

# Downsizing the Deportation State

Jennifer Lee Koh\*

*The contemporary deportation state—the federal administrative infrastructure for enforcing the immigration laws through deportation and detention—has grown steadily for well over two decades. During the Trump era, the deportation state engaged in spectacles of cruelty against immigrants and received encouragement from blatantly anti-immigrant rhetoric from the former president. However, its overall growth also reflected an extension of past practice from prior administrations. In this Article, I argue that the Biden administration should not only pursue an immigration agenda that seeks to reverse Trump-era immigration policies and enact legislative immigration reform—which it has expressed a commitment to doing—but should also seek to downsize the deportation state. To do so, it should place particular attention on how agency funding, management of the bureaucracy, and relationships with subfederal and private entities might impact successive Presidents' capacity to engage in mass deportation and detention.*

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## INTRODUCTION

What might President Biden's immigration legacy be? Based on the campaign and first several months of office, the Biden administration has demonstrated a commitment to undoing many of its predecessor's immigration policies. Immediately after taking office, President Biden issued a series of executive orders and proclamations that reversed some of the most controversial immigration policies of the Trump era, such as the travel bans<sup>1</sup> and

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\* Associate Professor of Law, Pepperdine Caruso School of Law. I am grateful to Angélica Cházaro, Stephen Lee, Shalini Bhargava Ray, and Beth Zilberman for feedback on earlier drafts of this essay, to University of Washington law student Oliana Luke for research assistance, and to University of Washington School of Law Dean Mario Barnes for research funds that supported this Essay while I was a visiting professor at the University of Washington during the 2020–21 academic year. Any errors are mine.

<sup>1</sup> See *Proclamation on Ending Discriminatory Bans on Entry to the United States*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/?fbclid=IWAR2nuFi5Jl1bMyysdA0vaLa2vDi2FnnjCIsh6PC5Eh0Z5RtoPZ6e-5UT7IY> [https://perma.cc/4K3L-RWVG].

efforts to rescind Deferred Action for Childhood Arrivals (DACA).<sup>2</sup> With respect to prosecutorial discretion, the Administration has revised the immigration enforcement priorities aimed at guiding deportation and detention decisions,<sup>3</sup> which appear to have had some impact on the number of arrests and deportations in the interior United States.<sup>4</sup> Immigration agencies sought to change course on a range of practices, from highly visible programs such as the Migrant Protection Protocols (MPP), which required asylum seekers to remain physically in Mexico while having their asylum claims heard by the immigration courts,<sup>5</sup> to seemingly mundane but deeply frustrating practices with respect to the treatment of blank spaces on immigration applica-

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<sup>2</sup> See *Executive Order on Preserving and Fortifying Deferred Action for Childhood Arrivals* (DACA), WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/> [https://perma.cc/3LSS-586Y]. Other actions addressed the counting of noncitizens in the U.S. Census, ending construction of the border wall, and repealing the elimination of enforcement priorities in immigration. See *Executive Order on Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census* (Jan. 20, 2021), WHITE HOUSE <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-ensuring-a-lawful-and-accurate-enumeration-and-apportionment-pursuant-to-decennial-census/> [https://perma.cc/3XXG-CJ76]; *Proclamation on Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/> [https://perma.cc/2TTH-RJNZ]; *Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-the-revision-of-civil-immigration-enforcement-policies-and-priorities/> [https://perma.cc/4B4H-2S3E].

<sup>3</sup> See Memorandum from David Pekoske, Acting Sec'y, Dep't of Homeland Sec., Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_0120\\_enforcement-memo\\_signed.pdf](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf) [https://perma.cc/PD5F-ZX7Q]; Memorandum from Tae D. Johnson, Acting Dir. of U.S. Immigr. & Customs Enf't, Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021), [https://www.ice.gov/doclib/news/releases/2021/021821\\_civil-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf) [https://perma.cc/75G9-TDJY]; see also Memorandum from John D. Trasvina, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities (May 27, 2021), [https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf).

<sup>4</sup> See Michelle Hackman, *Deportations and Arrests of Immigrants in the U.S. Illegally Fall Sharply Under Biden*, WALL ST. J. (Apr. 4, 2021, 10:00 AM), <https://www.wsj.com/articles/deportations-and-arrests-of-immigrants-in-the-u-s-illegally-fall-sharply-under-biden-11617544800> [https://perma.cc/X8SW-LVH6].

<sup>5</sup> See Molly O'Toole & Molly Hennessy-Fiske, *Biden Administration to Start Processing 'Remain in Mexico' Asylum Seekers in California*, L.A. TIMES (Feb. 11, 2021), <https://www.latimes.com/politics/story/2021-02-11/biden-administration-to-process-asylum-seekers-in-california-forced-under-trump-to-remain-in-mexico> [https://perma.cc/82AS-BX7S]. On June 1, 2021, DHS announced the formal termination of MPP. See Memorandum from Alejandro N. Mayorkas, Sec'y, Dep't of Homeland Sec., Termination of the Migrant Protection Protocols Program (June 1, 2021), [https://www.dhs.gov/sites/default/files/publications/21\\_0601\\_termination\\_of\\_mpp\\_program.pdf](https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf) [https://perma.cc/G4WJ-JXQ2].

tion forms.<sup>6</sup> In litigation over controversial Trump-era policies such as the public charge rule (which sought to deny green cards to immigrants who received certain public benefits)<sup>7</sup> and the withholding of federal funds to sanctuary cities,<sup>8</sup> the Administration moved to dismiss the actions in light of anticipated policy changes.<sup>9</sup> During its first week, the Biden administration also announced its support for immigration legislation that would create mechanisms for millions of people who currently lack authorized status to establish pathways to permanent residence and U.S. citizenship.<sup>10</sup>

Immigrant communities and their allies expressed a mixture of cautious optimism and continued concern at the start of 2021. Despite President Biden's stated commitment to distinguishing himself from Trump on immigration, many policies remained in place during the first six months of the new President's term—perhaps due to the pace at which regulatory and administrative change can realistically take place, but perhaps also due to lack of political priority. For instance, the Biden administration continued to employ and defend the summary expulsion of families and adults seeking asylum at the United States–Mexico border pursuant to Title 42 of the United States Code. The Trump administration had justified Title 42 expulsions on public health grounds related to COVID-19, but the practice has come to signify the most recent iteration of the politicization of, and hostility towards, asylum seekers at the southern border.<sup>11</sup> The judiciary has slowed other immigration policy initiatives from the Biden administration. A significant early effort to exercise prosecutorial discretion, a 100-day moratorium

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<sup>6</sup> See *USCIS Confirms Elimination of "Blank Space" Criteria*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 1, 2021), <https://www.uscis.gov/news/alerts/uscis-confirms-elimination-of-blank-space-criteria> [<https://perma.cc/Z48E-44S2>].

<sup>7</sup> See Joseph Daval, *The Problem with Public Charge*, 130 YALE L.J. 998, 1004–05 (2021).

<sup>8</sup> See generally Peter Margulies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions that Require State and Local Cooperation on Immigration Enforcement*, 75 WASH. & LEE L. REV. 1507 (2018) (analyzing constitutional and statutory issues arising out of federal efforts to restrict sanctuary city funding).

<sup>9</sup> See Sophia Tareen & Jessica Gresko, *Biden Administration Won't Defend Trump Immigration Rule*, AP NEWS (Mar. 9, 2021), <https://apnews.com/article/supreme-court-trump-immigration-case-db42f1db13f8f4f82befdbf880656a6e> [<https://perma.cc/WC3B-EHQ8>]; Lawrence Hurley, *Biden Seeks Dismissal of 'Sanctuary' Funding Dispute at Supreme Court*, REUTERS (Mar. 4, 2021, 5:54 PM), <https://www.reuters.com/article/us-usa-court-immigration/biden-seeks-dismissal-of-sanctuary-funding-dispute-at-supreme-court-idUSKCN2AW2WN> [<https://perma.cc/D7SU-FE3D>].

<sup>10</sup> See *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, BIDEN-HARRIS TRANSITION (Jan. 20, 2021), <https://web.archive.org/web/20210120162259/https://buildbackbetter.gov/press-releases/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/> [<https://perma.cc/84B8-PVM3>]; *Statement by Joseph R. Biden, Jr. on Introduction of the U.S. Citizenship Act of 2021*, WHITE HOUSE (Feb. 18, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/18/statement-by-president-joseph-r-biden-jr-on-introduction-of-the-u-s-citizenship-act-of-2021/> [<https://perma.cc/67JP-TD8H>].

<sup>11</sup> See 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/U64F-BWBW>].

on deportations, was enjoined by a federal court.<sup>12</sup> By August 2021, federal district courts in Texas had issued three nationwide injunctions prohibiting the Biden administration from moving forward with key immigration policy departures from Trump—restoring DACA, terminating MPP, and implementing enforcement priorities.<sup>13</sup> The Administration’s management of migration at the southern border and the human rights emergency involving Central American countries (primarily El Salvador, Guatemala, and Honduras) requires continued attention. And despite President Biden’s early support for comprehensive immigration reform in Congress, the viability of meaningful legislative options remains unclear.<sup>14</sup>

The Biden administration could approach its immigration policies not only through the lens of distinguishing itself from Trump or through the enactment of new laws and policies, but from a broader historical perspective that accounts for the growth of the modern deportation state. This perspective recognizes that the government’s capacity to engage in immigration enforcement—especially detention and deportation—has grown steadily over time, and that scaling back the size and scope of the governmental infrastructure that has made mass detention and deportation possible is warranted. After all, funding for Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), the two main federal agencies responsible for enforcing the immigration laws in the interior and at the border, exceeds that of any other law enforcement agency in the federal government.<sup>15</sup> In fiscal year 2019, ICE received \$8.3 billion in funding, and

<sup>12</sup> See *Texas v. United States*, No. 6-21-cv-00003, 2021 U.S. Dist. LEXIS 14116, at \*2 (S.D. Tex. Jan. 26, 2021) (finding that State of Texas had standing due to likelihood of irreparable harm resulting from moratorium, and was likely to succeed on statutory and arbitrary and capricious claims); see also Anil Kalhan, *Immigration Enforcement, Strategic Entrenchment, and the Dead Hand of the Trump Presidency*, 2021 U. ILL. L. REV. ONLINE 46 (2021) (discussing moratorium and *Texas v. United States* litigation).

<sup>13</sup> See *Texas v. United States*, No. 1:18-cv-00068, 2021 WL 2033433 (S.D. Tex. July 16, 2021) (enjoining reinstatement of DACA); *Texas v. Biden*, No. 2:21-cv-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021) (enjoining termination of MPP and ordering continued operation of program until certain conditions met); *Texas v. United States*, No. 6:21-cv-00016, 2021 WL 3683913 (S.D. Tex. Aug. 19, 2021) (enjoining implementation of Biden administration enforcement priorities).

<sup>14</sup> The House of Representatives passed the Dream and Promise Act in the spring of 2021, which is significantly narrower than the U.S. Citizenship Act set forth by the President with respect to both the categories of people eligible for legalization and the criminal bars to potential immigration relief. See Nicole Narea, *The House’s Piecemeal Immigration Reform, Explained*, VOX (Mar. 18, 2021), <https://www.vox.com/policy-and-politics/2021/3/12/22321668/house-immigration-reform-dream-promise-farm-worker> [https://perma.cc/RFR2-R8E5]. In August 2021, the press reported that certain members of Congress were advocating for the inclusion of immigration provisions in the budget reconciliation bill. Rebecca Beitsch, *Budget Package Includes Pathway to Citizenship, Green Cards for Millions*, HILL (Aug. 9, 2021), <https://thehill.com/policy/national-security/566964-budget-reconciliation-package-includes-pathway-to-citizenship>.

<sup>15</sup> See Muzaffar Chishti & Jessica Bolter, *As #DefundThePolice Movement Gains Steam, Immigration Enforcement Spending and Practices Attract Scrutiny*, MIGRATION POL’Y INST. (June 25, 2020), <https://www.migrationpolicy.org/article/defundthepolice-movement-gains-steam-immigration-enforcement-spending-and-practices-attract> [https://perma.cc/3PTQ-XLUB].

CBP, \$17.7 billion—for both agencies, resources nearly three times greater than received around the time of their creation in 2003.<sup>16</sup> Indeed, the federal government has spent a total of \$333 billion on those agencies since 2003.<sup>17</sup> Increased funding has given rise to greater capacity. As of January 2021, the two agencies employ nearly 50,000 border and interior enforcement agents, reflecting increases of two- to three-fold since 2003.<sup>18</sup> Prior to 2003, the former federal agency the Immigration and Naturalization Service (INS) deported fewer than 40,000 people, but by FY 2019 ICE removed over 260,000—a more than four-fold increase.<sup>19</sup> The numbers of people detained each year by immigration authorities have likewise undergone exponential increases.<sup>20</sup>

Yet this growth in the deportation state has yielded troubling results. The dominant tools used by immigration enforcement—quasi-criminal measures like physical incarceration, with attendant costs leading to family separation, displacement, and distrust in government—have led to harms exacted upon immigrant communities, especially communities of color. More enforcement resources have not led to greater legal compliance. The agencies, in turn, have developed reputations for lawlessness, which have undermined their legitimacy. And the deportation state has played a strong role in perpetuating legacies of racial injustice and white supremacy in the United States.

This Article contends that an overarching goal for the Biden administration should be to reduce the overall size, scale, and support for the federal government's capacity to detain and deport. Such efforts necessarily involve confronting—and questioning—the substantive rules of immigration law dealing with who to admit, how to distribute benefits, the centrality of deportation in immigration enforcement, and how deportation takes place. The focus of this Article, however, is on questions that are adjacent to core immigration law rules, such as how and to what extent enforcement operations are resourced, how internal staffing and management of the immigra-

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<sup>16</sup> See AM. IMMIGR. COUNCIL, *THE COST OF IMMIGR. ENFORCEMENT AND BORDER SECURITY* 2–3, (Jan. 2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_cost\\_of\\_immigration\\_enforcement\\_and\\_border\\_security.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf) [<https://perma.cc/86XW-YMAC>] (reporting that funding in FY 2003 was \$3.3 billion for ICE, and \$5.9 billion for CBP).

<sup>17</sup> See *id.* at 1.

<sup>18</sup> See *id.* (noting that number of border enforcement agents employed by CBP is nearly double that of FY 2003 levels, and almost triple in the case of ICE).

<sup>19</sup> See U.S. IMMIGR. & CUSTOMS ENF'T, *FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT* 18–19, <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf> [<https://perma.cc/XKY2-FAC6>]. In FY 2020, ICE reportedly conducted 185,884 removals, which the agency acknowledged was a thirty percent decrease, likely due to Title 42 expulsions at border. *ICE Statistics*, U.S. IMMIGR. & CUSTOMS ENF'T (2021), <https://www.ice.gov/remove/statistics> [<https://perma.cc/C7P3-5AWZ>].

<sup>20</sup> See Emily Kassie, *How Trump Inherited His Expanding Detention System*, MARSHALL PROJECT (Feb. 12, 2019, 3:45 PM), <https://www.themarshallproject.org/2019/02/12/how-trump-inherited-his-expanding-detention-system> [<https://perma.cc/XB2Q-97RF>] (showing roughly six-fold increase in numbers of people detained by federal immigration authorities per day from FY 1994 to 2019).

tion bureaucracy takes place, and how external relationships with entities outside the federal government help grow the potential reach of the deportation state. As part of this symposium on agency restructuring to advance progressive agendas, this Article contends that these questions warrant direct attention and concern. It highlights three key areas: first, the capacity of and funding for the administrative bureaucracy; second, the management of the civil servants and frontline agents, and third, the contracts, agreements and collaborations entered into by federal immigration agencies.

In doing so, this Article seeks to make two broader contributions to current immigration discourse. First, given the recognition that the executive branch has come to occupy a central—if not the most critical—role in shaping immigration policy, it encourages reform-minded scholars, policymakers and advocates to think about designing an immigration system that not only responds to the excesses of the Trump era, but also reduces the likelihood of a future President inheriting a maximally resourced deportation bureaucracy. Second, by focusing on aspects of the deportation state—funding, staffing, and contracts—that tend to evade significant public attention, this Article encourages critical examination of ways in which the deportation state might expand through mechanisms that are not immediately evident and that are prone to escaping accountability.

Part I of the Article provides a brief overview of the current state of immigration law and policy in early 2021, providing background on preceding administrations beginning with President William J. Clinton. Part II sets forth rationales for downsizing the deportation state, grounded in fairness, effectiveness, legitimacy, and racial justice considerations. Part III explores issues related to funding, supervision, and management of the front line as well as the subfederal and private relationships that arise out of the contemporary deportation state. The Article concludes with restrained optimism for the short term, and a call for sustained attention to the government’s deportation capacity in the long term.

## I. HOW WE GOT HERE: THE EXPANSION OF THE DEPORTATION STATE

This Part highlights the expansion of the deportation state from the Clinton administration through Trump, with significant emphasis on the latter.<sup>21</sup> The discussion below advances two consistent but distinct points.

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<sup>21</sup> For analysis of the Trump era, see Fatma Marouf, *Immigration Challenges of the Past Decade and Future Reforms*, 73 SMU L. REV. F. 87 (2020) (describing immigration policies under Trump, emphasizing increased enforcement, expansions to immigration detention, dismantling of asylum and refugee systems, and rise of racism and white nationalism); Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 257 (2018) (comparing immigration proposals issued by Trump administration to historical examples—including Reagan, Clinton, Bush, and Obama—and arguing that “when Trump Administration actions and proposals are juxtaposed with those of other eras, many similarities surface—and in some cases are harsher than what President Trump has proposed.”); Jaclyn Kelley-Widmer, *Unseen Policies: Trump’s Little-Known Immi-*

First, irrespective of differences in political party and in rhetoric about the value and contributions of immigrants in the U.S., each administration has nonetheless taken steps that bolster the federal government's detention and deportation capacity. Second, this Part understands the Trump administration's immigration policies as *both* a departure from *and* a continuation of past administrations. President Trump was unique in his zealous and steadfast commitment to undermining the benefits and protections available to immigrants, the use of unwaveringly negative rhetoric with respect to immigrants, and the eager enactment of immigration policies designed to maximize human suffering. But the former President's policies also benefited from the deportation bureaucracy created and expanded by his predecessors and cannot be understood as an aberration from past Presidents.

### A. *Setting the Stage: From Clinton to Obama*

Explaining the rise of the deportation state calls for a special focus on the role of presidential administrations led by both political parties in recent decades, which set the stage for the Trump era's deployment of immigration power.<sup>22</sup> Despite the obvious differences amongst former Presidents Clinton, George W. Bush, and Barack Obama with respect to the traditional political spectrum, like the proverbial frog in warm water that slowly comes to a boil, the deportation state grew under each administration.

President Clinton held the U.S. Presidency at a time when the prevailing public sentiment was quick to assign blame to immigrants, recipients of public benefits, and—arguably most of all—the “criminal alien.”<sup>23</sup> While campaigning for his second term in 1996, President Clinton signed into law two pieces of legislation that enacted extensive and lasting changes to the immigration laws designed to bring greater harshness to the statutory scheme, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>24</sup> IIRIRA and AEDPA laid much of the foundation for immigration enforcement today. With respect to deportation power, IIRIRA and AEDPA expanded the classes of people subject to potential deportation (especially due

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*gration Rules as Executive Power Grab*, 35 GEO. IMMIGR. L. J. 801 (2021) (detailing transformation of immigration system through executive policies “out of the public view”).

<sup>22</sup> While the discussion here begins with President Clinton, the growth of the contemporary deportation state also predates the Clinton administration. See César Cuauhtémoc García Hernández, *Criminalizing Migration*, 150 DAEDALUS 106, 115 (2021) (“Across the last four decades in the United States, the ideological commitment to stigmatize migrants through the use of criminal law has enjoyed bipartisan support.”).

<sup>23</sup> See Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1844 (2007).

<sup>24</sup> As Clinton stated at the signing ceremony for IIRIRA, the bill “strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system.” Gerhard Peters & John T. Woolley, *William J. Clinton, Statement on Signing the Omnibus Consolidated Appropriations Act*, THE AMERICAN PRESIDENCY PROJECT (Sept. 30, 1996), <https://www.presidency.ucsb.edu/node/221661> [<https://perma.cc/T8V5-F9UX>].

to prior convictions), restricted the ability to defend oneself from removal by imposing various bars to discretionary relief, and authorized the creation of deportation procedures that empowered front line agents to directly process certain kinds of removal orders.<sup>25</sup> The laws also laid the groundwork for the ballooning of immigration detention through the creation of large categories of people subject to mandatory detention,<sup>26</sup> and eliminated opportunities to challenge various immigration decisions and policies by restricting judicial review.<sup>27</sup> By making large numbers of people deportable while removing discretion from immigration judges to even consider possible defenses to removal and not providing opportunities for lawfully-sanctioned migration at the front end, the 1996 laws ultimately enhanced Presidential power over the immigration system. As Adam Cox and Cristina Rodriguez explain, a de facto delegation of immigration power to the President in the modern era has resulted.<sup>28</sup>

When President Bush took office in January 2001, he expressed support for comprehensive immigration reform and adopted language that was generally positive on immigration, consistent with the Republican Party at the time.<sup>29</sup> But the events of September 11, 2001, the resulting “War on Terror,” and the conflation of national security with immigration enforcement led to significant shifts in the Bush administration’s immigration policies.<sup>30</sup> The Bush administration oversaw the creation of the Department of Homeland Security (DHS) in 2002, which consolidated the enforcement functions of the former Immigration and Naturalization Service (INS) into the new agencies ICE and CBP, and placed immigration service and benefits functions within a separate agency, Citizenship and Immigration Services (US-

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<sup>25</sup> See generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (discussing impact of IIRIRA and AEDPA); see also Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 270–73 (2012) (describing criminal grounds of removal, limitations on defenses to removal, and restrictions on judicial review); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 191, 196–99 (2017) (describing effect of 1996 laws on expedited removal).

<sup>26</sup> See Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 364–65 (2014).

<sup>27</sup> See Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1412 (1997).

<sup>28</sup> See ADAM B. COX & CRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 98–101, 127–29 (2020); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510–11 (2009); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 108 (2015).

<sup>29</sup> See Don Gonyea, *The GOP’s Evolution on Immigration*, NAT’L PUB. RADIO (Jan. 25, 2018), <https://www.npr.org/2018/01/25/580222116/the-gops-evolution-on-immigration> [<https://perma.cc/W545-JEHJ>].

<sup>30</sup> Politicians criticized the then-INS for its failure to detect the individuals responsible for the 9/11 attacks, several of whom were later found to have overstayed their visas. See generally Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); Chacon, *supra* note 23; Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law”*, 29 N.C. J. INT’L L. & COM. REG. 639 (2004).

CIS).<sup>31</sup> President Bush continued to express support for legislative immigration reform (including the creation of pathways to citizenship for undocumented persons), and contended that “the vast majority” of undocumented immigrants “are decent people who work hard, support their families, practice their faith, and lead responsible lives.”<sup>32</sup> But the former President also contended that “[i]llegal immigration . . . brings crime to our communities”<sup>33</sup> and oversaw a number of initiatives that maximized enforcement of the immigration laws.<sup>34</sup> For instance, the Bush administration enhanced resources for border and interior immigration enforcement, expanded the use of immigration detention, engaged in immigration raids in workplaces and homes, and increased collaborations with local law enforcement and the criminal justice system.<sup>35</sup> Ultimately, comprehensive immigration reform efforts in Congress failed in 2006 and 2007.<sup>36</sup> Funding for immigration enforcement nevertheless grew. From FY 2003 to FY 2008, the combined budgets of ICE and CBP increased from \$9.2 billion to \$15.4 billion.<sup>37</sup>

The election of President Barack Obama brought hope of positive change for immigrant communities. But the Obama administration began by vigorously pursuing immigration enforcement, as part of an aspirational and theoretical understanding that building a record of tough enforcement would persuade skeptical members of Congress to support comprehensive immigration reform.<sup>38</sup> However, Congress’s ultimate refusal to move forward on immigration legislation left the Obama administration with record-high deportation numbers and a reputation as “Deporter-in-Chief” amongst immigration advocates—without the sought-after reform.<sup>39</sup> Recognizing the lack of legislative options, the use of prosecutorial discretion in immigration

<sup>31</sup> See Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 379–80 (2017).

<sup>32</sup> *President George W. Bush, Address to the Nation on Immigration Reform*, GEORGE W. BUSH WHITE HOUSE ARCHIVES (May 15, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-8.html> [<https://perma.cc/Z4UA-LWR9>].

<sup>33</sup> *Id.*

<sup>34</sup> DEP’T HOMELAND SEC., BUREAU OF IMMIG. & CUSTOMS ENF’T, ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003 – 2012, DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND 1 (2012) <http://cryptogon.com/docs/endgame.pdf> [<https://perma.cc/2XZD-ZZR3>] (“We must strive for 100% removal rate.”).

<sup>35</sup> See Miller, *supra* note 30; Chacon, *supra* note 23; Kanström, *supra* note 30.

<sup>36</sup> See RUTH ELLEN WASEM, CONG. RES. SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS, (2013), <https://fas.org/sgp/crs/homesecc/R42980.pdf> [<https://perma.cc/SR6J-BSAD>]. Legislatively, the REAL ID Act of 2005 introduced provisions to heighten evidentiary standards for asylum seekers to prevail in their claims. See *id.* at 2.

<sup>37</sup> See AM. IMMIGR. COUNCIL, *supra* note 16, at 3.

<sup>38</sup> See Kevin R. Johnson, *Lessons About the Future of Immigration Law from the Rise and Fall of DACA*, 52 U.C. DAVIS L. REV. 343, 349–50 (2018).

<sup>39</sup> RANDY CAPPS ET AL., REVVING UP THE DEPORTATION MACHINE: ENFORCEMENT UNDER TRUMP AND THE PUSHBACK 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.”).

enforcement to shield certain groups of immigrants from deportation became one of the Obama administration's signature policies.<sup>40</sup> Many people benefitted from the embrace of prosecutorial discretion, most visibly (but not exclusively) from the creation of DACA. Reliance on executive-level discretion also highlighted the existence of at least two deeper problems in the deportation state and with the Administration's rhetoric. First, the Obama administration's efforts to inject a sense of proportionality and restraint were not welcomed at the front lines of the immigration enforcement agencies, thereby casting doubt on ICE and CBP's institutional capacity to value goals outside of enforcement.<sup>41</sup> Second, in an effort to convey that *some* immigrants deserved to be exempt from enforcement, the Obama administration communicated that *other* immigrants were legitimate targets for deportation—an ethos exemplified by President Obama's infamous assertion that deferred action be expanded to “families, not felons.”<sup>42</sup>

Despite President Obama's efforts to achieve relief for immigrants short of legislative reform, the deportation capacity of the federal government continued to grow. ICE's collaboration with the criminal legal system, including state and local actors, was justified in part by the need to identify enforcement priorities.<sup>43</sup> Enforcement funding, deportations, and detention continued.<sup>44</sup> Using FY 2003 as a point of comparison, the combined budgets of ICE and CBP had more than doubled by the last full fiscal year of the Obama administration.<sup>45</sup>

### B. Immigration in the Trump Era

The strong consensus amongst advocates for immigrants is that the Trump Presidency engaged in devastating and harmful policy and discourse that transformed various aspects of the immigration system. From 2017 to 2020, the federal government's commitment to criminalizing immigrants, ending asylum protections, eliminating avenues for lawful migration and entrenching racial hierarchy were sustained and unrelenting. Efforts to track each policy action have yielded abundant counts. Researchers at the Migra-

<sup>40</sup> See generally Johnson, *supra* note 38.

<sup>41</sup> See, e.g., Chen, *supra* note 31, at 385–87; Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879, 1880–81, 1892 (2019); Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind Pres. Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 685 (2016).

<sup>42</sup> *Remarks by the President in Address to the Nation on Immigration*, OBAMA WHITE HOUSE ARCHIVES (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/73J6-N32J>].

<sup>43</sup> See AM. IMMIGR. COUNCIL, *THE CRIMINAL ALIEN PROGRAM (CAP): IMMIGRATION ENFORCEMENT IN PRISONS AND JAILS 1* (2013), [https://www.americanimmigrationcouncil.org/sites/default/files/research/cap\\_fact\\_sheet\\_8-1\\_fin\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/cap_fact_sheet_8-1_fin_0.pdf) [<https://perma.cc/8CKL-CE5X>] (describing information-sharing program that “extends to every area of the country and intersects with most state and local law enforcement agencies”).

<sup>44</sup> See AM. IMMIGR. COUNCIL, *supra* note 16, at 3 (showing combined ICE and CBP budget for FY 2009 as \$17.2 billion, and for FY 2016 as \$19.2 billion).

<sup>45</sup> See *id.* (showing combined ICE and CBP budget for FY 2003 as \$9.2 billion, and for FY 2016 as \$19.2 billion).

tion Policy Institute identified over four hundred immigration-related executive actions from the start of 2017 through the summer of 2020.<sup>46</sup> The Immigration Policy Tracking Project, developed by Lucas Guttentag with support from Yale Law School and Stanford Law School, contains over 1,000 entries documenting every immigration policy, from nearly every corner of the immigration system, beginning in January 2017 through the inauguration of President Biden in January 2021.<sup>47</sup>

The changes wrought by Trump immigration policies have been significant at every level, from the granular day-to-day operation of the immigration bureaucracy to the broader aims and structure of the immigration agencies. The Trump administration sought to weaken the benefits-granting side of the immigration state, for instance by severely curtailing the availability of asylum for individuals persecuted in their home countries through an array of changes affecting policies and practices at the border and within the U.S.<sup>48</sup> The adjudication of immigration benefits available for noncitizens in the U.S.—opportunities to seek lawful permanent residence, citizenship applications, and even work permits—stalled or became subject to new rules.<sup>49</sup> Through multiple executive-level bans, the former President restricted the availability of visas for individuals seeking permission to enter the U.S. from their countries.<sup>50</sup> The Trump administration also took numerous steps to bolster USCIS's enforcement work while minimizing its service-oriented mission,<sup>51</sup> such as through the referral of benefits applications to ICE and growing its fraud and denaturalization units.<sup>52</sup>

When it comes to immigration enforcement, the administrative state continued to grow under Trump. Although prior administrations expanded detention and deportation capacity, those practices in the Trump era were more indiscriminate due to the lack of enforcement priorities, at times more

<sup>46</sup> See generally Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency*, MIGRATION POL'Y INST. (2020), <https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency> [https://perma.cc/L7G3-4XGX].

<sup>47</sup> See IMMIGRATION POLICY TRACKING PROJECT, <https://immpolicytracking.org> [https://perma.cc/4SG6-VFA7].

<sup>48</sup> See Lindsay M. Harris, *Asylum Under Attack*, 67 LOYOLA L. REV. 1, 7–19 (2020).

<sup>49</sup> See, e.g., Stuart Anderson, *USCIS Immigration Delays Grow Longer and Longer*, FORBES (Jan. 31, 2019, 12:12 AM), <https://www.forbes.com/sites/stuartanderson/2019/01/31/uscis-immigration-delays-grow-longer-and-longer/?sh=115a802a2254> [https://perma.cc/MAX2-97EJ].

<sup>50</sup> See, e.g., Proclamation No. 10014, 85 Fed. Reg. 23441 (Apr. 22, 2020); Proclamation No. 10052, 85 Fed. Reg. 38263 (June 25, 2020).

<sup>51</sup> See Beth K. Zilberman, *The Institutional Design of Immigration Enforcement* 33–35 (April 2021) (unpublished manuscript) (on file with author).

<sup>52</sup> See Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 409–14 (2019); Debra Cassens Weiss, *Justice Department Creates Unit to Denaturalize Citizens Who Didn't Disclose Crimes*, ABA J. (Feb. 27, 2020, 11:54 AM), <https://www.abajournal.com/news/article/justice-department-creates-standalone-unit-to-denaturalize-citizens-who-didnt-disclose-crimes> [https://perma.cc/F29R-SFFF].

spectacular in cruelty,<sup>53</sup> and other times hidden far from public view until whistleblowers and advocates intervened.<sup>54</sup> ICE agents pursued arrests to the fullest extent permitted under the federal statutes, with explicit instructions from the President and agency heads to treat any immigrant believed to have violated the immigration laws as a priority for deportation.<sup>55</sup> The Attorney General undermined and politicized the already-fragile decisional independence of the immigration courts and Board of Immigration Appeals (BIA).<sup>56</sup> A range of substantive and procedural interpretations of the law—particularly through the frequent use of the Attorney General’s power to certify BIA decisions and issue precedential decisions that reflected the President’s immigration policy agenda—narrowed opportunities for people to seek relief from removal.<sup>57</sup> ICE subjected nearly all arrested immigrants to detention, and over time expanded its reliance on a web of jail facilities that spanned private ownership, state and local jails, and federal facilities.<sup>58</sup> In addition to ICE, which is tasked with the civil deportation system, the Department of Justice directed federal criminal prosecutors to deploy their authority to criminally prosecute individuals for immigration violations to the maximum levels possible.<sup>59</sup> During this time period, funding for ICE and CBP operations continued to grow despite public outcry regarding multiple policies—family separation, the detention of children, MPP, to name a few—that seemed designed to inflict cruelty and break the spirits of immigrant communities. Indeed, from FY 2017 to FY 2021, combined funding for the two agencies jumped from \$20.1 billion to \$26 billion.<sup>60</sup>

State and local governments facilitated mixed outcomes with respect to the growth of the deportation state. States and localities in immigrant-friendly jurisdictions enacted a wide array of legislation, policies and prac-

<sup>53</sup> See, e.g., Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2363–9 (2019) (discussing family separation as a “spectacular” act of violence but arguing that family separation is fundamental to multiple components of U.S. immigration system).

<sup>54</sup> See, e.g., Rachel Treisman, *Whistleblower Alleges ‘Medical Neglect,’ Questionable Hysterectomies of ICE Detainees*, NAT’L PUB. RADIO (Sept. 16, 2020, 4:43 AM), <https://www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detainee> [<https://perma.cc/L9JZ-HSCT>].

<sup>55</sup> See SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 30–38 (2019).

<sup>56</sup> See Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 108 GEO. L.J. 579, 584–85 (2020); INNOVATION LAW LAB & S. POVERTY LAW CTR., THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 7 (2019), [https://www.splcenter.org/sites/default/files/com\\_policyreport\\_the\\_attorney\\_generals\\_judges\\_final.pdf](https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf) [<https://perma.cc/CVC8-HBLL>].

<sup>57</sup> See Kim Bellware, *On immigration, Attorney General Barr Is His Own Supreme Court. Judges and Lawyers Say That’s a Problem*, WASH. POST (Mar. 5, 2020, 9:51 AM), <https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power/> [<https://perma.cc/T2JJ-7CH6>].

<sup>58</sup> See Marouf, *supra* note 21, at 95–96.

<sup>59</sup> See Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1977–91 (2020) (discussing adoption of “zero tolerance” approach to criminal prosecution of immigration offenses at border under Trump Administration).

<sup>60</sup> See AM. IMMIGR. COUNCIL, *supra* note 16.

tices designed to stymie the federal government's deportation goals.<sup>61</sup> These resistance efforts led to lower levels of enforcement in some areas of the U.S.<sup>62</sup> But the Trump administration sought to retaliate against jurisdictions that enacted sanctuary and other local policies aimed at protecting immigrants, for instance by threatening jurisdictions with the elimination of federal funding as well as enhancing targeted enforcement efforts.<sup>63</sup> On the flip side, other states and localities enacted "anti-sanctuary" policies or undertook actions to enhance the strength of federal immigration enforcement.<sup>64</sup>

The federal government has bolstered its deportation capacity by expanding its contracts with private technology companies to increase surveillance of immigrant communities, thereby extending and automating the deportation state's reach. The use of information technology throughout immigration governance pre-dates the Trump administration.<sup>65</sup> Under Trump, ICE deployed technologies that allowed it to purchase data mined from an increasing number of facets of everyday life—utility company profiles, facial recognition, and license plate scanners, by way of example—thereby enabling it to seek enforcement against a broader range of noncitizens.<sup>66</sup>

Along the way, the erosion of basic democratic and rule of law norms has taken place.<sup>67</sup> The subversion of constitutional and statutory requirements regarding the appointment of agency heads led to the existence of

<sup>61</sup> See Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1225–50 (2019) (describing broad range of sanctuary-type practices and policies in public and private sectors); see also Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1736–51 (2018) (tracing range of policies enacted at the local level); Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 129–31 (2019) (presenting empirical analysis of local and state responses to Trump-era immigration policies and finding strong trend of enacting pro-immigrant policies).

<sup>62</sup> See Hamed Aleaziz, *How ICE Became the Face of Trump's Immigration Crackdown and Where It Goes from Here After Biden Is in Charge*, BUZZFEED (Dec. 7, 2020, 12:48 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/trump-ice-biden-future> [<https://perma.cc/9GYB-GW28>].

<sup>63</sup> See, e.g., Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (purporting to eliminate federal funding for sanctuary cities); Caitlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html> [<https://perma.cc/65LG-B2DR>].

<sup>64</sup> See generally Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837 (2019) (examining emergence, and implications, of subfederal laws seeking to compel local government compliance with federal immigration authorities).

<sup>65</sup> See generally Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1 (2014).

<sup>66</sup> See McKenzie Funk, *How ICE Picks Its Targets in the Surveillance Age*, N.Y. TIMES MAG. (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/magazine/ice-surveillance-deportation.html> [<https://perma.cc/Q89J-2FPD>]; Alvaro M. Bedoya, *The Cruel New Era of Data-Driven Deportation*, SLATE (Sept. 22, 2020, 1:40 PM), <https://slate.com/technology/2020/09/palantir-ice-deportation-immigrant-surveillance-big-data.html> [<https://perma.cc/J94D-Z2PT>].

<sup>67</sup> See ANIL KALHAN, AM. CONST. SOC'Y, BUILDING IMMIGRATION POLICY BACK BETTER 4, (2020), [https://www.acslaw.org/wp-content/uploads/2021/01/Kalhan\\_Whats-the-Big-Idea-Book-2020-26-31.pdf](https://www.acslaw.org/wp-content/uploads/2021/01/Kalhan_Whats-the-Big-Idea-Book-2020-26-31.pdf) [<https://perma.cc/927H-5L24>].

strings of acting officials purporting to carry out the duties of agency leadership.<sup>68</sup> In some cases, the courts intervened to invalidate policy actions taken by invalidly appointed agency heads,<sup>69</sup> highlighting the ways in which the legitimacy of agency leadership has been undermined by those appointments. Another area that has subverted rule of law norms involves the relationship between the executive and the courts. Immigration agencies under the Trump administration repeatedly defied the authority of the federal courts, for instance, by deporting people despite federal court orders staying deportation.<sup>70</sup> As I have explored elsewhere, the executive's outright defiance of the judiciary in the deportation context is a byproduct of the legal framework, institutional design, and bureaucratic conditions that have empowered various components of the deportation state to disregard the rule of law and judicial authority.<sup>71</sup>

## II. QUESTIONING THE DEPORTATION STATE

Given the extent to which immigration policy was prioritized during the Trump era, it is both necessary—and consistent with Biden's campaign goals—for the Biden administration to distinguish itself from and reverse the actions of its predecessor. Still, the Biden administration should approach immigration not only in response to Trump, but also with attention to the impact of its practices and policies on successive administrations. While every Presidential election introduces opportunities for change, the executive's deportation power has an accumulating effect, such that as one administration consolidates power to detain and deport in the hands of the executive, that power transfers to the next administration. To that end, the Biden administration should seek to downsize the deportation state. This Part briefly discusses the policy and normative justifications for doing so, grounded in practical fairness, effectiveness, rule of law, and racial hierarchy.

The deportation bureaucracy has evolved into a regime that wields disproportionate levels of power over its subjects, and its operative realities raise extensive fairness concerns. Despite the courts' longstanding treatment of

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<sup>68</sup> See U.S. GOV'T ACCOUNTABILITY OFF., B-331650, LEGALITY OF SERVICE OF ACTING SECRETARY OF HOMELAND SECURITY AND SERVICE OF SENIOR OFFICIAL PERFORMING THE DUTIES OF DEPUTY SECRETARY OF HOMELAND SECURITY (2020), <https://www.gao.gov/products/b-331650> [<https://perma.cc/XX55-25LP>].

<sup>69</sup> See, e.g., *Battalla Vidal v. Wolf*, 501 F. Supp. 3d 117 (E.D.N.Y. 2020) (finding that then-Acting Secretary of Homeland Security Chad Wolf had not been lawfully serving in role and on that basis invalidating Wolf memorandum seeking to suspend DACA pending DHS review of program).

<sup>70</sup> See Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948, 966–82 (2021) (describing defiance by ICE officials responsible for executing deportations in violation of federal court orders, and by Board of Immigration Appeals for failure to follow federal court remands).

<sup>71</sup> See generally *id.*

deportation as a civil sanction that does not rise to the level of punishment,<sup>72</sup> treating deportation as the only consequence of an immigration law violation fails to reflect a basic level of proportionality justified under the law, as numerous scholars have argued.<sup>73</sup> The government's power to incarcerate people goes hand in hand with the deportation power, given that the statute authorizes ICE to detain anyone charged with possible removal, and deprives broad categories of noncitizens from bond hearings before immigration judges under the mandatory detention statutes.<sup>74</sup> Relatedly, the harms exacted by deportation—family separation, loss of community, loss of home—far outweigh its benefits. Indeed, Angélica Cházaro's normative critique of deportation's legitimacy contends that violence lies at the heart of deportation and practice, both with respect to the process itself (which involves the physical seizure and displacement of persons) and with respect to its consequences on the lives of people impacted by deportation.<sup>75</sup>

The system's reliance on incarceration, including private prisons, facilitates the exercise of state power and abuse over people in ICE's custody and adds a structural layer of unfairness to its impact on immigrant communities and individuals. As César Cuauhtémoc García Hernández's work calling for the abolition of immigration detention shows, an elaborate web of immigration detention centers ultimately dehumanizes immigrants; treats them as commodities to maximize the wealth of for-profit prisons, local officials and others; and operates through an intentional pattern of stigmatization and segregation of migrant bodies.<sup>76</sup> However, the harms of deportation and detention are not limited to the physical removal and caging of immigrant bodies. Moreover, Eisha Jain has detailed how deportation reflects only a portion of a far more extensive framework—"the tip of a much larger enforcement pyramid"—that enhances immigrant vulnerability in a host of everyday interactions (including but not limited to police and employers).<sup>77</sup>

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<sup>72</sup> See generally *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); cf. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (describing deportation as "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").

<sup>73</sup> See, e.g., Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1688–89 (2009); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 417–18 (2012); Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L. J. 1243, 1245–48 (2013); Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1035 (2017).

<sup>74</sup> See, e.g., 8 U.S.C. §1226(a) (authorizing detention "pending a decision on whether the alien is to be removed from the United States"); 8 U.S.C. §1266(c) (mandating detention for noncitizens with certain prior convictions).

<sup>75</sup> See Angélica Cházaro, *The End of Deportation*, UCLA L. REV. (forthcoming 2021).

<sup>76</sup> See César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 249–51 (2017); see also CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019).

<sup>77</sup> See Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1473 (2019).

Taking fairness considerations seriously leads to questioning whether ICE and CBP's core enforcement work—the work of detention and deportation—should continue in its present form. Rather than treat deportation as the default sanction, various scholars have expressed support for intermediate sanctions that fall short of deportation, such as penalties, fines, or waiting times.<sup>78</sup> Along those lines, Peter Markowitz calls for “optimal enforcement scaling,” which involves questioning current political commitments to ensuring an enforcement response to every violation.<sup>79</sup> Regarding detention, various commentators have urged treating immigration detention as the exception, rather than the norm.<sup>80</sup>

Assuming that the tools of enforcement (here, detention and deportation) exist not only for the sake of enforcement (detaining and deporting), but for the purpose of encouraging compliance with the law, then the very effectiveness of the government's current enforcement approach is also questionable.<sup>81</sup> As Professor Markowitz points out, despite the growth of ICE and CBP, rates of compliance with the immigration laws have not actually increased. Indeed, since the creation of those agencies, the total population of unauthorized immigrants has expanded by more than seventy percent.<sup>82</sup> Some may contend that growth in the undocumented population or unauthorized border crossings mean that the agencies ought to engage in more, not less, enforcement. But a reflexive insistence on more enforcement overlooks the alternative possibility of the government engaging its resources to

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<sup>78</sup> See, e.g., Eagly, *supra* note 59, at 204–27 (discussing immigration scholarship supporting intermediate sanctions other than deportation, citing to Adam Cox, Michael Wishnie, Juliet Stumpf, and Allison Tirres).

<sup>79</sup> Peter L. Markowitz, *After ICE: A New Humane & Effective Immigration Enforcement Paradigm*, 55 WAKE FOREST L. REV. 89, 133–36 (2020) [hereinafter Markowitz, *After ICE*]; see also Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J. FORUM 130 (2019) [hereinafter Markowitz, *Abolish ICE*].

<sup>80</sup> See, e.g., ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS 204 (2020) (asserting that discrete immigration enforcement reforms “are just placeholders until we can achieve the real goal: the abolition of immigration imprisonment”); Margo Schlanger, *The President and Immigration Law Series: The Urgent Need to Shrink Immigration Detention*, JUST SECURITY (Oct. 13, 2020), <https://www.justsecurity.org/72821/the-president-and-immigration-law-series-the-urgent-need-to-shrink-immigration-detention/> [<https://perma.cc/SH5X-S6HM>] (arguing in favor of “dramatically shrink[ing] immigration detention”). For an earlier discussion of detention abolition, see Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 58 (2010) (suggesting “a more fundamental reconsideration of immigration control policies premised upon convergence with criminal enforcement”).

<sup>81</sup> As Professor Markowitz puts it, “detentions and deportations are means, not ends,” meaning that “[j]ust as the goal of criminal justice systems is to reduce crime rates, not to maximize incarceration, policymakers must judge the effectiveness of America's immigration enforcement system on the ultimate measure that matters: compliance with immigration law.” Peter L. Markowitz, *A New Paradigm for Humane and Effective Enforcement*, CTR. FOR AM. PROGRESS (Nov. 30, 2020, 9:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2020/11/30/493173/new-paradigm-humane-effective-immigration-enforcement/> [<https://perma.cc/4HU4-88TG>].

<sup>82</sup> See Markowitz, *After ICE*, *supra* note 79, at 105.

facilitate compliance with the immigration laws.<sup>83</sup> Doing so would better meet the challenges of the immigration system and, as Amanda Frost has detailed, are consistent with cooperative enforcement efforts taking place in other areas of administrative law, such as occupational health, environmental, securities, and food and drug safety, in which federal agencies take steps to encourage regulated entities to comply with the law rather than resorting first to the most drastic sanctions available under the law.<sup>84</sup>

In addition to fairness and effectiveness concerns, ICE and CBP have developed strong reputations as rogue agencies, such that fueling their expansion raises serious rule of law and legitimacy concerns. Much public outcry has resulted from the abusive and coercive tactics employed by the deportation state. The agencies have also demonstrated a steady failure to follow their own rules, much less constitutional standards.<sup>85</sup> Trump promised to “take the shackles off” of immigration agents,<sup>86</sup> a policy choice that led to a radicalization of the front line—what Hiroshi Motomura describes as “rogue by design.”<sup>87</sup> In the case of CBP, border agents suffer from the highest rates of alleged misconduct than any other federal law enforcement agency, and various commentators have described its institutional culture as lawless and militarized.<sup>88</sup> The perceptions of illegitimacy associated with those agencies in turn weakens confidence in the government and rule of law in the United States, particularly amongst immigrants.<sup>89</sup>

The legal framework developed by the courts and Congress facilitates the tremendous power exercised by the deportation state’s front line, which it exercises with little accountability. CBP and ICE agents have the power to issue removal orders directly against certain immigrants: individuals apprehended at or near the border (through expedited removal), those who re-

<sup>83</sup> See also Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 3 (2017) (arguing for cooperative enforcement approaches, in which “government officials would proactively assist a subset of unauthorized immigrants come into compliance with the law”).

<sup>84</sup> See Markowitz, *Abolish ICE*, *supra* note 79, at 137–38; Frost, *supra* note 83, at 3–4.

<sup>85</sup> See Markowitz, *After ICE*, *supra* note 79, at 104 (observing that “ICE has also amassed a notorious record of lies and racism”).

<sup>86</sup> C-SPAN, White House Daily Briefing (Feb. 21, 2017), <https://www.c-span.org/video/?424360-1/sean-spicer-briefs-reporters-white-house> [<https://perma.cc/87SC-6DLB>] (“The President wanted to take the shackles off individuals in these agencies,” referring to ICE and CBP); see also Nicholas Kulish, Caitlin Dickerson & Ron Nixon, *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES (Feb. 25, 2017) (describing ICE officers as “newly emboldened, newly empowered and already getting to work” in contrast to restraints imposed by Obama-era deportation priorities).

<sup>87</sup> Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 457 (2018).

<sup>88</sup> See Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, POLITICO MAG. (Nov. 2014), <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220> [<https://perma.cc/4VF5-4JUM>]; Garrett M. Graff, *The Border Patrol Hits a Breaking Point*, POLITICO MAG. (July 15, 2019), <https://www.politico.com/magazine/story/2019/07/15/border-patrol-trump-administration-227357> [<https://perma.cc/S9Z5-BHJ3>].

<sup>89</sup> See Kari Hong, *10 Reasons Why Congress Should Defund ICE’s Deportation Force*, 43 N.Y.U. REV. L. & SOC. CHANGE: HARBINGER 40, 41–42 (2019).

entered after a prior removal (through reinstatement), and non-lawful permanent residents with aggravated felony convictions (through administrative removal).<sup>90</sup> These orders constitute the vast majority of all removals issued by the federal government.<sup>91</sup> ICE agents make decisions about who to arrest, who to process for removal, and who to detain. In certain respects, they exert control over the conditions of detention.<sup>92</sup> They communicate with non-citizens about the law and legal options. But in their work, they encounter few constraints, whether from federal courts, immigration judges, agency lawyers, or even professional rules of conduct.<sup>93</sup> Allegations of racism directly from the rank-and-file of the deportation agencies are extensive. Nonetheless, the Supreme Court has decreased ICE and CBP agent accountability, holding that monetary damages under *Bivens* are unavailable against CBP agents even in the case of shooting and death,<sup>94</sup> and insulating expedited removal from judicial review.<sup>95</sup> Certainly, specific statutes that empower the front line, such as expedited removal, are ripe for attention.<sup>96</sup> But in the absence of deep revision from the courts and legislature, the case for diluting the size and scope of the front line is strong.

Finally, critiques of the present-day deportation state are inseparable from concerns about the perpetuation of racial insubordination. The overwhelming percentage of persons directly impacted by the deportation state are Latinx.<sup>97</sup> And Black immigrants, in particular, comprise a disproportionate number of immigrants facing deportation, reflecting an entrenchment of anti-blackness associated with the criminal legal system.<sup>98</sup> The criminal grounds of deportation as well as the deportation state's long-standing reliance on various points of entry to the criminal legal system—law enforcement stops, arrests, and probation for instance—contribute to this state of

<sup>90</sup> See generally Koh, *supra* note 25 (describing use of procedures that enable front line officers to directly issue removal orders with minimal or no administrative and judicial review).

<sup>91</sup> See *id.*

<sup>92</sup> See Koh, *supra* note 70, at 961–62.

<sup>93</sup> See, e.g., Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 512–15 (2013) (describing informal communications, including scripts used by ICE officers, to encourage detained non-citizens to agree to entry of stipulated removal orders).

<sup>94</sup> See *Hernandez v. Mesa*, 140 S. Ct. 735, 739 (2020); see also *Constitutional Remedies – Bivens Actions – Search and Seizure – Hernandez v. Mesa*, 134 HARV. L. REV. 550, 550 (“*Hernandez* ultimately serves as another illustration of the Court’s failure to hold rogue government officials accountable for constitutional violations.”).

<sup>95</sup> See Koh, *supra* note 70, at 957–58 (discussing implications of judicial review over expedited removal in light of Supreme Court’s decision in *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020)).

<sup>96</sup> See *id.*

<sup>97</sup> See, e.g., Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L. J. 599, 602–04 (2015).

<sup>98</sup> See BLACK ALLIANCE FOR JUST IMMIGRATION & NYU IMMIGRANT RIGHTS CLINIC, THE STATE OF BLACK IMMIGRANTS, PART II: BLACK IMMIGRANTS IN THE MASS CRIMINALIZATION SYSTEM, <http://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf> [https://perma.cc/AHN9-PJQH].

affairs.<sup>99</sup> Racial insubordination has been central to the deployment of immigration detention and deportation throughout history as well as in the modern era.<sup>100</sup> Increasingly, the immigrants' rights movement has linked its vision for change with grassroots calls for racial justice and criminal law reform, which includes calls to reduce the government's power to detain and deport.<sup>101</sup>

### III. LONG-TERM SHIFTS FOR THE FUTURE

In this Part, I identify three core areas that might facilitate a downsizing of the deportation state. The discussion focuses on agency resources, management, and internal and external relationships. By restructuring the immigration bureaucracy to lessen the focus on detention and deportation, the agencies might be better positioned to engage in compliance-oriented, humanitarian work necessitated by migration realities and challenges.

#### A. Funding

Calls to defund ICE and CBP have increasingly moved to the forefront of the immigrants' rights movement, and for good reason. Movement-based proposals for defunding are typically linked to long-term goals of abolishing the agencies altogether; however, even with abolition unlikely to take place in the near future, a deeper consideration of the degree of funding allocated to deportation is in order. The growth of Congressional funding for immigration enforcement through budgetary allocations for ICE and CBP over roughly the past two decades has been extraordinary.<sup>102</sup> Every year, DHS has justified its funding proposals to Congress by emphasizing the need to protect the country and maintain public safety (including from threats from unidentified "enemies").<sup>103</sup> Although DHS is comprised of twenty-nine different agencies, ICE and CBP alone received nearly thirty percent of DHS's budget allocation in fiscal year 2020.<sup>104</sup> As discussed in Part I, the accumulation of funding for ICE and CBP took place over time, and back-

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<sup>99</sup> See Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 173 (2018); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 825 (2015).

<sup>100</sup> See García Hernández, *supra* note 76, at 247–48.

<sup>101</sup> See generally Kevin R. Johnson, *Bringing Racial Justice to Immigration Law*, 116 NW. U. L. REV. ONLINE 1 (2021) (arguing for recognition "that the movement for justice for non-citizens of color shares important commonalities with the goals of the Black Lives Matter movement").

<sup>102</sup> See generally AM. IMMIGR. COUNCIL, *supra* note 16.

<sup>103</sup> See U.S. IMMIGR. & CUSTOMS ENF'T, FY 2019 BUDGET IN BRIEF 1 (2019), <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf> [<https://perma.cc/YCA8-QPVE>] ("Our great Nation has always been shielded from threats by distance and by two oceans, but we can no longer have confidence in that protection; threats exist both outside and inside our borders. Our enemies are adapting rapidly and plotting against us at an alarming rate.")

<sup>104</sup> See Chishti & Bolter, *supra* note 15.

ward-looking assessments of those agencies show funding increases steadily taking place.<sup>105</sup> The most significant expenses appear to be operational expenses and officer salaries, the latter fueled by expansions in hiring at the front line agent level.<sup>106</sup>

Congress has periodically chosen to hinge funding on specific purposes and outcomes, at times at devastating human cost. Under the bed funding mandate in place from 2010 to 2017, for instance, Congress made DHS's funding contingent upon ICE maintaining a certain number of detention beds per day (initially set at 33,400), which fueled a rise in the incarceration of individuals.<sup>107</sup> Even where funding increases appear designed to meet humanitarian challenges, mismanagement has resulted, thereby leading to a concern that the deportation state is ill-equipped to justify the simultaneous acquisition of resources for humanitarian goals while maintaining an agency culture that is overwhelmingly focused on enforcement. In 2019, for instance, Congress allocated funds to CBP for families and children at the border, but government reports a year later revealed that the agency had misspent the funds on dirt bikes, canine supplies, and surveillance systems.<sup>108</sup>

One might posit that funding allocations are a byproduct of the broader immigration law framework in place, such that substantive reforms will naturally lead to a gradual defunding of the immigration enforcement agencies. To some extent, this may be true—but not entirely. If large-scale legalization takes place, then significant numbers of persons otherwise subject to enforcement action would indeed become eligible to gain status. With fewer people subject to enforcement, then the justification for deportation and detention may diminish. But the experience of the Obama administration suggests that exempting a subset of the immigrant population from the prospect of deportation will not necessarily temper the deportation state.<sup>109</sup> In large part, this was the result of the Obama administration's hesitation towards questioning the legitimacy of deportation and detention altogether and its

<sup>105</sup> See *id.* (noting a nearly tripling of ICE and CBP budget since the founding of DHS in 2002).

<sup>106</sup> See Daniel Bush, *The Challenges Biden Will Face on Immigration Reform*, PBS NEWS HOUR (Dec. 2, 2020, 5:00 PM), <https://www.pbs.org/newshour/nation/the-challenges-biden-will-face-on-immigration-reform> [<https://perma.cc/9BMB-S3LX>] (reporting that in FY 2020, 85 percent of CBP's "14.9 billion pot of discretionary spending went to salaries and expenses," and that "nearly all of [ICE]'s \$8 billion discretionary spending in fiscal year 2020 went to staff salaries and other expenses associated with running the agency"); see also Chishti & Bolter, *supra* note 16 (noting that CBP, with a total staff of more than 60,000, boasts 44,000 "armed, sworn law enforcement officers"—the largest number of all federal agents, and that "ICE's workforce of more than 20,000 includes 13,300 law enforcement officers.").

<sup>107</sup> See Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST'L. L. & PUB. POL'Y 77, 86–88 (2017) (describing origins of detention bed quota).

<sup>108</sup> See David Welna, *Government Watchdog Says Aid for Migrants Misspent by Border Agency*, NAT'L PUB. RADIO (July 15, 2020, 8:30 PM), <https://www.npr.org/2020/07/15/891636652/government-watchdog-says-aid-for-migrants-misspent-by-border-agency> [<https://perma.cc/9XCY-F2PW>].

<sup>109</sup> See Marisa Franco & Carlos Garcia, *The Deportation Machine Obama Built for President Trump*, THE NATION (June 27, 2016), <https://www.thenation.com/article/archive/the-deportation-machine-obama-built-for-president-trump/> [<https://perma.cc/RL5G-F69E>] (describing growth in immigration enforcement funding under Obama).

justification that enforcement priorities enabled it to focus on persons with serious criminal records, exemplified by the “families, not felons” logic.<sup>110</sup> And as Professor Chazaro has argued, efforts that focus primarily on legalization for some suffer from the problem of exacerbating the conditions of illegality for others.<sup>111</sup> For those who may not qualify for legalization due to encounters with the criminal legal system or because they otherwise lack the qualities deemed necessary for such relief, the dangers associated with the deportation state continue.<sup>112</sup>

Thus, even in the event that immigration reform legislation takes place in the early years of the Biden Presidency, funding decisions nonetheless warrant close interrogation. The process of setting an agency’s budget is an opaque process to much of the public, and involves Congress, the President, and the agencies. Congress possesses the classic power of the purse over agency funding.<sup>113</sup> Congressional committees evaluate agency funding proposals and must approve final agency budgets through annual appropriations bills.<sup>114</sup> However, negotiations over a particular budget begin long before the President submits it to Congress for committee hearings and voting. The Office of Management and Budget (OMB) is a central player in receiving budget proposals from administrative agencies across the federal government; those agencies must justify their funding requests in detailed reports. The President can inject the administration’s policy preferences during the OMB review process.<sup>115</sup> The President can, for instance, work through the appropriations process to redesignate funding streams devoted to immigration detention to other purposes—a maneuver that may have particular impact on private prisons, whose contracts depend on the existence of Congressional funding.<sup>116</sup>

Funding considerations may also affect the capacity of the immigration bureaucracy to bring people into compliance with the law. Currently, the benefits-adjudicating agency USCIS is almost entirely self-funded through application fees and does not require congressional approval through the an-

<sup>110</sup> See *supra* discussion accompanying note 42.

<sup>111</sup> See Angelica Chazaro, *Beyond Respectability: Dismantling the Harms of “Illegality”*, 52 HARV. J. LEGIS. 355, 357 (2015).

<sup>112</sup> Indeed, the first summary of the Biden immigration legislation made clear that lawful permanent residence would be contingent on passing “criminal and national security background checks.” See *Fact Sheet*, *supra* note 10.

<sup>113</sup> See Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1343 (1988).

<sup>114</sup> See *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (“[N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”).

<sup>115</sup> See Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2187–92 (2016) (describing role of Resource Management Offices at OMB and opportunities for Presidential influence over budget approval process).

<sup>116</sup> See César Cuauhtémoc García Hernández, *Biden’s Migration Policy Options*, BORDER CRIMINOLOGIES BLOG (Jan. 11, 2021), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/01/bidens-migration> [https://perma.cc/DGL5-AGUU].

nual budgeting process.<sup>117</sup> But Congress could appropriate additional funds to USCIS in order to increase its capacity, particularly for benefits applications that are not driven by fees (such as asylum applications), or to increase its receptivity to granting fee waivers in an effort to reduce financial barriers to immigration law compliance.<sup>118</sup> Increases to USCIS's funding capacity also require strong management of the agency's priorities, which are discussed in the next section.

The implementation details of how major changes in funding allocations could take place, while beyond the scope of this Article, might occupy future scholars. Although legal scholars have widely recognized the astronomical funding expansions for immigration enforcement that have occurred over time, legal scholarship that directly interrogates the federal agency funding process in the immigration enforcement context is strikingly minimal.<sup>119</sup> The case for shifting the historical trajectory of increased funding for immigration enforcement is strong. How such a shift is achieved, as a matter of politics and law, is a question that warrants sustained attention into the future.

### B. Agency Staffing and Management

A second area of potential focus is the staffing, management, and supervision of the deportation state itself. The executive branch is far from monolithic. Administrative law scholars have vigorously explored the dynamics associated with the operation of politically appointed agency leaders working alongside career civil servants.<sup>120</sup> Under some accounts, civil servants have been characterized as a check on agency heads, reflecting greater political neutrality, more expertise and fidelity to an agency's mission.<sup>121</sup> While political appointees come and go, the underlying culture, mission, and values

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<sup>117</sup> See 6 U.S.C. § 296(c); WILLIAM A. KANDEL, CONG. RESEARCH SERV., R44038, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING (May 15, 2015).

<sup>118</sup> See Jens Hainmueller et al., *A Randomized Controlled Design Reveals Barriers to Citizenship for Low-Income Immigrants*, PROC. NAT'L ACAD. SCI. 939, 944 (2018) (finding that lowering the fees associated with naturalization applications would increase naturalization rates amongst low-income immigrants).

<sup>119</sup> Legal scholarship has addressed discrete questions related to funding, often prompted by specific political disputes, for instance around whether the federal government has the authority to restrict federal funding to sanctuary jurisdictions or the implications of President Trump's demands for border wall funding. See, e.g., Margulies, *supra* note 9; Raymond H. Brescia, *The Shifting Frontiers of Standing: How Litigation Over Border Wall Funding is Exposing Standing's Current Doctrinal Fault Lines*, 68 UCLA L. REV. DISCOURSE 80 (2020). Gillian Metzger has commented upon the general marginalization of the agency funding and appropriations process in public law doctrine, and thoughtfully explored "the implications of taking appropriations seriously" in doctrinal analysis. Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1080–83 (2021).

<sup>120</sup> See, e.g., Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530–50 (2015) (describing agency heads, civil servants and civil society as reflecting separation of powers dynamics and principles within administrative agencies).

<sup>121</sup> See *id.* at 540–41 (discussing civil servants as an "institutional counterweight" to agency heads); see also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dan-*

are shaped in large part by civil servants and front line agents.<sup>122</sup> The task of supervising the existing deportation state rests largely with the President and executive branch leadership.<sup>123</sup>

In the immigration enforcement context, however, as discussed in Part II, the civil servants and frontline agents powering the deportation state have suffered from unusual levels of politicization and at times shown contempt for the rule of law.<sup>124</sup> The cultures of ICE and CBP, for instance, have long demonstrated pro-deportation cultures that fail to account for the service and humanitarian elements of the immigration laws, particularly amongst the front line officers tasked with conducting investigations, arrests, and managing the detention and deportation process.<sup>125</sup> According to Shalini Bhargava Ray, the lack of enforcement priorities under Trump amounted to an abdication of the President's constitutional duty to faithfully execute the laws as a result of his failure to supervise the bureaucracy.<sup>126</sup>

The influence of the ICE and CBP unions in particular merit closer scrutiny. During the Obama era, the ICE officers' union spearheaded (ultimately unsuccessful) litigation in response to DACA, leading to the decision to centralize discretion over DACA in USCIS.<sup>127</sup> The agency front line's commitment to prioritizing deportation found a warm welcome, however, in President Trump, who the enforcement unions endorsed during his campaign.<sup>128</sup> The role of the ICE and CBP unions in shaping agency culture and policy surfaced again in the last days of the Trump administration, upon news brought to light by a government whistleblower that the Administration had entered into agreements that would have required the Biden administration to receive union approval before changing enforcement policy.<sup>129</sup>

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*gerous Branch from Within*, 115 YALE L.J. 2314 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009).

<sup>122</sup> See Michaels, *supra* note 120, at 541–47.

<sup>123</sup> See Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L. J. (forthcoming 2021) (manuscript at 9), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3573110](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3573110) [<https://perma.cc/P8G7-XE3V>] (“[O]n most leading theories of the presidency, the President has, at a minimum, a duty to oversee the bureaucracy”); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (exploring the impact of presidential administrations on agency functioning).

<sup>124</sup> See *supra* discussion at notes 85–89.

<sup>125</sup> See Koh, *supra* note 70; 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).

<sup>126</sup> See Ray, *supra* note 123.

<sup>127</sup> See Kagan, *supra* note 41, at 684–92.

<sup>128</sup> See Ryan Devereaux, *An Unchecked Union*, THE INTERCEPT (Dec. 27, 2020, 8:00 AM), <https://theintercept.com/2020/12/27/border-patrol-trump-biden-politics/> [<https://perma.cc/3FQR-YF5F>] (observing that CBP union's endorsement of Trump was first endorsement of a presidential campaign in union's history); Kim Kelly, *Abolish ICE's Union*, NEW REPUBLIC (Sept. 2, 2019), <https://newrepublic.com/article/154915/abolish-ice-immigration-customs-enforcement-union> [<https://perma.cc/5SSY-ZCYN>].

<sup>129</sup> See Zolan Kanno-Youngs & Charlie Savage, *Trump Official's Last-Day Deal with ICE Union Ties Biden's Hands*, N.Y. TIMES (Feb. 1, 2020), <https://www.nytimes.com/2021/02/01/us/politics/cuccinelli-biden-ice.html> [<https://perma.cc/D4E8-5YH6>].

The staffing, supervision and management of immigration judges (IJs) also play a meaningful role in the system. The hiring of IJs—already affected by a history of politicization, particularly during the Bush era<sup>130</sup>—intensified during the Trump administration. Record numbers of new IJs were hired, while dozens resigned or retired—some while issuing public statements indicating that their resignations were in direct protest to policies like family separation and IJ case quotas.<sup>131</sup> The American Bar Association expressed concern about the lack of sufficient vetting during the evaluation process for IJs.<sup>132</sup> At the agency appellate level, many Trump-appointed members of the BIA were IJs with astoundingly high asylum denial rates.<sup>133</sup> And the IJ union—which issued vocal criticisms of the former Administration’s policies impacting the immigration courts—was de-certified towards the end of 2020, during the last months of the Trump administration, in what appeared to have been an act of retaliation against the organization.<sup>134</sup>

Changing agency culture is a long-term project that involves many areas of agency management. While it may be tempting to view the process of addressing agency culture as a form of bureaucratic administration, as opposed to law,<sup>135</sup> the question of how supervision of the front line takes place comprises a part of what Gillian Metzger and Kevin Stack have characterized as “internal administrative law.” According to Metzger and Stack, those “core internal features of agencies—such as management structures, guidance, planning and coordination, civil service, professionalism, and the like”

<sup>130</sup> See U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), <https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf> [<https://perma.cc/G3BH-EL5N>].

<sup>131</sup> See, e.g., Ilyce Shugall, *Why I Resigned as an Immigration Judge*, L.A. TIMES (Aug. 4, 2019, 4:00 AM), <https://www.latimes.com/opinion/story/2019-08-03/immigration-court-judge-asylum-trump-policies> [<https://perma.cc/9GZR-S6NT>]; *Why Immigration Judges Opt to Leave Over Trump Policies*, NAT’L PUB. RADIO, (Feb. 10, 2020, 5:08 AM), <https://www.npr.org/2020/02/10/804408028/why-immigration-judges-opt-to-leave-over-white-house-policies> [<https://perma.cc/UH7L-WSZM>].

<sup>132</sup> See Reade Levinson, Kristina Cooke & Mica Rosenberg, *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts*, REUTERS (Mar. 8, 2021, 7:06 AM), <https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179> [<https://perma.cc/UV6R-AJXP>].

<sup>133</sup> See Felipe de la Hoya, *The Shadow Court Cementing Trump’s Immigration Policy*, NATION (June 30, 2020), <https://www.thenation.com/article/society/trump-immigration-bia/> [<https://perma.cc/6UM7-GW62>] (describing appointment of immigration judges with extremely high asylum denial rates to BIA, including “one judge who threatened to unleash a dog on a 2-year-old boy during a hearing”).

<sup>134</sup> See Joe Davidson, *In a Rare Move, Trump Appointees Bust Union, Hit Federal Immigration Judges*, WASH. POST (Nov. 6, 2020, 6:00AM), [https://www.washingtonpost.com/politics/trump-union-bust-immigration-judges/2020/11/05/f4dbec26-1f86-11eb-9ec3-3a81e23c4b5e\\_story.html](https://www.washingtonpost.com/politics/trump-union-bust-immigration-judges/2020/11/05/f4dbec26-1f86-11eb-9ec3-3a81e23c4b5e_story.html) [<https://perma.cc/U2EY-R62L>] (describing action by Federal Labor Relations Authority to decertify National Association of Immigration Judges).

<sup>135</sup> See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244 (2017) (observing and critiquing that “key features of internal administration—internal policies, procedures, practices, oversight mechanisms, and the like—are rarely viewed as part of administrative law”).

have increasingly become subjects of scholarly attention, and accordingly “need to be recognized as central to administrative law.”<sup>136</sup>

A range of internal administrative law measures might further the diminishing of the deportation state. Simply reducing the number of agents may encounter complications related to unionization as well as civil servant protections. But hiring standards and job qualifications for positions throughout the immigration bureaucracy matter, as do systems governing internal promotions and job incentives. Taking steps to cultivate expertise amongst the rank-and-file, as well as amongst agency adjudicators, requires investments in training and centralization. Developing rigorous systems for internal accountability, discipline, and oversight to respond to complaints about officer misconduct and failure to adhere to law and policy is a related option. So is growing the capacity of internal agency offices aimed at promoting positive values and norms.<sup>137</sup> Funding decisions are a key component of how the employee base of the immigration enforcement agencies develop, which requires action from Congress. But as with funding, sustained and focused attention to how the frontline actors within the broader deportation state evolve should be a priority. Despite these challenges, the Biden administration nonetheless has a meaningful role to play in the supervision and management of the bureaucracy.

### C. *Subfederal and Private Extensions of the Deportation State*

Even if the core infrastructure of ICE and CBP undergoes significant reductions in funding and fundamental changes in staffing, the fact remains that the modern deportation state has expanded by way of collaborations with entities outside the federal government. Two prominent sources of collaboration have been state and local law enforcement, and private industry. Indeed, both immigration federalism and privatization across the administrative state have attracted considerable attention from scholars.<sup>138</sup>

With respect to state and local law enforcement authorities directly collaborating with ICE, the nature of the federal government’s collaboration varies widely by jurisdiction but is also contingent on the federal executive

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<sup>136</sup> *Id.* at 1246.

<sup>137</sup> See Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1227, 1246 (2020) (suggesting greater attention on use of agency offices described in Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014)).

<sup>138</sup> See David Rubenstein, *Supremacy, Inc.*, 67 UCLA L. REV. 1130, 1133–34 (2020) (“While some commentators hail federal outsourcing as a key innovation of modern government, others decry outsourcing’s distorting effects on constitutional rights, separation of powers and administrative law.”); Jennifer Chacon, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1340–47 (2019) (describing significant literature on immigration federalism, and noting that “over the past three decades, the immigration federalism literature has focused on many of the same questions common in federalism scholarship more generally – the relationship between distribution of governmental power and individual rights, the appropriate scope of federal preemption, and the contours and limits of anticommandeering principles under the Tenth Amendment”).

branch's commitment to such relationships. In a number of areas, state and local law enforcement continue to enter into agreements—known as 287(g) agreements—to deputize nonfederal police officers with immigration powers,<sup>139</sup> which were introduced under Bush, scaled back under Obama, and proliferated under Trump.<sup>140</sup> Many local law enforcement agencies also provide opportunities for enhanced ICE's presence in communities through their policies and practices of honoring ICE's requests to hold people temporarily for immigration purposes (known as detainers).<sup>141</sup> Despite high levels of cooperation with immigration enforcement in some parts of the country, other state and local jurisdictions have actively resisted federal immigration enforcement efforts through the enactment of sanctuary policies that prevent cooperation with federal immigration authorities, funding deportation defense and other immigration legal services, and regulating or prohibiting the expansion of private immigration detention centers.<sup>142</sup>

When it comes to privatization, some aspects of private industry participation in immigration enforcement are well-documented, such as the role of the for-profit prison industry in bolstering immigration detention.<sup>143</sup> The GEO Group and CoreCivic, both publicly traded corporations that have made political contributions and lobbied for stricter immigration enforcement policies, provided roughly half of the bed space for ICE during the Trump administration in locations throughout the country.<sup>144</sup> Critiques of the lack of accountability and standards related to detention conditions at private facilities are particularly strong.<sup>145</sup> Both companies enjoy decade-long contracts with ICE, which if permitted to run would outlast the Biden administration. Notably, resistance to some of these contracts have bubbled up at the subfederal level, with states such as California and Washington passing laws that would prohibit the renewal of existing contracts for for-profit immigration detention after the expiration of current agreements.<sup>146</sup>

<sup>139</sup> See generally 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).

<sup>140</sup> See *id.* at 1273–75.

<sup>141</sup> See, e.g., Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 BROOK. L. REV. 1085, 1089 (2019).

<sup>142</sup> See *supra* discussion accompanying notes 62–65.

<sup>143</sup> See Jennifer Chacon, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. REV. 1 (2017) (discussing range of private entities' participation in immigration enforcement and analyzing critiques of privatization in context of immigration detention); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1510 (2015).

<sup>144</sup> See Hauwa Ahmed, *How Private Prisons Are Profiting Under the Trump Administration*, CTR. FOR AM. PROGRESS (Aug. 30, 2019, 9:02 AM), <https://www.americanprogress.org/issues/democracy/reports/2019/08/30/473966/private-prisons-profit-trump-administration/> [<https://perma.cc/Q274-L55V>].

<sup>145</sup> See U.S. DEP'T OF HOMELAND SEC., ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf> [<https://perma.cc/6DN7-VYS8>].

<sup>146</sup> See Aris Folley, *Washington State Senate Passes Legislation to Ban Private, For-Profit Prisons*, HILL (Mar. 31, 2021, 5:14 PM), <https://thehill.com/homenews/state-watch/545844->

But the privatization of immigration enforcement is not limited to incarceration, and now extends to the use of widespread technological surveillance over potential enforcement subjects. With political momentum growing against the private prison industry, GEO Group and CoreCivic have reportedly turned to other aspects of immigration enforcement. GEO Group, for instance, has invested in ankle monitoring (which is used heavily by ICE as an alternative to physical incarceration).<sup>147</sup> The federal deportation state's contracts with privatized surveillance and data-gathering collides with state and local government, thereby implicating multiple sectors in efforts to enhance immigration enforcement efforts in immigrant communities.<sup>148</sup> ICE has contractual relationships with private companies that purchase and consolidate data from a wide range of sources, such as state Departments of Motor Vehicles, private company utility records, and social media profiles.<sup>149</sup> A dizzying web of relationships and entities populate this emerging space. Advocates and scholars have just begun to reveal the range of companies participating in technology surveillance for immigration enforcement purposes, and includes entities like Palantir, Clearview AI, Vigilant Solutions, Thomson Reuters, LexisNexis, and Amazon.<sup>150</sup> Even in states that have adopted sanctuary and no-sharing policies with ICE, ICE has managed to receive information through such technology companies, or even directly from state offices (at times in contravention of state policy).<sup>151</sup> To increase its reach, ICE also deploys sophisticated technology from private companies that engage in facial recognition and license plate scanning.<sup>152</sup> In general, the very existence of such contracts and technological

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washington-state-senate-passes-legislation-to-ban-private-for-profit [https://perma.cc/BTJ6-DJTK].

<sup>147</sup> See Jamiles Lartey, *Think Private Prison Companies Are Going Away Under Biden? They Have Other Plans*, THE MARSHALL PROJECT (Nov. 17, 2020), https://www.themarshallproject.org/2020/11/17/think-private-prison-companies-are-going-away-under-biden-they-have-other-plans [https://perma.cc/779K-5S3E].

<sup>148</sup> See *supra* discussion accompanying notes 65–66.

<sup>149</sup> See Drew Harwell, *ICE Investigators Used a Private Utility Database Covering Millions to Pursue Immigration Violations*, WASH. POST (Feb. 26, 2021, 4:55 PM), https://www.washingtonpost.com/technology/2021/02/26/ice-private-utility-data/ [https://perma.cc/DS2P-QTBM]; Bedoya, *supra* note 66.

<sup>150</sup> See, e.g., JULIE MAO, JUST FUTURES LAW, STATE DRIVER'S LICENSE DATA: BREAKING DOWN DATA SHARING AND RECOMMENDATIONS FOR DATA PRIVACY, (Mar. 2020), https://justfutureslaw.org/wp-content/uploads/2020/04/2020-3-5-State-DMV-Data-Sharing-Just-Futures-Law.pdf [https://perma.cc/S97M-RGZE]; Harwell, *supra* note 14 (describing databases owned by Thomson Reuters and Equifax that contract with DHS).

<sup>151</sup> See Funk, *supra* note 66 (describing ICE access to Washington State Department of Licensing's Driver and Plate Search database due to changes in system that allowed law enforcement officers to log on and run their own searches); April Glaser, *Sanctuary Cities Are Handing ICE a Map*, SLATE (Mar. 18, 2018, 2:06 PM), https://slate.com/technology/2018/03/how-ice-may-be-able-to-access-license-plate-data-from-sanctuary-cities-and-use-it-for-arrests.html [https://perma.cc/GD8S-8NE9].

<sup>152</sup> See Drew Harwell & Tony Romm, *ICE is Tapping into a Huge License-Plate Database, ACLU says, Raising New Privacy Concerns About Surveillance*, WASH. POST (Mar. 13, 2019, 11:40 AM), https://www.washingtonpost.com/technology/2019/03/13/ice-is-tapping-into-huge-license-plate-database-aclu-says-raising-new-privacy-concerns-about-surveillance/ [https://perma.cc/8HXW-FABT]. The Obama Administration laid the groundwork for such

innovations is subject to minimal public scrutiny. Often, they become known primarily through the work of advocates, despite their profound influence on the capacity of the deportation state.<sup>153</sup>

Again, congressional funding considerations in combination with political will are key to shifting the dynamics of these seemingly ever-expanding contracts. For some issues—reliance on subfederal and private entities for immigration detention, for instance—the case for change may already be at a tipping point, particularly in light of the Biden administration’s stated commitment to ending the federal criminal justice system’s reliance on private prisons.<sup>154</sup> With others, such as the use of surveillance technology and artificial intelligence, the need for shifts may be less obvious, in part due to the complexity, opacity, and rapidly shifting nature of technological surveillance in the modern era.<sup>155</sup> And while certain technological innovations and private collaborations may present benefits for the immigration bureaucracy,<sup>156</sup> the executive branch should proceed cautiously when adopting new technologies in the interest of reform, particularly to the extent those efforts provide resources for future administrations hostile to the human rights of immigrants to manipulate and expand deportation capacity. Political will and activism at all levels—including at the local level and amongst consumers and shareholders—are necessary to generate substantial change. That momentum has also been building, whether in the form of state and local efforts to

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relationships with Silicon Valley, although some such contracts—such as one to engage in license plate tracking—were rejected by head agency officials due to privacy concerns. See Ellen Nakashima & Josh Hicks, *Department of Homeland Security Cancels National License-Plate Tracking Plan*, WASH. POST (Feb. 19, 2014), [https://www.washingtonpost.com/world/national-security/dhs-cancels-national-license-plate-tracking-plan/2014/02/19/a4c3ef2e-99b4-11e3-b931-0204122c514b\\_story.html](https://www.washingtonpost.com/world/national-security/dhs-cancels-national-license-plate-tracking-plan/2014/02/19/a4c3ef2e-99b4-11e3-b931-0204122c514b_story.html) [<https://perma.cc/NLR9-KY99>].

<sup>153</sup> For instance, the grassroots and movement-building organization Mijente has spearheaded a number of campaigns aimed at surveillance and the use of technology in immigration enforcement and policing. See, e.g., #NOTeCHFORICE, <https://notechforice.com> [<https://perma.cc/ML6F-KEEA>]. Legal advocacy organizations such as Just Futures Law have generated reports, pursued Freedom of Information Act (FOIA) and other litigation to highlight the harms associated with technological surveillance and ICE contracts with private technology companies. See, e.g., *Resource Pages*, <https://justfutureslaw.org/resources/> [<https://perma.cc/3KBJ-HXH9>] (listing reports and litigation work).

<sup>154</sup> See Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 26, 2021) (directing Attorney General to refrain from renewing private prison contracts for use in federal criminal system, but not immigration detention).

<sup>155</sup> A significant literature has critiqued the rise of big data policing and surveillance, and has raised a host of concerns, including the potential for bias, lack of governmental regulation, privacy, and enhancements to surveillance capacity. See, e.g., Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797 (2021); Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL’Y REV. 15, 19 (2016).

<sup>156</sup> For a description of technological innovations taking place across the administrative state, see DAVID FREEMAN ENGSTROM ET AL., *GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES* (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf> [<https://perma.cc/5L5C-TNFF>].

close detention centers and local jails,<sup>157</sup> grassroots efforts to identify and articulate the harms of increased technology surveillance,<sup>158</sup> or movements for privatized self-regulation to enhance accountability.<sup>159</sup>

## CONCLUSION

This Article has encouraged the Biden administration to approach its immigration policy with the goal of downsizing the deportation state, a shift that would depart not just from the Trump era but from multiple administrations before it. Three particular areas—funding, staffing and supervision, and subfederal and privatization collaborations—constitute significant dimensions of any effort to minimize the size, scope, and capacity of the bureaucratic apparatus tasked with conducting deportations and detentions. Each of these three areas is interconnected. Removing immigration enforcement’s heavy reliance on carceral tools such as detention, for instance, may be fundamentally addressed through funding and collaborations with subfederal and private entities. Increasing the compliance capacity of the immigration bureaucracy requires rethinking funding streams for immigration enforcement as well as supervision and staffing of the immigration state. If we are serious about orienting the system towards a greater measure of fairness, justice, and humanity, each of these areas requires specific attention.

The Biden administration may offer a glimmer of hope for immigrant communities in the short term, but the past several decades have illustrated the vulnerability of immigrant communities to the country’s political whims. Even as immediate reforms and legislative fixes remain essential, shaping the nature of the contemporary deportation state should remain a priority in the long run.

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<sup>157</sup> See Matt Katz, *County Officials Shutting ICE Out of Local Jails*, NAT’L PUBLIC RADIO (Oct. 14, 2018, 8:00 AM), <https://www.npr.org/2018/10/14/657238852/jails-nationwide-end-contracts-with-immigration-and-customs-enforcement> [<https://perma.cc/8C6Z-XJ6L>].

<sup>158</sup> See, e.g., GRASSROOTS LEADERSHIP, JUST FUTURES LAW & MIJENTE, *AUSTIN’S BIG SECRET: HOW BIG TECH AND SURVEILLANCE ARE INCREASING POLICING* (2020), [https://grassrootsleadership.org/sites/default/files/reports/austins\\_big\\_secret\\_how\\_big\\_tech\\_and\\_surveillance\\_are\\_increasing\\_policing.pdf](https://grassrootsleadership.org/sites/default/files/reports/austins_big_secret_how_big_tech_and_surveillance_are_increasing_policing.pdf) [<https://perma.cc/8BCF-EFV8>] (detailing surveillance technology and contracts used by Austin Police Department, and connection to immigration enforcement actions).

<sup>159</sup> See Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 99–100 (2019) (suggesting that private industry take steps to enhance accountability and transparency in use of artificial intelligence, in light of civil rights concerns); Muzaffar Chishti & Jessica Bolter, “Cubicle Activism”: *Companies Face Growing Demands from Workers to Cut Ties with ICE and Others in Immigration Arena*, MIGRATION POL’Y INST. (Oct. 30, 2019), <https://www.migrationpolicy.org/article/cubicle-activism-companies-face-worker-demands-cut-ties-ice> [<https://perma.cc/AWG8-RZP3>].

