

While it can be shown that immigrants are not more likely to commit crimes than their U.S.-born counterparts, and that in fact they may be less likely to do so, this does not resolve the question of whether contact with law enforcement justifies deportation. Millions of people whose contact with the criminal justice

249. See *id.*

250. Yolanda Vázquez, *Enforcing the Politics of Race and Identity in Migration and Crime Control Policies*, in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING, *supra* note 144, at 142, 151 (citation omitted).

251. Johnson, *supra* note 166, at 52.

252. See, e.g., David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 189–91 (2012). As the author plainly states, whatever else explains the increasingly “blurred boundary between criminal justice and immigration enforcement” it “cannot be understood as a response to the rising problem of crime committed by noncitizens. [It] cannot be understood in that way because there is no such problem.” *Id.* at 189. Sklansky cites various studies pointing to falling crime rates across the United States, falling border apprehensions, statistics that demonstrate that immigrants are “much more law-abiding than native-born Americans,” and below-average crime rates in border cities with high undocumented populations. *Id.* at 190–92.

system led to their apprehension by immigration authorities have in fact been deported in the past three decades, and at least some part of this group have harmed others.²⁵³ Thus, even though immigrants are less likely to commit crimes, the U.S. crime rate in general has gone down,²⁵⁴ and border towns full of undocumented people are safer places to live than interior cities full of the U.S.-born,²⁵⁵ the reality is that immigrants are coming into contact with law enforcement and that these encounters are leading to their deportations. If we are to argue that this should not be the case, then we must address the question—should contact with law enforcement (currently the proxy for identifying those who harm others) lead to deportation? The answer, I would posit, is no. Even if individual immigrants come into contact with law enforcement, it should not follow that this contact leads to deportation.

Accepting the deportation of people who may present a risk of harm to others is problematic on several fronts, not the least of which is that it requires accepting the idea that one can quantify dangerousness in any sort of dependable way, when, as explained above, controlling danger through policing crime has primarily been a racialized project in the United States. Even if one were to accept that the arrest and conviction of certain individuals marks them as irredeemably dangerous, their subsequent deportation fails to “interrogate the deeply troubling premise that U.S. citizens are more deserving of protection than other human beings.”²⁵⁶ As Allison Crennen-Dunlap and César Cuauhtémoc García Hernández have stated, adopting reform proposals that accede to the deportation of “dangerous” people “accepts that a person deemed dangerous should not be allowed to live among U.S. residents, whom she might endanger, even though that same person could just as easily endanger those living in the country to which she is deported (if indeed, she is ‘dangerous’).”²⁵⁷ Thus defending safety through deportation means defending a particularly toxic form of nationalism that takes as a given the differential value of life based on place of birth. Further, the idea of deporting people perceived as

253. See Sharpless, *supra* note 222, at 697–98.

254. John Gramlich, *5 Facts About Crime in the US*, PEW RSCH. CTR. (Oct. 17, 2019), <https://web.archive.org/web/20191017044950/https://www.pewresearch.org/fact-tank/2019/01/03/5-facts-about-crime-in-the-u-s/> [https://perma.cc/3GDN-6RPV].

255. Julián Aguilar & Alexa Ura, *Border Communities Have Lower Crime Rates*, TEX. TRIB. (Feb. 23, 2016, 6:00 AM), <https://www.texastribune.org/2016/02/23/border-communities-have-lower-crime-rates/> [https://perma.cc/9VCD-NDMH].

256. Allison Crennen-Dunlap and César Cuauhtémoc García Hernández, *Pragmatics and Problems*, 69 FLA. L. REV. F. 1, 9 (2017).

257. *Id.*; see also KANSTROOM, *supra* note 169. Kanstroom also questions the adoption of these proposals, stating that “[c]riminal deportees—even assuming that they have in fact been convicted of serious crimes—may no longer be ‘our’ problem. But they are still *somebody’s* problem. And the problem may get worse due to the effects of deportation itself.” *Id.* at 41.

dangerous also gives a false sense of the strength of imaginary national boundaries in precluding those who have harmed others from making a return trip to the United States. A return trip may be difficult, but it is by no means impossible, particularly for those deported to Mexico or Central America (most of those deported). In fact, for those who are attached to the United States by virtue of family and other ties, their attempted return may be virtually guaranteed.²⁵⁸

Immigration scholars have begun the necessary pushback against the presumed disposability of people who are considered appropriately deportable because of their criminal convictions and perceived dangerousness. Annie Lai and Chris Lasch point to the need to avoid a single-minded focus on advocacy to delink immigration from crime control, warning that “leaving unquestioned the outcomes of the system of crime control” risks “retrenching problems with the broader system of crime control in the United States that affect noncitizens and citizens alike” and means disavowing those immigrants “who do apparently commit crime.”²⁵⁹ Rebecca Sharpless likewise warns that engaging in a limited criminalization critique that accepts “that immigration enforcement can be tethered to crime control (as long as it has the right focus) . . . leav[es] unchallenged the edifice of the carceral state.”²⁶⁰ She envisions an immigrant justice movement that acknowledges that immigrant justice cannot be separated from “the racial justice movement to dismantle the carceral state.”²⁶¹ She thus calls for abandoning the effort to distinguish between immigrants and criminals, and between people with serious and less serious conviction records, warning that such distinctions distance the immigrant rights movement from movements for racial justice, “furthering the harms of our carceral nation.”²⁶²

Such efforts require questioning the goal of deportation as post-entry social control, not just in the easy cases of a long term lawful permanent resident with one shoplifting conviction facing deportation, but also in the harder cases, when a person might have multiple convictions for violent crimes. Refusal to distinguish between the deserving immigrant and the repeat offender in immigrant scholarship and advocacy opens the door to considering an end to deportation altogether by refusing to distribute survival along lines of criminality, lines which

258. María Martin, *‘Nothing for Us Here’: Deported Guatemalans Plan to Return to U.S.*, NBC NEWS (Mar. 29, 2018, 5:41 AM), <https://www.nbcnews.com/news/latino/nothing-us-here-deported-guatemalans-plan-return-u-s-n858231> [https://perma.cc/Z7L3-PETT].

259. Lai & Lasch, *supra* note 216, at 542–43 (emphasis omitted).

260. Sharpless, *supra* note 222, at 731.

261. *Id.* at 731–32.

262. *Id.* at 732.

reflect a commitment to racialized governance through crime,²⁶³ rather than a commitment to safety.

Along these lines, shifting our horizon to refuse the disposability of people who have had contact with the criminal justice system would require challenging all forms of banishment—not just deportation—and linking deportation to the naturalized practices of domestic banishment.²⁶⁴ Banishment in the modern era has moved beyond deportation—huge swaths of the U.S.-born population are now removed from their communities and effectively expelled from society, whether through prolonged prison sentences, the civil death that follows release from prison, or the literal banishment orders deployed by both criminal and civil authorities to require that individuals considered undesirable stay out of certain designated areas.²⁶⁵ Expulsions have become naturalized through mass incarceration: Kidnapping people from their lives through arrest and prolonged incarceration is something the United States does more than any other country at any time in history.²⁶⁶ For immigrants, the banishment happens to take on a separate, extra aspect—beyond the domestic forms of banishment and legal liminality their contact with law enforcement might create, noncitizens face the more ancient form of banishment—expulsion from the territory where they reside.

Viewed in this light, immigrants have more in common—in terms of making common cause—with those who are fighting to dismantle police departments, decriminalize certain behavior, and abolish jails and prisons than they do with those who insist that “immigrants are not criminals.” The BREATHE Act, a comprehensive legislative proposal for overhauling the criminal legal system, authored by the Movement for Black Lives, shows social movement actors already making these connections; the Act includes subsections repealing

263. *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

264. For an examination of modern modes of U.S. banishment, see generally KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA (2010).

265. Chacón, *supra* note 43, at 750. Given the way that banishment produces liminal legality in both citizen and noncitizen populations, Chacón encourages crimmigration scholars to avoid exceptionalizing the convergence of immigration and criminal law. *Id.* at 757–58.

266. *See* SASKIA SASSEN, EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY 65 (2014) (“At present, 1 in 100 Americans is incarcerated in a U.S. state or federal prison or detained in a local jail awaiting trial. When those on probation or on parole are added, the total figure tops 7 million people—1 in 31 Americans. And if all people with an arrest or conviction record are counted, the number reaches 65 million people—1 in 4 Americans. That the United States criminal justice system now touches overall 25 percent of the population is quite extreme compared with most Global North countries. If there was ever an argument to be made for American exceptionalism, the mushrooming state and private corporate prison complex would likely be the proof.” (footnote omitted)).

the laws that facilitate removal of people with criminal records, abolishing the Border Patrol, abolishing ICE, and ending the practice of immigration detention, seamlessly interspersed with other non-immigration specific proposals in the section entitled Divesting Federal Resources From Incarceration and Policing and Ending Criminal-Legal System Harms.²⁶⁷

Jennifer Chacón uses the frame of “legal liminality” to conceptually link these different struggles.²⁶⁸ Connecting immigrant banishment with other forms of internal banishment, she states:

The age-old punitive method of banishment is an increasingly common form of contemporary social control, and it is not limited to the sphere of immigration enforcement. The susceptibility of certain noncitizens to banishment in the form of deportation is mirrored by the exposure of other liminal populations to banishment in the form of spatial exclusion and susceptibility to incarceration. In both instances, the criminal justice system operates in tandem with civil systems of law to effectuate the expulsion of individuals deemed undesirable.²⁶⁹

In this light, the expulsions that constitute a key part of deportation are not exclusive to deportation—and are not even exclusive to noncitizens. This does not make deportation any less traumatic or consequential—the deportation of noncitizens to countries to which they do not wish to return is a form of indefensible violence, as previously discussed. But it does point to the possibilities of interventions that recognize expulsion and legal liminality as connected to, rather than exceptional and different from, other banishment practices. Theorizing deportation abolition becomes possible when considering deportation not as an acceptable response to an individual wrongdoer’s time in the United States, but as part of a continuum of violent, unacceptable practices against entire populations.

Indeed, the reach of the United States’s banishment regime extends not just geographically, but also across the population of immigrants in the United States who will never be deported, but who nonetheless live with the threat of deportation. The overlap of public safety and immigration organizes many aspects of the lives of the deportable. Their interactions with law enforcement, already fraught, take on a menacing cast, with banishment always a possibility.

267. THE BREATHE ACT, SECTION 1: DIVESTING FEDERAL RESOURCES FROM INCARCERATION AND POLICING & ENDING CRIMINAL-LEGAL SYSTEM HARMS, MOVEMENT FOR BLACK LIVES, <https://breatheact.org/wp-content/uploads/2020/09/Section-1-The-BREATHE-Act-Summary.pdf> [https://perma.cc/7SEY-94U5].

268. Chacón, *supra* note 43, at 742.

269. *Id.* at 711.

Even if they initially escape the criminal system unscathed by immigration consequences, the mark of law enforcement lingers permanently. It is not unusual for a person arrested and convicted decades ago to have that contact with criminal law enforcement retroactively trigger deportation.²⁷⁰ In the very act of trying to terminate their deportability—by applying to become U.S. citizens—many long term lawful permanent residents have instead been referred to deportation proceedings. Unless an immigrant is able to naturalize, deportability on the basis of contact with the criminal justice system is a life sentence, and thus every interaction with law enforcement agents (and with civil authorities who cooperate with immigration agencies) becomes fraught with the possibility of banishment. Dismantling this trap requires an embrace of deportation abolition through an unabashed rejection of the deportation of people marked as criminal.

B. Challenging the Goals of Deportation: Extended Border Control

Extended border control, the second accepted goal of deportation, is widely considered to be incident to sovereignty. Thus, any consideration of the end of deportation must contend with the question of sovereignty. According to Daniel Kanstroom, “[o]nce one accepts the basic legitimacy of the nation-state, then deportation of noncitizens as a tool of extended border control is both logically necessary and potentially legitimate so long as certain secondary questions are properly accounted for.”²⁷¹ Kanstroom makes clear that this does not open the door to violations of basic rights: “It does not imply, of course, acceptance of arbitrary or disproportionately harsh implementation of such enforcement.”²⁷² The concerns that Kanstroom and other scholars, activists, and human rights researchers frequently bring to light regarding the violence of extended border control enforcement (particularly in proximity to the U.S.–Mexico border)²⁷³ are limited to the way extended border enforcement is carried out, not to its legitimacy. ICE and CBP are frequently castigated for being unaccountable actors, with the implication that an accountable immigration enforcement force would enact deportations humanely—defending the United States’s sovereignty while

270. Cf. Crennen-Dunlap & Hernández, *supra* note 256, at 8 (“Thus, a migrant convicted of an offense at age eighteen might find herself in removal proceedings at age sixty-eight. Under the proposed reform, if that conviction was for a violent offense and involved five years’ incarceration, that individual would not be eligible for asylum regardless of what had happened in her life during the fifty years since her offense.”).

271. Kanstroom, *supra* note 6, at 476 (emphasis omitted).

272. *Id.* at 475.

273. For examples of this violence and the scholarship and advocacy reports covering it, see *supra* Part II.

maintaining at least some semblance of recognition of the dignity of the people being apprehended and deported.²⁷⁴

To challenge deportation involves taking the analysis in a different direction, and questioning not just the way that exterior border enforcement is carried out, but the premise that sovereignty demands that deportations continue into an indefinite future. Simply stated, we do not have to believe in the state's right to deport.²⁷⁵ As philosopher Sarah Fine states, pointing to a previous era where sovereignty was defined by a state's capacity to keep people from leaving its borders, without deportation "the whole edifice would not collapse, just as it has not collapsed in the absence of a belief in the state's sovereign right to prevent its own citizens from leaving and returning."²⁷⁶ This Part does not purport to provide a full accounting of the limits of the nation-state, but rather points to arguments being developed across different fields that, when read together, limit the salience of sovereignty as an excuse for the continued project of deportation. Thus, the arguments below seek to reveal the arbitrary linkage of immigration with sovereignty.

New frameworks that complicate U.S. sovereignty are sorely needed. Spanish philosopher Daniel Innerarity has pointed to the need to expand the debate about sovereignty beyond "rigid borders that continue colonizing a good part of our political imaginary."²⁷⁷ Implicitly or explicitly calling national sovereignty itself into question undermines the claim that deportation is a necessary incident of sovereignty. Linda Bosniak's work on alternative conceptions of citizenship is instructive here. Bosniak considers these alternative conceptions a critical tool to enable us to challenge the presumption that "citizenship is appropriately (and necessarily) an enterprise located within the bounds of the modern nation-state, and . . . any alternative conception . . . require[s] special justification."²⁷⁸ Likewise, the arguments

274. For an example of an immigrant advocate calling for humane deportation, see Sonia Nazario, Opinion, *Do You Care About the Rule of Law? Then Act Like It*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/opinion/asylum-immigration-trump.html> [<https://perma.cc/5ZHK-EE7X>] ("What we should do is let asylum seekers cross our borders and then release them—under supervision, monitored by case workers or even ankle bracelets—while their claims are being processed If asylum seekers' claims are rejected, they should be deported. In other words: be openhearted on the front end, giving people a real chance at safety if they need it, and be tougher on the back end.").

275. Fine, *supra* note 37, at 117.

276. *Id.*

277. DANIEL INNERARITY, GOVERNANCE IN THE NEW GLOBAL DISORDER: POLITICS FOR A POST-Sovereign Society 80 (Sandra Kingery trans., 2016).

278. Bosniak, *supra* note 18, at 453.

presented in this Part seek to “invert the burden of justification”²⁷⁹ inherent in the notion that deportation (like citizenship) is incident to sovereignty. They seek to force sovereignty to justify itself, both on its own terms and as an excuse for the practice of deportation.

When viewed from the point of view of a person facing deportation (as opposed to from the point of view of U.S.-born scholars and advocates), this inverted burden makes the most sense, despite straining the political imaginary of those who are already secure in their enjoyment of U.S. citizenship’s promise. The arguments in this Part begin the work of dismantling the defense of deportation as a legitimate practice of sovereignty. This Part proposes that sovereignty as a defense of deportation tends to occlude histories that led to the current maldistribution of resources at the heart of modern migration patterns, that sovereignty as a defense of deportation obscures the incoherence of the United States as a bordered or bounded nation-state, and that sovereignty as a defense of deportation obscures the unjust advantages the United States enjoys as an imperial power in the twenty-first century, thus making its defenders unwitting participants in exercises of domination.

1. Inverting the Burden: Settler Colonialism

Justifying deportation as incident to sovereignty in the United States requires a return to nineteenth century legal arguments, made by Supreme Court justices in the 1880s in a trilogy of cases that sought to justify the racist exclusion of Asian nationals from the United States.²⁸⁰ This is the usual starting point for discussions of the right to deport when considered by immigration scholars, because the

279. *Id.*

280. Congress passed the Chinese Exclusion Act in 1882, seeking to bar people of Chinese descent from entering or remaining in the United States. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943). The Supreme Court upheld the Act, disguising its racist motivation in a call for respect for sovereignty:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.

Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603–04 (1889); *see also* Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289, 290 (2015) (“These cases—*Chae Chan Ping*, *Ekiu*, and *Fong Yue Ting*—established what is called ‘plenary power’ over the regulation of immigration. This has meant that the political branches of the U.S. nation-state have the power to exclude aliens, admit them on such terms as they see fit, and deport them with little or no constraint from the judicial branch, as a legitimate exercise of the powers inherent in nation-state sovereignty.” (footnotes omitted)).

Chinese exclusion cases are accepted to have established the “plenary power” doctrine—the power by the political branches of the United States to exclude, admit, and deport noncitizens on whatever terms they consider acceptable—as a legitimate exercise of sovereignty of the nation-state.²⁸¹ As Sherally Munshi puts it:

Of course, the crude nativism expressed in the Chinese Exclusion Acts is no longer tolerated, but the conceptions of territorial sovereignty and immigrant exclusion announced in the *Chinese Exclusion Cases* remain a defining feature of our legal landscape. The Supreme Court has done little to unsettle the principle that territorial sovereignty includes the absolute right to exclude or deport foreigners.²⁸²

The Chinese exclusion cases established the modern deportation regime, rooting the deportation power—and the lack of judicial review over such power—in a defense of sovereignty that remains good law today.

The tendency to take the nation-state as currently configured for granted underlies much immigration scholarship and advocacy.²⁸³ While the role of the Chinese exclusion cases is often commented on, the overlapping histories of subordination that created the current landscape deportations take place in today are often occluded, except as a historical note.²⁸⁴ Immigration scholars do cite Indian removal laws as historical antecedents to U.S. deportation laws and policies,²⁸⁵ but for the most part, the past is considered past in immigration scholarship and advocacy. Citing Carole Bateman, critical immigration scholar Leti Volpp notes that “this tendency to presume borders are fixed over time is common to political theory: ‘discussions of the legitimacy of the modern state ([which is] always taken for granted) have said nothing about the land on which

281. Volpp, *supra* note 280, at 290.

282. Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 276 (2016).

283. Volpp, *supra* note 280, at 294 (“[Immigration scholarship] unreflectively reflects the tradition of Westphalian territorial sovereignty, whereby a single sovereign controls absolutely a defined territory and its associated population.”).

284. See Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMANITIES 51, 78 (2016) (“Exclusion narratives focus too narrowly on the actions of government, tending to reify the apparent givenness of the nation-state in its current configuration, effacing the contingencies that gave rise to its creation. In turn, they often render the nation-state a relative constant through history, permanent and immovable, resistant to the creative actions and political agency of individuals and collectivities.”).

285. E.g., KANSTROOM, *supra* note 41, at 63–90 (describing the Trail of Tears as well as fugitive slave laws as the “[a]ntecedents” of American deportation policy).

the state is created.’ In immigration law, states are fixed, and people are in motion.”²⁸⁶

Indigenous scholars reveal the limits of considering states—and the histories that created them—as fixed. They urge reconsideration of U.S. sovereignty as a given, not just based on historical antecedents, but on the ongoing experience of Indigenous people. Indigenous anthropologist Audra Simpson cautions: “The cornerstones of democratic governance—consent, citizenship, rule by representation—are revealed to be precarious at best when the experiences of Indigenous peoples are brought to bear on democracy’s own promises and tenets.”²⁸⁷ Pointing to “complicated relationships to the past, to territory, and to governance,” Simpson asserts “that Indigeneity is quite simply a key to critical analysis, not as a model of an alternative theoretical project or method (as interesting and valuable as this is) but simply as a case that, when considered robustly, fundamentally interrupts what is received, what is ordered, what is supposed to be settled.”²⁸⁸ For Simpson, the ongoing survival and experience of Indigenous people in North America and their assertion of Indigenous sovereignty “call[s] up both the impermanence of state boundaries and the precarious claims to sovereignty enjoyed by liberal democracies such as the United States.”²⁸⁹ The precariousness of the United States’s claims to sovereignty, when viewed from the point of view of Indigenous people whose very survival proves an ongoing challenge to the United States’s existence, indicates cracks in the edifice of an unquestioned sovereignty as a justification for deportation.²⁹⁰

These cracks in sovereignty’s façade are acknowledged by scholars and activists who point to the complexity of attempting to resolve the status of immigrants with calls for membership on lands wrested from Indigenous

286. Volpp, *supra* note 280, at 296 (alteration in original) (quoting Carole Pateman, *The Settler Contract*, in CONTRACT & DOMINATION 35, 36 (Carol Pateman & Charles W. Mills eds., 2007)).

287. Audra Simpson, *Settlement’s Secret*, 26 CULTURAL ANTHROPOLOGY 205, 209 (2011).

288. *Id.*

289. *Id.* at 211.

290. Alyosha Goldstein, *Introduction: Toward a Genealogy of the U.S. Colonial Present*, in FORMATIONS OF UNITED STATES COLONIALISM 9–10 (Alyosha Goldstein ed., 2014) (“As Jodi Byrd points out, the ‘settler colony’s national construction of itself as an ever more perfect multicultural, multiracial democracy’ depends on relegating colonialism and slavery to the past while adamantly denying their continued significance—as the ongoing exploitation of land and resources and the racialized justification for dehumanization and expendability—as the material foundation for U.S. global empire. Thus to emphasize colonialism is to acknowledge that continental conquest and the diverse forms of unincorporation, inclusion, and partial sovereignty perpetuated by the United States remain incomplete, unsettling, unresolved, and ongoing.” (footnote omitted) (quoting JODI A. BYRD, THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM 123 (2011)).

people.²⁹¹ In *The Indigenous as Alien*, Volpp examines the liberal consensus of the United States as a “nation of immigrants,” with people from around the world choosing as individuals to migrate and pursue the American dream:

[This] obscures the nonconsensual bases of American democracy—if American is a product of free choice, there is no slavery, colonial possession, conquest, and genocide; the violent sources of the republic are recentered on the idea of voluntary choice continually reaffirmed by the figure of the immigrant consenting to membership in the regime The desiring of America eclipses the dispossession by America. This dispossession disappears, “buried underneath” the vision of America as a land of equality and liberty. The nation thus appears as an ethical community, rather than as the product of violence, or as an accident.²⁹²

Other scholars have pointed to the need to theorize the complexity of mass displacement of Indigenous peoples across the Americas, many of whom are now arriving at the U.S.-Mexico border only to face incarceration and deportation to countries with which they have contested relationships.²⁹³ As these scholars show, U.S. sovereignty, as a coherent and absolute reason to uphold the continued existence of deportation, does not survive an intellectually honest encounter with ongoing Indigenous survival and struggles for self-determination. The assertion that sovereignty extends to the control of immigration is contradicted by the refusal of the U.S. government to recognize its present failure

291. As Sherally Munshi puts it, “[i]n the past few years, scholars working across fields of [I]ndigenous studies, ethnic studies, and immigration law have begun to interrogate the relationship between the demand for inclusion issued by racialized immigrants, on the one hand, and the ongoing and unredressed violence of settler colonialism, on the other.” Munshi, *supra* note 284, at 80 n.146; *see also* Volpp, *supra* note 280, at 289 (“Immigration law, as it is taught, studied, and researched in the United States, imagines away the fact of preexisting [I]ndigenous peoples.”); Amar Bhatia, *We Are All Here to Stay? Indigeneity, Migration, and ‘Decolonizing’ the Treaty Right to Be Here*, 31 WINDSOR Y.B. ACCESS TO JUST., no. 2, 2013, at 39. (examining how migrant rights and treaty relations might interact when informed by Indigenous law and legal traditions); DUNBAR-ORTIZ, *supra* note 58 (arguing that positing the United States as a “nation of immigrants” promotes a benign narrative of progress that obscures that the country was founded in violence as a settler state, imperialist from its inception).

292. Volpp, *supra* note 280, at 321–22 (footnotes omitted) (quoting Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 434 (2005)).

293. See, e.g., Megan Ybarra, *Why Are Indigenous Children Dying at the US Border? Transnational State Violence and Indigenous Erasure in Asylum Bureaucracies*, SOC’Y & SPACE (Jan. 16, 2019), <http://societyandspace.org/2019/01/16/why-are-indigenous-children-dying-at-the-us-border-transnational-state-violence-and-indigenous-erasure-in-asylum-bureaucracies> [https://perma.cc/2VGQ-3SZT]; Megan Ybarra, “*We Are Not Ignorant?*: Transnational Migrants’ Experiences of Racialized Securitization, 37 SOC’Y & SPACE 197 (2019).

to uphold treaties with American Indian tribes that nominally granted land in the first instance.

2. Inverting the Burden: Imperial Interconnection

If and when grappling with U.S. sovereignty enters discussions about immigration enforcement policy, it is often in terms of an exhortation to consider “root causes” of migrant flows.²⁹⁴ The U.S. public is urged to consider the context for the arrival of those coming to the territory, particularly in terms of reckoning with the United States’s role in developing the conditions that led people to arrive here to begin with. This is vital work. As scholar Eddie Bruce Jones suggests, in the context of calling for a new way of teaching law:

[W]e should present refugee law, and immigration law more generally, within the broader context of global power relations in order to properly identify its limits, if we are indeed concerned with the transformative potential that decolonial thinking promises. We should do this in a way that takes historical developments into account, including and indeed especially racialized colonial relations.²⁹⁵

When viewed in light of a commitment to ending deportation, however, work to elevate the root causes of migrant flows can take on a different cast. Questioning the United States’s sovereign territoriality and historic and ongoing practice of interventions with other nations’ affairs can act as more than a call to remind the United States about its obligations to people impacted. Instead, it can undermine the very capacity of the United States to claim the right to deport anyone. In this telling, the United States is not a benevolent superpower which, in looking out for the world’s stability, sometimes contributes to refugee flows which it acknowledges and deals with humanely. Instead, the United States’s repeated and well-documented violations of the sovereignty of other nations can be wielded to dismantle the notion that U.S. sovereignty should remain sacrosanct in its expression in the practice of deportation.

International law scholar E. Tendayi Achiume has taken these root cause arguments in a new and provocative direction, providing necessary analysis that helps build toward the end of deportation by refusing to accept sovereignty as an

294. See, e.g., Bill Ong Hing, *Thinking Broadly About Immigration Reform by Addressing Root Causes*, in 1 *LEGAL BRIEFS ON IMMIGRATION REFORM FROM 25 OF THE TOP LEGAL MINDS IN THE COUNTRY* 224, 236 (Deborah Robinson & Mona Parsa eds., 2011).

295. Bruce-Jones, *supra* note 162, at 183.

excuse for the violent regulation of migratory flows.²⁹⁶ Her paradigm-shifting construction of migration as decolonization challenges the accepted relationship between migrant sending and receiving countries. Achiume reconceptualizes migration by describing decolonization as:

[T]he pursuit of a long overdue geopolitical reordering of benefits of a global order defined by interdependence forged in the colonial era. As people move across international borders fleeing or rejecting severe political-economic conditions and the fallout of these conditions, the movement of these individuals can be understood to enact an important step in the process of decolonization. If colonialism was a mandatory invitation to co-depend in a relationship characterized by asymmetric benefits, decolonization as I conceive of it here is the pursuit of a more equitable marriage between the geopolitical center and the periphery.²⁹⁷

This reconceptualization of migration—which necessarily includes a reconceptualization of deportation—represents an important departure from the sovereignty-based arguments for migration control. Achiume’s description of the “mandatory invitation to co-depend” describes not only colonial relationships, but also the current relationship of the United States to much of the world, rendering her analysis even more pertinent to the U.S. context.²⁹⁸ Achiume’s work seeks to “supplant the extant international legal fiction and logic of formally

296. E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019) [hereinafter Achiume, *Migration as Decolonization*].

297. E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization?*, 111 AM. J. INT'L. L. UNBOUND 142, 145 (2017) (emphasis omitted) [hereinafter Achiume, *Reimagining International Law*]. In another Article, Achiume summarizes her intervention:

First and Third World peoples are *not* political strangers. They are quite the opposite: Due to neocolonial interconnection, First and Third World peoples are bound in a relationship of co-sovereignty that makes Third World peoples *political insiders* to First World nation-states. Corrective distributive justice considerations give Third World migrants entitlements to national admission and inclusion in the First World. Where Third World migration is responsive to neocolonial subordination, it should be understood as decolonial insofar as it enhances political equality, even if only as a formal matter. The migration as decolonization thesis foregrounds the political agency of migrants, and presents neocolonial interconnection and subordination as the baseline from which the ethics of immigration restrictions should be assessed, and from which these restrictions should be negotiated. First World nation-states have no right to exclude Third World peoples, and creating a world that reflects this fact requires a complete reimagining of national borders and the institutions of political inclusion.

Achiume, *Migration as Decolonization*, *supra* note 296, at 1573–74.

298. Achiume, *Reimagining International Law*, *supra* note 297, at 145.

independent, autonomous nation-states (each with a right to exclude nonnationals as a matter of existential priority), with the logic and ethics of imperial interconnection (specifically, colonial and neocolonial interconnection)”²⁹⁹

In line with an abolitionist ethic, Achiume specifically reconfigures sovereignty from the point of view of displaced migrants.³⁰⁰ From the vantage point of the deportable, migration is a manifestation of a redistributive politics; every attempted move to the United States by an unauthorized migrant represents an attempt at “reordering [the] benefits” of the global order, if only for survival.³⁰¹ The apprehension and deportation of such individuals involves reinforcing the United States’s prerogative to resist the individual attempts to reorder the distribution of life chances and rebalance the asymmetrical harms of empire and colonization.

Considering challenges to deportation in light of the migration as decolonization framework “invert[s] the burden” in the Bosniak sense,³⁰² forcing the United States to justify its project of reinforcing vastly uneven relations through deportation. For those displaced migrants just arriving in the United States after their initial displacement from their countries of origin, the act of deportation is a secondary displacement. If their act of arriving in the United States can be conceptualized as part of a process of decolonization, the United States’s insistence on deporting them not only undermines their life chances because of the violence of deportation, but also reinforces the asymmetrical, neocolonial relationships between the United States and the migrants’ home countries, by forcing people whose survival in the home country is at risk (economically, politically, socially, or otherwise) to nonetheless be banished there.

Achiume’s intervention decisively destabilizes the category of sovereignty as a defense to deportation. The usual defense of sovereignty as an excuse for deportation has at its root the existential threat that noncitizens are thought to pose to the United States if the government did not have the power to exclude and deport them. By focusing on the experience of migrants and on the unequal

299. Achiume, *Migration as Decolonization*, *supra* note 296, at 1520–21 (footnote omitted).

300. *Id.* at 1569 (“The second yield is to center migrants and the political equality ambitions of their movement as capable of suggesting more ethical, and perhaps more sustainable, contours of territorial and political borders. In other words, contrary to an *a priori* stipulation of an open-borders regime between the First and Third Worlds, the call is to look to the agents, impetus, and patterns of decolonial migration as vital sources of information about border regime institutional design. Third World migrants—including unauthorized economic migrants—emerge as a vital new ‘epistemological source.’” (quoting Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987))).

301. Achiume, *Reimagining International Law*, *supra* note 297, at 145.

302. Bosniak, *supra* note 18, at 453.

relationships imposed by countries like the United States on migrant-sending countries, Achiume reveals that “to the extent Third World migrants are seen as a threat to First World nation-states, they are more properly understood as only truly threatening the continuing and illegitimate First World subordination of Third World peoples, with whom they share the neocolonial empire that remains in effect today.”³⁰³ Thus, in Achiume’s account, the supposed sovereignty threat is a long-overdue reordering of the United States’s unequal relationships of subordination with Third World countries. When viewed in this light, sovereignty as an excuse for deportation becomes much less defensible. In fact, in this telling, those who seek justice for migrants are invited to assist in sovereignty’s undoing.

3. Inverting the Burden: Slippery Borders

A separate but related claim to the limits of sovereignty in justifying deportation is the way that this argument occludes the incoherence of the United States as a territory bounded by definable borders. The perennial debate on the construction of a U.S.-Mexico border wall³⁰⁴ reinforces the sense in the public’s imaginary that there is a distinct and bounded entity, the United States of America, which can be demarcated with a physical barrier. The arguments for and against the wall debate the effectiveness of such a barrier, but there is little public debate over where the wall would be built if funded. These arguments assume there is a “there” that is the United States, and that there is a world outside U.S. borders that is not the United States.³⁰⁵ The scope of the debate is limited to whether the exercise of U.S. sovereignty requires a physical barrier, or whether the existing infrastructure along the border is a sufficient deterrent to those who seek to penetrate the United States’s clearly demarcated territory.

This view of the United States as a sovereign territory with coherent edges has been persistently challenged by scholars in fields outside immigration law. As Alyosha Goldstein points out:

303. Achiume, *Migration as Decolonization*, *supra* note 296, at 1568.

304. See, e.g., Rebecca Ballhaus & Peter Nicholas, *Trump Seeks to Reset Border-Wall Debate*, WALL ST. J. (Feb. 6, 2019, 12:02 AM), <https://www.wsj.com/articles/president-trump-state-of-the-union-2019-11549390001> [<https://perma.cc/YSZ3-GSHR>]; Jordain Carney, *GOP Bristles Over Plan to Shift Military Funding to Border Wall*, HILL (Mar. 1, 2019, 6:00 AM), <https://thehill.com/homenews/senate/432129-gop-bristles-over-plan-to-shift-military-funding-to-border-wall> [<https://perma.cc/KQ65-4Z3V>]; Glenn Thrush, *He Says ‘Wall,’ They Say ‘Border Security’: A Glossary of the Border Debate*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/us/politics/border-wall-types.html> [<https://perma.cc/82YW-GD74>].

305. See Volpp, *supra* note 280, at 294.

The United States of America has never been a uniform or unequivocal geopolitical entity. This is not merely a consequence of prevailing forms of federalism, demographic heterogeneity, or regional particularity. This is not simply a matter of an unavoidable gap between empirical description and the ideal form of the nation-state. Rather, the United States encompasses a historically variable and uneven constellation of state and local governments, [I]ndigenous nations, unincorporated territories, free associated commonwealths, protectorates, federally administered public lands, military bases, export processing zones, *colonias*, and anomalies such as the District of Columbia that do not comprehensively delineate an inside and outside of the nation-state.³⁰⁶

The incoherence of the United States's boundaries is exacerbated by the country's political interconnectedness with other nation-states, notably those with whom it shares a continent. Rather than consider the United States a discrete autonomous political community, Achiume's work suggests that scholars and policymakers consider how the brutal and ongoing initiation of other countries into the United States's political community challenges any suggestion that the boundaries of the United States coincide with its national territorial borders.³⁰⁷ The claim for strong borders—and for a deportation regime premised on the need to maintain such borders—is undermined by analyzing how the United States as a project far exceeds its traditional territorial borders.³⁰⁸

This is not to say the traditional map of the United States holds no meaning. For noncitizens, the effect of deportation could not be clearer in terms of territoriality (you are either allowed to remain on land marked U.S. soil or you are not), and as a result, much writing and advocacy on deportation remains likewise limited to discussing the process of deportation in the United States and the effects on those facing deportation and their families and communities. There is also a burgeoning literature on what happens to people after they are deported,

306. Goldstein, *supra* note 290, at 1.

307. See Achiume, *Migration as Decolonization*, *supra* note 296, at 1533.

308. Leti Volpp points to how exercises of governance outside of territorially marked borders have always been the rule, rather than the exception, leading to the “fracturing of the Westphalian model, though legal fictions.” Leti Volpp, Commentary, *Imaginings of Space in Immigration Law*, 9 LAW, CULTURE & HUMANITIES 456, 461 (2013). Citing the work of Kal Raustiala and Teemu Ruskola, Volpp points to spaces even within the traditional borders of the nation state where “the territorial sovereign’s power did not reach” (including sanctuaries and ambassador’s residences), and spaces outside the nation state where the sovereign’s power did reach (through colonial governance and extraterritorial jurisdiction). *Id.* Modern day manifestations of such exercises of governance abound, with the ongoing debates about the legitimacy of the incarceration and prosecution of Guantánamo detainees as one prominent example. *See id.* at 458.

which explores the impacts of deportation on people who have been banished to their countries of origin.³⁰⁹ These still take for granted that there is a place where deportation occurs (on U.S. territory), and there is a place where deportees go (away from U.S. territory), and that maintaining the integrity of the United States as a territory depends on the U.S. government's ability to continue to banish people outside of its territory at will.

Looking at the United States's presence in other countries quickly calls this common sense division into question. The vast amount of space the United States exercises control over (both literally and in a political sense) outside of its territories undermines the claim that deportation is necessary to maintain the integrity of U.S. territorial borders. The enormous reach of U.S. interventionism calls into question any notion of the United States as having fixed, definable borders to begin with, and undermines any claims to the integrity of such borders in every sense of the word. The notion of a bounded U.S. sovereignty is contradicted by fact that the United States's actual borders can be difficult to pinpoint, given the terms of its territorial reach across the globe. The United States currently has about eight hundred military bases in seventy countries, with about 200,000 troops stationed abroad.³¹⁰ While some of these bases are small, others constitute entire cities within the countries hosting the bases, with their own hospitals, schools, and other infrastructure, including 194 military-run golf courses outside the United States.³¹¹ At their core, these bases demonstrate an incursion into another country's sovereignty, and represent one of the most prominent indicators of the United States's exceptional relationship to the rest of the world.

Attempting a thought experiment in which the United States invites or even tolerates another country having a military base on U.S. land illuminates this exceptionalism. The disbelief that greeted Ecuador's suggestion that they open a military base in Miami in exchange for the U.S. military continuing to use an air base in that country highlights the deeply worn groove that U.S.

309. See, e.g., BETH C. CALDWELL, DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO (2019); GOLASH-BOZA, *supra* note 242; KANSTROOM, *supra* note 169.

310. David Vine, *Where in the World Is the U.S. Military?*, POLITICO MAG. (July–Aug. 2015), <https://www.politico.com/magazine/story/2015/06/us-military-bases-around-the-world-119321> [<https://perma.cc/4JYT-7YU3>]; Thomas Gibbons-Neff & Eric Schmitt, *Despite Vow to End 'Endless Wars,' Here's Where About 200,000 Troops Remain*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/world/middleeast/us-troops-deployments.html> [<https://perma.cc/W329-PMKP>].

311. Vine, *supra* note 310; AJ Vicens & Eric Wuestewald, *Green Zones: A Map of the US Military's Golf Courses*, MOTHER JONES (Jan. 16, 2014), <https://www.motherjones.com/politics/2014/01/pentagon-military-golf-courses-map> [<https://perma.cc/DP2Q-CQUK>].

exceptionalism has worn.³¹² The current global status quo involves U.S. military presence abroad going not just unchallenged, but mostly unremarked on by people who live in U.S. territory, with bipartisan support of an ever-growing military budget being the norm rather than the exception.³¹³ This status quo could instead be reframed as the United States's anomalous disregard of internationally accepted norms of sovereignty (which involve the norm of not having a military base on another country's territory). The claim of the United States as one among a group of equal sovereign nations, all of whom have the right to exclude and deport, is seriously undermined when considering the United States as an international anomaly—a superpower that wields disproportionate weight in the international arena by dint of its unmatched ability among nations to exert control backed by the threat of its deadly arsenal.³¹⁴

The lack of coherent borders to U.S. territory (and to the country's influence) undermines the claim that sovereignty justifies deportation. Likewise, the United States's outsized borders of influence are not a mere historical accident—they are continually maintained and strengthened in order to maintain advantages. “The United States nevertheless remains reliant on the ever-expanding dispossession and disavowal of [I]ndigenous peoples, global circuits of expropriated labor, economies of racialization, and its expansive network of military bases—that is, on people and places remade as things in the service of the accumulation of wealth and the exercise of geopolitical power.”³¹⁵ Thus an uncritical adoption of sovereignty as excusing deportation occludes the unjust advantages—in the form of political and economic subordination of other nations—that the United States's outsized borders create and maintain.

What's more, the maintenance of these advantages is part and parcel of a project of preemptive deportation through exclusion that exceeds the traditional boundaries of nation-state sovereignty. As Ayelet Shachar has posited, “[t]he border has broken free of the map; it may extend well beyond the edge of a territory or well into its interior.”³¹⁶ She calls for a new paradigm—the shifting border—to

312. See Phil Stewart, *Ecuador Wants Military Base in Miami*, REUTERS (Oct. 22, 2007, 7:43 AM), <https://uk.reuters.com/article/ecuador-base/ecuador-wants-military-base-in-miami-idUKADD25267520071022> [https://perma.cc/EVB2-CTR7].

313. See Ben Werner, *Pentagon to Start FY 2019 With Defense Spending Bill Signed Into Law*, USNI NEWS (Sept. 28, 2018, 6:19 PM), <https://news.usni.org/2018/09/28/36944> [https://perma.cc/974P-HZ2V].

314. See Daniel Cebul, *US Remains Top Military Spender*, SIPRI Reports, DEF. NEWS (May 2, 2018), <https://www.defensenews.com/industry/2018/05/02/us-remains-top-military-spender-sipri-reports> [https://perma.cc/6R43-ZHBB].

315. Goldstein, *supra* note 290, at 1–2.

316. Ayelet Shachar, *Beyond Open and Closed Borders: The Grand Transformation of Citizenship*, 11 JURIS. 1, 5 (2020).

describe the unmooring of state power from a fixed geographical marker. Prefiguring this theoretical move, a 2016 article in the *Journal on Migration and Human Security* defined the collection of actions the United States is taking beyond its traditional borders to prevent migrants from entering U.S. territory as the “externalization of migration controls.”³¹⁷ These actions can be taken by one state or several states acting in concert, and also enlist the services of private actors.³¹⁸ One particularly salient example of external migration control in action is the United States’s ongoing efforts to control Haitian migration. In the aftermath of the disastrous January 2010 earthquake, the U.S. Coast Guard patrolled the waters outside Haiti to ensure that Haitians could not escape the widespread crises of disease, homelessness, and food insecurity that followed the humanitarian disaster by attempting to flee to the United States.³¹⁹ A recording of Haiti’s ambassador to the United States was played over loudspeakers from a U.S. Air Force cargo plane that flew over the island, directing Haitians not to attempt to come to the United States.³²⁰ This type of activity dates back to the 1980s, when the U.S. Coast Guard apprehended 22,000 Haitians attempting to seek political asylum.³²¹ Of these 22,000, fewer than a dozen were brought to the United States to allow them to pursue asylum claims.³²²

Outside of directly engaging with Haitians to block any attempt at passage to the United States, the United States has also built up the capacity of Haiti’s nearest neighbor, the Dominican Republic (the two nations share one island), to arrest and deport Haitians.³²³ The U.S. government facilitated the initial creation of a border patrol-style agency for the government of the Dominican Republic, and the U.S. Border Patrol subsequently engaged in extensive training for the newly-created

317. Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION & HUM. SEC. 190, 193 (2016).

318. For example, people employed by international airline carriers are now mandated to provide information on passengers boarding planes to the United States. Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 15 (2014).

319. Todd Miller, *Wait—What Are US Border Patrol Agents Doing in the Dominican Republic?*, NATION (Nov. 19, 2013), <https://www.thenation.com/article/wait-what-are-us-border-patrol-agents-doing-dominican-republic> [https://perma.cc/2DE8-GHQ2] [hereinafter Miller, *Wait—What?*].

320. *Id.*

321. Frelick, Kysel & Podkul, *supra* note 317, at 199.

322. *Id.*

323. Todd Miller, *How the US Militarized the Haiti-Dominican Republic Border*, MOTHER JONES (Nov. 19, 2013), <https://www.motherjones.com/politics/2013/11/border-patrol-us-haiti-dominican-republic> [https://perma.cc/3AC7-DZUQ] [hereinafter Miller, *U.S. Militarized*]; Miller, *Wait—What?*, *supra* note 319.

Dominican border patrol agency.³²⁴ This new agency's primary target is the Haitian migrants who attempt to cross into the Dominican Republic. The Dominican Republic is just one example of the export of U.S.-benefitting migration control—between 2002 and 2013, the U.S. Border Patrol trained 15,000 foreign border officers in over one hundred countries.³²⁵

Beyond simply preventing migrants from entering the legal jurisdiction of the United States, the United States's efforts at external migration control can be viewed as part of a larger project not just of controlling migrants, but of enforcing the very divisions that mark the dividing line between the wealthy global north and the countries of the global south and their populations, what some term "global apartheid."³²⁶ The problem with the externalization of migration controls is not just that it makes it harder for deserving asylum seekers to make it to the United States to seek protection (which it undoubtedly does), but that it reinforces the notion that the part of humanity that employs migration as a survival tactic is the problem to be managed. Addressing the role of informal U.S. imperialism in creating the vast inequalities that feed migrant flows is ignored in favor of an approach that interdicts those that do attempt to survive their subordination by migrating. The fact that countries of the global south host 80 percent of the world's refugees highlights the success the United States and other countries of the global north have had in keeping displacement—that they often had a direct hand in creating—far from their shores, all in the name of sovereignty.³²⁷

From the point of view of those who are dominated and marginalized, the United States is experienced as exclusion, no matter what promise it holds as a rhetorical beacon of democracy. For most of the people of the world, including the majority of residents of the global south, exclusion and deportability defines their relationship to the United States. This is not to say that the rest of the world exists in relationship to the United States, but rather that U.S. imperialism forces a relationship with much of the world—whether in the form of military bases, the military incursions these bases support, or the export of criminal and immigration policy,³²⁸ to say nothing of the United States's coercive economic relations with other nations. That relationship is not one that welcomes the people of most of the world as potential citizens of the United States, or even potential visitors, but rather as deportable subjects the United States must surround and control even

324. Miller, *U.S. Militarized*, *supra* note 323; Miller, *Wait—What?*, *supra* note 319.

325. Miller, *Wait—What?*, *supra* note 319.

326. E.g., GOLASH-BOZA, *supra* note 242, at 261.

327. SASSEN, *supra* note 266, at 61.

328. See generally Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL'Y REV. 83 (2010).

before they attempt passage to U.S. territory. Bosniak writes that her critical approach to citizenship is motivated “less by liberal universalism than by an ethical desire to combat domination and marginalization wherever they occur.”³²⁹ Most scholars and advocates who critique twenty-first century deportation policy would likely identify their work as in line with combatting domination and marginalization. Yet until scholars and advocates fully embrace the task of challenging sovereignty as a cover story for legitimating deportation and exclusion, deportation as an exercise of subordination of marginalized people will remain undisturbed.

Even those who are willing to question sovereignty’s limitations as a justification for deportation might be unwilling to question the promise of liberal nationalism. As Michael Walzer and others have argued, hardened borders (and, thus, deportations) are necessary not only to define the polity (they are what create the “we”), but also to allow for liberal values and rights within the state.³³⁰ In this view, the liberal state is the “ultimate embodiment of the values that enable and guarantee equality.”³³¹ The embrace of liberal nationalism is what allows many scholars and advocates to be pro-migrant but not necessarily anti-deportation. The logic of liberal nationalism presumes the violence of deportation is an acceptable and inevitable sacrifice to maintain a coherent national community that can protect those who maintain membership. Theorizing deportation abolition requires challenging the promises of liberal nationalism, and of membership and belonging.

Those challenges have already been taken up in other contexts, and include arguments that a person’s place of birth should be treated as morally irrelevant as a feature for differentiating between persons.³³² Another challenge has come from the work of Ayelet Shachar, who posits a “shifting-border” framework to describe the ways in which “the long arm of the state to regulate mobility” extends “half a world away while also stretching deep into the interior,” thus destabilizing the “familiar dichotomous categorization of a ‘soft’ inside (where rights are extensively

329. Bosniak, *supra* note 18, at 502.

330. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 29–32 (1983). For Walzer, membership is “the most important good,” which defines access to all other goods and should be distributed by those who are already members. *Id.* at 29; *see also* Bosniak, *supra* note 18, at 502 (“Many liberal nationalists, for example, argue that a high degree of solidarity among members of a national community is a necessary precondition for the kinds of redistributive policies in the advanced capitalist countries that liberals usually support.”).

331. REDDY, *supra* note 231, at 8.

332. Martha C. Nussbaum, *Reply*, in FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 131, 133 (Joshua Cohen ed., 1996).

protected) and a ‘hard’ outside (where protections typically do not apply).³³³ On a related note, Bosniak has argued that the costs of granting rights and privileges to members depends “upon the policing of territorial boundaries against outsiders far more desperately needy than those who are able to enjoy” the benefits of insider status.³³⁴ Her arguments dovetail with Achiume’s, in calling attention to the way that the benefits of membership provided by wealthy nations like the United States require enormous economic resources that are “amassed at the expense of nationals of former colonies and less developed countries.”³³⁵ Along the same lines, Soya Jung argues against “belonging” as the ultimate goal, stating that “[t]he failures of capitalism and modern liberal democracy stem from their reliance on belonging as the basis for differential valuations of human life.”³³⁶

When viewed from the point of view of the deportable, demands for inclusion or membership are likely to fail. For this population, the move most aligned with their survival would be to challenge the legitimacy of a nation-state committed to ongoing violence against nonmembers to secure freedoms for its members. That challenge could take many forms, and will require not a renewed commitment to inclusion for some at the cost of permanent banishment for others, but rather a replacement for the rivalries of membership, a shift in how we relate to each other.³³⁷ A politics of deportation embraces this shift. As

333. Shachar, *supra* note 35, at 217–18.

334. Bosniak, *supra* note 18, at 502.

335. *Id.*

336. Jung, *supra* note 212, at 52.

337. Soya Jung’s formulation informs this argument:

Antiracist struggle requires not a reshuffling of categories but a replacement for the rivalries of capitalism, a new common sense and practice for how we live on this earth.

....

I believe that the transformative potential we need lies in the growing global ranks of the dispossessed, who are not all the same and are not all experiencing the same things, but who are prey to the outcomes of an economic system that so few of us understand. This has always been true, but it has reached a different scale and pace.

This is where a new kind of human identity can emerge, not from an invitation to join the hegemon, not at the doorstep of the living. It will emerge from the knowledge among the dispossessed that I am not you, and you are not me, and that this is only a problem if our differences result in consequentially different life outcomes and if they determine the ability of one of us to eat, to live free of violence, to have adequate shelter, to form intimate human relationships, to be healthy, and to imagine and create. The truth is that we need one another to do these things.

Id. at 55, 62–63.

discussed in the next Part, it seeks at once to dismantle and remake the conditions of deportability that give rise to the immigration enforcement system.³³⁸

IV. ENDING DEPORTATION IN PRACTICE

The full embrace of the common sense of deportation by the majority of pro-immigrant lawyers, advocates, and academics means that even as the violence inherent to deportation reaches new heights, responses to this crisis remain restricted to mitigating deportation's harm to individual noncitizens. The common sense of deportation—the idea that deportation is an inevitable and necessary practice of immigration enforcement—creates this trap for pro-immigrant advocacy efforts. In an effort to address the crisis of mass deportation, and in the absence of being able or willing to argue against deportation itself, pro-immigrant forces are instead limited to arguing that deportation is being maldistributed—that there is a contradiction between what the rule of law requires, what due process requires, and the way that deportation is currently being meted out. Resolving this contradiction thus establishes the limits of pro-immigrant efforts.

Attempts to resolve this contradiction take various forms. Some focus on arguing for procedural protections, seeking to resolve the contradiction by making sure those deported to a premature death only suffer such a fate after receiving the most robust procedures available. Advocacy for universal representation of those facing deportation proceedings falls in this category.³³⁹ Some focus on the substantive remedies available within immigration law, seeking to resolve the contradiction by proposing reforms to the immigration statute that would provide expanded routes to lawful status to avoid deportation. Advocacy for expanded forms of asylum relief, or for granting greater discretion to immigration judges, prosecutors, and others to consider the equities in an individual's case, fall in this

338. Cf. BRETT STORY, PRISON LAND: MAPPING CARCERAL POWER ACROSS NEOLIBERAL AMERICA 22 (2019) ("An abolitionist politic is, at its core, transformative, seeking to remake the social relations and power inequities that give rise to the prison system and for which the prison system does work.").

339. See, e.g., Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 HUM. RTS., no. 4, 2013, at 14, 14 (arguing that immigrants in removal proceedings should be entitled to counsel because of the fundamental unfairness that faces unrepresented immigration defendants, and that the due process rights of noncitizens today are less robust than those of criminal defendants pre-Gideon); Johnson, *supra* note 230 (arguing that there should be a right to counsel in deportation proceedings for lawful permanent residents because the proceedings implicate life and liberty interests similar in kind to those at stake in criminal prosecutions).

bucket.³⁴⁰ Some focus on the form of the immigration court itself, seeking, for example, to transform the decisionmakers into judges ruled by Article I or III of the U.S. Constitution, rather than decisionmakers employed at the will of the attorney general of the United States.³⁴¹

What these efforts have in common is an inability to question “[t]he legitimate limits of deportation.”³⁴² When considered through these reforms, deportation is illegitimate because it is happening without the proper procedure, or without the proper escape mechanisms, or in the wrong type of courtroom. Reformers share a concern that the integrity of the immigration system is at risk. The legitimacy of deportation as a practice of immigration enforcement is taken as a given, and it is simply the form it takes that is the problem. This concern about legitimacy and integrity is ultimately a concern about reconciling the United States’s idea about itself as a nation of immigrants committed to the rule of law with the reality of deportation’s inevitable and irremediable violence.³⁴³ The belief in the ability of the rule of law and application of the Constitution to temper the harms of deportation runs through these efforts to address deportation.

The process of attempting to resolve the contradiction between the violence of deportation and a nation governed by the rule of law leads us away from the necessary task of questioning deportability itself.³⁴⁴ The preceding Parts have

340. See, e.g., Wadhia, *supra* note 130, at 3 (discussing expedited removal, reinstatement of removal, and administrative removal through the lens of prosecutorial discretion, and suggesting that “the government has discretion to give individuals who present compelling equities, including eligibility for relief, a more complete court proceeding before an immigration judge”); Hing, *supra* note 230; Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637 (2012); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012).

341. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010) (proposing the creation of an Article III immigration court, and discussing proposals for an Article I immigration court).

342. KANSTROOM, *supra* note 169, at 226.

343. See MARC R. ROSENBLUM, DORIS MEISSNER, CLAIRE BERGERON & FAYE HIPSMAN, MIGRATION POL’Y INST., THE DEPORTATION DILEMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT 1–2 (2014), <https://www.migrationpolicy.org/sites/default/files/publications/RemovalsOverview-WEBFINAL.pdf> [https://perma.cc/48FY-2KCB].

344. Others have noted this contradiction, and labeled it the “deportation dilemma”—that is, the challenge of how to reconcile enforcement that is both tough and humane. *Id.* at 2. This Article stakes out different normative ground, asserting that the contradiction, or dilemma, cannot be resolved, but rather, that deportation should be ended altogether. Hiroshi Motomura has labeled the contradiction “the most basic dilemma of immigration and citizenship law in American political culture—or in any liberal democratic society organized as a nation.” Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 363 (2012).

introduced critiques that destabilize deportation and lay the groundwork for deportation abolition. This Part proposes a framework to guide deportation abolition strategy, and to distinguish between proposals that try to resolve the contradiction and those that actually challenge deportability.

While they may take many different forms, efforts to abolish deportation share some normative commitments. Their end goal is to target one or more of the conditions producing deportability. Their demands are collective, rather than individual (even as they engage in fights on individual cases). They understand state power (and thus, the power to deport) as an ensemble of structures, rather than something held by one group to be seized by another, and engage accordingly with public actors at all levels of governance, as well as private actors. Finally, the politics underlying deportation abolition efforts are based on the refusal of social value (the refusal to assign value to a person's life based on their potential social contributions in any sphere).³⁴⁵

Efforts in line with a commitment to deportation abolition reorient allegiance toward the populations traditionally disavowed by law and away from an unquestioning attachment to the abstraction of the rule of law. While the politics challenging liberal nationalism may be far from mainstream, they nevertheless inform interventions that prefigure the end of deportation. These interventions redirect advocacy efforts toward those for whom a relationship to the United States is defined by their deportability. This requires having an allegiance toward those already living on U.S. territory (from recent arrivals to longtime lawful permanent residents), those on their way (including those apprehended by Mexican security forces and other U.S.-funded and trained border forces before ever entering the United States), and those yet to come (including those whose displacement has not yet occurred). It is an allegiance that refuses geographic and temporal boundaries.

Part of opening the door to the end of deportation is having a practice of discerning, in the present time, whether a proposed reform or existing practice aligns with a politics of deportation abolition. The task of discerning which efforts bring us closer to deportation abolition can take a page from efforts to abolish prisons, where distinguishing between reforms that further entrench the carceral landscape and nonreformist reforms—"those measures that reduce the power of

345. See LISA MARIE CACHO, *SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED* 33 (2012).

an oppressive system while illuminating the system's inability to solve the crises it creates"—is key.³⁴⁶ One set of discerning questions could include:

1. Does the effort/reform/practice take deportation's indefinite continuation for granted?
2. Does it help build the infrastructure for managing continued deportation?
3. Does it seek to dismantle a condition of deportability? In other words, does it attack any of the underlying reasons that people become targets of the immigration enforcement apparatus to begin with, or any of the structures of the immigration enforcement apparatus itself?³⁴⁷

In this formulation, a wide set of practices could be considered in line with deportation abolition. Some will appear directly linked to immigration enforcement (such as efforts at shutting down or preventing the construction of new immigration detention centers³⁴⁸ or targeting tech companies that contract with ICE and CBP).³⁴⁹ Some may appear, at least at first glance, to have a more tenuous nexus (such as the effort to delete gang databases described below). Sometimes the efforts will involve simply holding the line—not adding more grounds for criminalizing immigrants to an immigration statute already bloated with reasons to detain and deport, or calling to reverse existing laws that facilitate deportation.³⁵⁰

346. Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN MAG. (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [https://perma.cc/49JF-TC6X].

347. For an argument that a similar set of discerning questions are necessary when considering comprehensive immigration reform proposals, see generally Cházaro, *supra* note 232. For a related set of criteria to assess whether a reform is in line with abolition, see Shiu-Ming Cheer, *Abolitionist Reforms and the Immigrants' Rights Movement*, 68 UCLA L. REV. DISCOURSE (2020), <https://www.uclalawreview.org/abolitionist-reforms-and-the-immigrants-rights-movement> [https://perma.cc/3LBY-LJQN]. See also DET. WATCH NETWORK, ENDING IMMIGRATION DETENTION: ABOLITIONIST STEPS VS. REFORMIST REFORM, https://www.detentionwatchnetwork.org/sites/default/files/DWN_Abolition%20vs%20Reform_ENG_2021_0.pdf [https://perma.cc/FTA9-QVTT] (delineating criteria for distinguishing between abolitionist and non-abolitionist reforms as related to immigration detention).

348. See, e.g., #CommunitiesNotCages, DET. WATCH NETWORK, <https://web.archive.org/web/20191114215018/https://www.detentionwatchnetwork.org/take-action/communitiesnotcages> [https://perma.cc/8YL8-JUGQ] (last visited Nov. 14, 2019); *Why Shut Down? FAQ's*, LA RESISTENCIA (Feb. 1, 2020), <http://laresistencianw.org/why-shut-down-faqs> [https://perma.cc/5KFW-SJYR].

349. #NOTECHFORICE, <https://notechforice.com> [https://perma.cc/A9YQ-A3JR] (last visited Jan. 9, 2022).

350. See IMMIGRANT JUST. NETWORK ET AL., A NEW WAY FORWARD FOR IMMIGRANT JUSTICE: DISMANTLE THE 1996 IMMIGRATION CRIMINALIZATION LAWS (2019), <https://www.ilrc.org/>

Some might argue that on the heels of the spectacular anti-immigrant violence of the Trump administration, now is the time to reinforce the rule of law and constitutional norms both in the immigration realm and beyond.³⁵¹ This would mean losing a valuable opportunity. The exposed violence of deportation provides an opening to question the limits of managing deportation and to consider what it might mean to reject deportation—and its necessary corollary, deportability—altogether. The purpose of this Part, as it is with this entire project, is to lay the groundwork for imagining ourselves out of the common sense of deportation. Pointing to the ways the common sense of deportation shapes—and dangerously limits—reform proposals from pro-immigrant scholars and advocates is a necessary part of that project. Pointing to efforts that defy the common sense of deportation and embrace the possibility of deportation abolition is likewise necessary. Ignoring this task means resigning ourselves to reforms which, at best, merely manage deportation, and at worst, actually reinforce deportability by hardening its edges. In order to illustrate the end of deportation in practice, the analysis below contrasts a law reform proposal that presumes indefinite deportation (injecting proportionality considerations into deportation adjudication) with one in line with ending deportation (dismantling gang databases).

A. Case Study 1: Proportionality Reforms

Immigration scholars and advocates have approached the question of injecting proportionality through distinct lenses, but they have in common a commitment to decreasing deportation by mandating that a government

sites/default/files/resources/2019.06_ilrc_new_way_forward.pdf [<https://perma.cc/VV4E-TB4V>].

351. See, e.g., *ACS Open Sign-On Letter Galvanizes Legal Community to Protect Mueller Investigation*, AM. CONST. SOC'Y, (Nov. 9, 2018), https://www.acslaw.org/press_release/acs-open-sign-on-letter-galvanizes-legal-community-to-protect-mueller-investigation [<https://perma.cc/YHB7-WPGR>]; Liam Brennan, *Trump's Disrespect for the Rule of Law Spreads*, JUST SEC. (Sept. 10, 2018), <https://www.justsecurity.org/60663/trumps-disrespect-rule-of-law-spreads> [<https://perma.cc/PJ8K-PZF4>]; Annie Correal, *Why Big Law Is Taking on Trump Over Immigration*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/nyregion/president-trump-immigration-law-firms.html> [<https://perma.cc/YPG5-GLFC>]; Shikha Dalmia, Opinion, *Trump's Asylum Order Is a Dastardly Assault on the Rule of Law*, WEEK (Nov. 12, 2018), <https://theweek.com/articles/806663/trumps-asylum-order-dastardly-assault-rule-of-law> [<https://perma.cc/G3VN-4J9G>]; Jennifer Rubin, Opinion, *Another Win for the Rule of Law and for Refugees*, WASH. POST (Dec. 20, 2018), <https://www.washingtonpost.com/opinions/2018/12/20/another-win-rule-law-refugees> [<https://perma.cc/5NMJ-MBBR>].

decisionmaker consider an individual immigrant's circumstances. In the immigration context, proportionality references "a constraint on power that mandates consideration of certain extraneous factors in order to justify removal."³⁵² It relates to the use of proportionality in criminal law, and to the idea that a sanction's severity should not exceed the gravity of an offense.³⁵³

For Juliet Stumpf, proportionality as applied to deportation means creating a graduated system of penalties for noncitizens up to and including deportation.³⁵⁴ In this system, Stumpf admits, deportation may be required when a serious crime is committed by a noncitizen with few ties to the United States.³⁵⁵ Michael Wishnie finds proportionality review to be "not merely advisable," as proposed by Stumpf, but constitutionally mandated, given deportation's punitive nature.³⁵⁶ Wishnie imagines that such an intervention will only infrequently result in invalidation of a removal order, and should be reserved for the "rare case where the punishment of the removal order is grossly disproportionate to the underlying misconduct."³⁵⁷ Thus, most noncitizens would still face deportation, but their deportations would hew to the constitutional requirement for proportionality review. Other immigration scholars focus on specific populations of immigrants when considering the applicability of proportionality. Angela Banks argues for proportionality review based on recognizing successful integration into the United States, making well-integrated lawful permanent residents more difficult to deport, and focusing deportation on cases when it is a "proportionate response to criminal activity."³⁵⁸

Embracing the possibility of deportation abolition offers a different interpretation of the injection of proportionality review as a necessary or even desirable pursuit in the deportation reform arena. One central premise of the justification for proportionality reforms is that every individual should have access to an adjudication of their particular circumstances, and that a decisionmaker should meaningfully adjudicate the individual's right to remain on U.S. soil based on reasoning grounded in the actual facts of person's case. But proportionality, by grounding a person's ability to remain in the United

352. Kanstroom, *supra* note 6, at 482.

353. Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416 (2012).

354. Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1689 (2009).

355. *Id.* at 1736.

356. Wishnie, *supra* note 353, at 417 n.19.

357. *Id.* at 418 (emphasis added).

358. Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1246 (2013).

States on an individualized determination by U.S. courts, individualizes review. By individualizing review, while at the same time imbuing that review with the legitimacy that comes from having proportionality norms rule the day, negative outcomes for immigrants—that is, deportations—are naturalized.³⁵⁹ In a system that fully applies proportionality review (ideally with counsel present to argue on behalf of immigrants), anyone being deported must clearly deserve such an outcome, and having had their fair chance at remaining in the United States, should be willing to accept deportation. In this world, those who resist these adjudications by not leaving the United States, or by being deported and returning to the United States, should be candidates for repudiation and abandonment, as they were found undeserving of remaining in the United States, were ordered deported with appropriate safeguards for efficient use of government resources and the rule of law, and nonetheless are resisting the fair outcome.³⁶⁰

Proportionality reforms end up valuing the violent sorting of migrant life by endorsing the continuation of immigration adjudications on the basis of a person's supposed equities. These equities, and the way they are deployed, may vary on the basis of the relief sought. But they all have in common the U.S. government's role in dividing the deportable into those who are worthy of being saved and those who can be discarded or exiled.³⁶¹ The reason for any given individual triggering deportability will depend on a multitude of factors, but ultimately, the current practices of immigration enforcement mean that, in the words of Nicholas De Genova, “[i]n deportation, the whole totalizing regime of citizenship and alienage, belonging and deportability, entitlement and rightlessness, is deployed against

- 359. Proponents of the right to counsel, for example, make claims about the value of a deportation process that ends in deportation but includes an attorney. *See, e.g.*, César Cuauhtémoc García Hernández, *Funding Lawyers for Immigrants Is a Path Forward in the Age of Trump*, HUFFPOST (Apr. 19, 2017), https://www.huffingtonpost.com/entry/_funding-lawyers-for-immigrants-is-a-path-forward-in_us_58ee61a4e4b0a3bddd60a637 [<https://perma.cc/4UK9-TQ86>] (“To the immigrant with no chance of staying in the United States, a cold dose of reality can dispel lingering hopes and encourage agreeing to deportation.”).
- 360. Arguments for the right to counsel premised on upholding the purported legitimacy of the immigration system also bolster this line of thinking. *See, e.g.*, Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2307 (2013).
- 361. One article argues for legal counsel for those facing deportation by pointing to the relatively low number of cases heard by the immigration courts each year, coupled with the fact that “many may need only fairly perfunctory representation that does not involve a great expenditure of legal resources.” Guttentag & Arulanantham, *supra* note 339, at 16. The low expenditure of legal resources comes from the fact that many immigrants have no route to avoiding deportation, and thus attorneys would be doing nothing more than helping the court process their clients for deportation.

particular persons in a manner that is, in the immediate practical application, irreducibly if not irreversibly individualizing.”³⁶²

This may just seem like more common sense. Individuals face deportation, individuals should be adjudicated, individuals will hopefully find a way out of the dilemma. This view hides the way that deportation itself is taken for granted in this individualizing regime. The fight for proportionality, alongside the fight for access to counsel, is the fight to get one lawyer for one person to present positive equities (over and over again), not to challenge deportability itself. Fighting individual deportations using the language of proportionality ultimately makes a statement that this particular person should not be subject to these laws, but that the laws themselves—and by extension, the values underlying the laws—are the right ones.

The values assumed by proportionality are particularly helpful to unpack to understand the limits of the common sense of deportation. To apply proportionality to individual cases means that immigration enforcement officers are invited to construct a mythical immigrant deserving of avoiding deportation, and then to measure people’s lives against this mythical immigrant. As presented in the U.S. imaginary, this deserving immigrant is “hard-working,”³⁶³ has gotten by without using any public benefits for themselves or their children,³⁶⁴ has managed to avoid all law enforcement contact,³⁶⁵ is married and has children, preferably U.S.-born ones,³⁶⁶ and preferably not so many as to raise concern.³⁶⁷ Proportionality reforms require lawyers to be able to present arguments, on behalf of the hundreds of thousands who face deportation, for how each individual deportable person falls more closely in line with the mythical deserving immigrant

362. Nicholas De Genova, *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, in THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT 33, 34–35 (Nicholas De Genova & Nathalie Peutz eds., 2010).

363. Cházaro, *supra* note 232, at 382–84.

364. See generally Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995).

365. See Cházaro, *supra* note 232, at 377–82.

366. See Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf’t (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/6E8W-JGTQ>] (urging the use of prosecutorial discretion for persons with a U.S. citizen child); see also 8 U.S.C. § 1229b(b)(1)(D) (providing that the attorney general may cancel removal if the undocumented person establishes “that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence”).

367. See generally Leo R. Chavez, “Illegality” Across Generations: Public Discourse and the Children of Undocumented Immigrants, in CONSTRUCTING IMMIGRANT “ILLEGALITY”: CRITIQUES, EXPERIENCES, AND RESPONSES 84 (Cecilia Menjívar & Daniel Kanstroom eds., 2014) (discussing the threat of Mexican fertility to American society).

than with the underserving “criminal alien” who presents a threat to the United States and should be deported.

Making these arguments, individually, over and over again, means that the role that race and other vectors of social vulnerability play in determining who ends up in removal proceedings is obfuscated. This is tied to the assumptions around shared values—many of the proposed reforms seem to assume that the positive equities any particular immigrant might have will outweigh the negative aspects in their case (usually their criminal record), without any discussion of how the criminal record itself is of questionable value, and how the perfect storm of racial identity, illegality, and the resulting profiling might have landed a person in removal proceedings to begin with. The devaluation of the “criminal alien” forms the necessary backdrop to proportionality reforms: If judges should consider someone’s value, then they must consider that value against someone else’s value—someone else whose banishment is the prerequisite for proportionality being applied.³⁶⁸ When applying a deportation abolition lens, such a judgment is indefensible. Hewing to deportation abolition means acknowledging that there can never be a proportionate deportation, and thus focusing instead on dismantling the conditions that produce deportability. The task becomes to attack the general system through which deportation proceeds, rather than calling for greater attention to immigrant deservingness.³⁶⁹

B. Case Study 2: Erase the Database

An immigrant-led campaign in Chicago to dismantle a gang database provides a useful analytical contrast to the efforts to inject proportionality review into deportation proceedings.³⁷⁰ Those who would benefit from the dismantling of the gang database—presumed gang members—are precisely those who would be least likely to benefit from proportionality reforms. Local law enforcement

368. See CACHO, *supra* note 345, at 33.

369. Exploring the current deportation regime’s obsession with the distinction between “innocent” victims and those who deserve deportation, Harsha Walia notes “[i]nnocence is a limiting political stance since criminality, like illegality, is a political construction. Criminality is made through shifting definitions of crime and policed as a race-making and property-protecting regime. Gilmore thus informs us that our political task is not to prove innocence, but ‘to attack the general system through which criminalization proceeds.’” WALIA, *supra* note 36, at 83.

370. *About Erase the Database*, ERASE DATABASE, <http://erasethedatabase.com/about> [<https://perma.cc/P397-E96V>] (last visited Jan. 9, 2022); April Lane, *Know Your Movements: The #EraseTheDatabase Campaign*, S. SIDE WKLY. (Oct. 16, 2018), <https://southsideweekly.com/know-your-movements-the-erasethedatabase-campaign-gang-database> [<https://perma.cc/63DM-EWK3>].

agencies defend the gang databases as a necessary tool for tracking people marked as “gang members,” in theory for the purposes of increasing public safety.³⁷¹ Federal immigration enforcement agencies rely on the designations in these databases to identify noncitizens to deport, to provide a reason for deportation, and to provide grounds for denying relief from deportation to those apprehended.³⁷² Underlying the reliance by both local and federal law enforcement on gang databases is the idea that such tools offer a more efficient way of arresting, incarcerating, and ultimately deporting undesirable people.³⁷³

The “Erase the Database” campaign is a collaboration between immigrant-led and Black-led grassroots organizations. The campaign has engaged in a variety of tactics to achieve its goal of eliminating the Chicago gang database.³⁷⁴ The campaign coalition emerged following the 2016 election of Donald Trump, in part as a response to Chicago’s claim that it was a “sanctuary city,” while maintaining carve-outs in its “Welcoming City” ordinance that excluded alleged gang members from protection from deportation.³⁷⁵ Immigrant

371. *E.g., Chicago Police Department Defends Use of Watch List*, AP NEWS (May 16, 2017), <https://www.apnews.com/bc64e72be20a48c7aa3a98a81084a41f> [https://perma.cc/ 7GB6-3Q7N]; Annie Sweeney & Paige Fry, *Nearly 33,000 Juveniles Arrested Over Last Two Decades Labeled as Gang Members by Chicago Police*, CHI. TRIB. (Aug. 9, 2018, 5:00 AM), <https://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-gang-database-juveniles-20180725-story.html> [https://perma.cc/ T7BN-L2AP].

372. LAILA L. HЛАSS & RACHEL PRANDINI, IMMIGRANT LEGAL RSCH. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS 4–5 (2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf [https://perma.cc/D3JM-NM9Z]; *see also* SEAN GARCIA-LEYS, MEIGAN THOMPSON & CHRISTYN RICHARDSON, MISLABLED: ALLEGATIONS OF GANG MEMBERSHIP AND THEIR IMMIGRATION CONSEQUENCES (2016), https://www.law.uci.edu/_academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf [https://perma.cc/W3QV-UFHV].

373. *See* Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. UNIV. L. REV. 697, 705–07 (2018).

374. The “Erase the Database” campaign is led by Organized Communities Against Deportation (OCAD), Black Youth Project 100 (BYP100), and Mijente. *About Erase the Database*, *supra* note 370. OCAD is an undocumented-led group that organizes against the deportation and criminalization of Black, Brown and immigrant communities in Chicago and surrounding areas. *About Us*, ORGANIZED CMTYS. AGAINST DEPORTATIONS, <https://organizedcommunities.org/about> [https://perma.cc/ S9H2-JJZV] (last visited Jan. 9, 2022). BYP100 is a member-based organization of Black eighteen to thirty-five year old activists, dedicated to creating justice and freedom for all Black people. *About BYP100*, BYP100, https://www.byp100.org/_about [https://perma.cc/3W5T-A7UW] (last visited Jan. 9, 2022). Mijente is a national political home for Latinx and Chicanx grassroots organizing that comes out of the “#Not1More” campaign. *See supra* notes 20–21 and accompanying text.

375. Lane, *supra* note 370. Carlos Ramirez-Rosa & Xanat Sobrevilla, Opinion, *How Undocumented Chicagoans are Ensuring a True Sanctuary City*, S. SIDE WKLY (Feb. 23,

organizers sought to redefine sanctuary under the Trump regime as requiring “cities to dismantle the current policing apparatus that acts as a funnel to mass incarceration and the deportation machine,” and challenging the gang database became a way to operationalize the demand to expand sanctuary.³⁷⁶

“Erase the Database” has successfully waged a public education and advocacy campaign that reveals the existence and broad-ranging effects of the gang database.³⁷⁷ By partnering with university-based researchers, the campaign has revealed the database to be highly racialized—it is primarily a list of Black and Latinx men. Of the 128,000 adults in the Chicago Police Department’s database, 70 percent are Black and 25 percent are Latinx.³⁷⁸ Children and elders are also disproportionately represented on the list. Those on the list face dire consequences due to their inclusion on the database, ranging from deportation, denial of employment and housing, denial of bond in both criminal and immigration court, and harsher sentences.³⁷⁹

The criteria for inclusion on the database remain murky.³⁸⁰ There is no process for being informed that one has been placed on the database, and no process for being deleted from it.³⁸¹ Partnering with movement lawyers, the campaign filed a class-action lawsuit challenging the Chicago Police Department’s unconstitutional policies and practices related to the gang database.³⁸² The fight

2021), <https://southsideweekly.com/op-ed-how-undocumented-chicagoans-are-ensuring-a-true-sanctuary-city> [https://perma.cc/8GKY-7QGW].

376. TANIA A. UNZUETA, MIJENTE, EXPANDING SANCTUARY: WHAT MAKES A CITY A SANCTUARY NOW? 1 (2017), <https://www.ctulocal1.org/wp-content/uploads/2018/09/2017-01-30-sanctuary-expanded-final.pdf> [https://perma.cc/7NWY-GVT2].
377. *See generally* UIC POLICING IN CHI. RSCH. GRP., EXPANSIVE AND FOCUSED SURVEILLANCE: NEW FINDINGS ON CHICAGO’S GANG DATABASE (2018), http://erasethedatabase.com/wp-content/uploads/2018/07/Expansive-and-Focused-Surveillance-June-2018_final.pdf [https://perma.cc/8R98-E3GE] [hereinafter EXPANSIVE AND FOCUSED]; JANAÉ BONSU & ANDY CLARNO, UIC POLICING IN CHI. RSCH. GRP., TRACKED AND TARGETED: EARLY FINDINGS ON CHICAGO’S GANG DATABASE (2018), <http://erasethedatabase.com/wp-content/uploads/2018/02/Tracked-Targeted-0217-r.pdf> [https://perma.cc/BBY4-UFLN] [hereinafter TRACKED AND TARGETED]. The UIC Policing in Chicago Research Group is a collaboration between academics, researchers, and social movement organizations who are part of the “Erase the Database” campaign.
378. EXPANSIVE AND FOCUSED, *supra* note 377, at 1.
379. TRACKED AND TARGETED, *supra* note 377, at 10.
380. *See* Annie Sweeney, *Lawsuit Alleges Chicago Police Department’s Massive Gang Database Discriminatory, Inaccurate*, CHI. TRIB. (June 20, 2018, 5:45 AM), <https://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-gang-database-lawsuit-20180619-story.html> [https://perma.cc/R2P2-QQSA].
381. TRACKED AND TARGETED, *supra* note 377, at 9.
382. Sweeney, *supra* note 380; Tania Unzueta, *Community-Driven Federal Class Action Lawsuit & Report Targets Chicago Police’s Inaccurate, Racially Discriminatory Gang Database*, ERASE DATABASE (June 19, 2018), <http://erasethedatabase.com/2018/06/19/community-driven-federal-class-action-lawsuit-report-targets-chicago->

extended successfully to Cook County, where the Cook County Board of Commissioners approved an ordinance in February 2019 to prohibit the Cook County sheriff from using or sharing the Cook County database, and eventually requiring it to destroy the database.³⁸³

The campaign and its tactics map neatly onto the normative commitments of deportation abolition. By attempting to eliminate a list primarily composed of criminalized men of color, it targets one of the primary conditions producing deportability.³⁸⁴ While the campaign has focused on individual cases to highlight the injustices of the database, the demands generated are collective ones.³⁸⁵ In seeking to dismantle one of the pipelines to deportation, the campaign looks beyond targeting the federal immigration enforcement agencies, and focuses on local city and county council members, the Chicago Police Department, the Cook County sheriff, and the Chicago mayor. The campaign has avoided pushing a narrative of opposing the database on the basis of innocent Chicagoans being included in it, a move which would open the door to the undeserving remaining on a perfected database, and the deserving being removed. Instead, members of the campaign have pushed for its elimination as a tool of racial subordination rather than its improved management.

While focusing on local decisionmakers, the campaign to eliminate the gang databases takes place in the context of the work the immigration agencies have done in the past three decades to enable the tracking of all immigrants. Anil Kalhan unmasked this process in his article *Immigration Surveillance*, highlighting different ways the immigration-related government agencies are now gathering information about every noncitizen possible, as well as U.S. citizens who leave and reenter the territorial United States, creating what Kalhan terms an “immigration surveillance state.”³⁸⁶ This approach to governance involves enabling and routinizing “the collection, storage, aggregation, processing, and

polices-inaccurate-racially-discriminatory-gang-database [https://perma.cc/ V9GT-ZWN9].

383. Mick Dumke, *Cook County Takes Steps to Erase Its Regional Gang Database*, PROPUBLICA (Feb. 21, 2019), <https://www.propublica.org/article/cook-county-sheriffs-office-database-new-ban-law> [https://perma.cc/4YMA-UQSJ].
384. See Sharpless, *supra* note 222, at 731. The decision to focus on a database primarily targeting Black men and to partner with a Black-led racial justice organization reveals the “Erase the Database” campaign as building from an understanding that “immigrant justice is inexorably linked to the racial justice movement to dismantle the carceral state.” *Id.*
385. See, e.g., *City of Chicago Admits Error in Immigrant Father’s Inclusion in Gang Database*, ORGANIZED CMTYS. AGAINST DEPORTATIONS (Dec. 6, 2017), <https://web.archive.org/web/20181127074138/http://organizedcommunities.org/city-of-chicago-admits-error-in-immigrant-fathers-inclusion-in-gang-database> [https://perma.cc/5RH2-6WZ7].
386. Kalhan, *supra* note 318, at 27 (emphasis omitted).

dissemination of detailed personal information for immigration control and other purposes on an unprecedented scale and facilitat[ing] the involvement of an escalating number of federal, state, local, private, and non-U.S. actors in immigration control activities.”³⁸⁷

The growing immigration surveillance state has led Kalhan and others to sound the alarm, and to suggest that the data gathered, which can be “inaccurate, outdated, or irrelevant,” violates principles that data should be “accurate, complete, and current.”³⁸⁸ Kalhan points to examples of inaccurate data leading to “[i]mproper deprivations of liberty”³⁸⁹ and raises concerns as to the bias inherent in the data gathered: “[T]he nature of the data generated and distributed by government database systems—coupled with the opaque nature of the criteria for inclusion—can mask the subjective and evaluative judgments that underlie that information, making it seem more objectively factual to enforcement actors relying upon it than may be warranted.”³⁹⁰ An immigration ethic that prioritizes allegiance to those whose data is gathered might go even further, and propose resisting surveillance and interoperability altogether, rather than just balancing them against concerns for fair application of existing criteria for criminalizing people. This is precisely what the Chicago gang database challenges do, calling for the full destruction and elimination of the gang databases, rather than settling for calling for their accurate application to a properly criminalized population.³⁹¹

Deportability is enhanced by interoperability, whether referring to the automated sharing and gathering of information about a person that renders their deportation more likely (as in the gang databases), or the tendency for low-tech interoperability, in terms of public actors across all levels of government cooperating with each other to share data. Resisting interoperability is thus in line with dismantling one of the preconditions of deportability—the ability of the government to track down and apprehend noncitizens. This may seem counterintuitive to much of current immigrant rights advocacy—the exhortations to legalize the undocumented population often frame the project as bringing immigrants out of the shadows, whereas resisting surveillance and interoperability

387. *Id.* at 8.

388. *Id.* at 65.

389. *Id.* at 66 & n.272.

390. *Id.* at 67.

391. This is not to say that calls for accuracy are not part of the campaign; a key way of drawing attention to the databases has been to highlight cases where those with no conceivable ties to gangs have been placed on them.

seeks instead to keep noncitizens relatively anonymous.³⁹² For the many noncitizens who currently live in the shadow of deportability, a call to shrink surveillance and interoperability is one that seeks to avoid having their value adjudicated in a deportation proceeding. For those labeled gang members, the strongest defense to deportation is never being turned over to ICE to begin with.³⁹³ People placed on gang databases become fair game for being apprehended and questioned not just by local law enforcement, but by federal immigration enforcement agencies who take their appearance on such a database as proof positive of their suitability for apprehension, incarceration, and deportation. For this population, the elimination of the gang database would result in the elimination of one primary vector of deportability. Disrupting the efficiency of the deportation system by dismantling the database might ultimately prove the strongest defense from deportation for such individuals.

When ending deportation becomes the goal, any efforts that expand the ability of the state to track and control people facing deportation become unacceptable. When the question becomes not how to best maintain allegiance to the rule of law but how to best maintain allegiance to those fighting deportation, the answer may look somewhat different than those proposals usually embraced by liberal pro-immigrant advocacy groups and scholars. For example, for people detained as a result of inclusion on a gang database, their very presence on the database might preclude them from qualifying for deportation relief, and may make a judge much less likely to grant them bond and release them from immigration detention.³⁹⁴ For this group, the application of proportionality norms may not make much of a difference to the outcome of their case, because gang members are considered proper targets for automatic detention and deportation. Even having the right to appointed counsel in their bond and detention hearings may not be enough to save them from deportation, given the

392. See Kalhan, *supra* note 318, at 57. Kalhan points out that a possible outcome of a mass legalization campaign could be the consolidation and extension of the reach of the immigration surveillance state, given that such a campaign would involve capturing the information of the millions expected to step forward to apply for status if such an opportunity arose. *Id.*

393. Jennifer M. Chacón, *Criminalizing Immigration*, in 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 205, 216 (Erik Luna ed., 2017) (“Immigration judges hear only about 17% of removal cases and have very little discretion to stay removal in the cases that they do hear. Once individuals enter the removal system through the criminal justice system, there are few exit ramps.” (footnote omitted)).

394. Hlass, *supra* note 373, at 702 (“If immigration adjudicators choose to credit the allegations, as many do, devastating consequences are likely to follow. Specifically, the young person will likely be refused the opportunity to post bond, subjected to detention for the pendency of removal proceedings, and, ultimately, denied any immigration benefits that he or she would otherwise be entitled to, resulting in the issuance of a deportation order.”).

deep consequentiality of a gang designation. Thus, for this group, efforts that aim to dismantle deportability by erasing the gang database may be their best hope for avoiding the violence of deportation.

With over 80 percent of deportations happening without a hearing before an immigration judge, the fight to end deportability must also grapple with the fact that the majority of deportations are immune to legal and policy reforms that involve bolstering the rule of law in the immigration setting.³⁹⁵ A politics that seeks to end deportation must grapple not only with those who might be caught up in the immigration court system, but with those who will not have the relative privilege of choosing to fight their case in front of a judge. A policy reform like the elimination of the gang database does not distinguish between those who will have a chance to present a viable deportation case before an immigration judge and those who will face nearly guaranteed removal. Instead, it aims to target one of the conditions that produce deportability—the designation as a gang member. It prevents deportability, rather than trying to make the system of deportation fairer for those who do get a hearing.

For the nearly one million people with outstanding removal orders (people who have been ordered deported but have not left),³⁹⁶ for the almost 800,000 that have been approved for Deferred Action for Childhood Arrivals (as of 2018)³⁹⁷ and whose updated location and biometrics the immigration service has on file, and for the 400,000 who have temporary protected status (as of 2022),³⁹⁸ one of their best hopes for survival is that the local systems they interact with refuse to hand them over to ICE. The “Erase the Database” campaign demonstrates the possibility of pursuing the abolition of deportation by dismantling deportability through a direct challenge to the ability of the state to track, label, and deport noncitizens.

CONCLUSION

The violence of the Trump era exposed cracks in the common sense of deportation. By introducing deportation abolition, this Article has sought to examine those cracks, confronting the common sense that deportation serves legitimate moral and political ends. What if immigration reform efforts were not

395. See Koh, *supra* note 13, at 184.

396. Madan, *supra* note 135.

397. Lori Robertson, *The DACA Population Numbers*, FACTCHECK.ORG (Jan. 12, 2018), <https://www.factcheck.org/2018/01/daca-population-numbers> [https://perma.cc/ EX2G-WHHY].

398. *Fact Sheet: Temporary Protected Status (TPS)*, NAT'L IMMIGR. F., <https://immigrationforum.org/article/fact-sheet-temporary-protected-status> [https://perma.cc/79YN-EFCL] (last visited Jan. 9, 2022).

focused on improving the current management of deportation, but on ending deportation altogether? What if legal scholars began to divest from addressing the excesses of deportation, and instead sought to develop the frameworks that could help bring about its demise? What if, in the face of the suffering and violence at the heart of deportation, we focused on shifting the legal and regulatory landscape toward dismantling the conditions of deportability? In beginning to offer answers to these questions, this Article has sought to provide a new horizon for immigration scholarship and advocacy, opening the door to the end of deportation.