IMMIGRATION LAW'S ARBITRARINESS PROBLEM

*Shalini Bhargava Ray**

Despite deportation's devastating effects, the Immigration and Nationality Act (INA) specifies deportation as the penalty for nearly every immigration law violation. Critics have regularly decried the INA's lack of proportionality, contending that the penalty often does not fit the offense. The immigration bureaucracy's implementation of the INA, however, involves a spectrum of penalties short of deportation. Using tools such as administrative closure, orders of supervision, and deferred action, agency bureaucrats decide who is deported and who stays, and on what terms, on a purely ad hoc basis. In this "shadow system," immigrants, their advocates, and the broader public lack basic information about what penalties are being imposed and why.

This Article argues for reframing the problem of immigration law's disproportionality as a problem of insufficient justification—one remediable only by building the infrastructure for reason giving in the immigration bureaucracy. Deportation strikes many as disproportionate because the government often lacks satisfactory reasons for imposing such a drastic penalty. But in the system of shadow sanctions today, the government not only fails to offer good reasons: It fails to offer any at all. As a result, the system of shadow sanctions represents a classic case of an arbitrary exercise of government power. Looking to examples of procedural innovation across the administrative state, this Article backs prudential reforms to create immigration law's missing reason-giving infrastructure. With it in place, the public can demand better reasons or proportionality. But the first step is addressing immigration law's arbitrariness problem.

* Associate Professor, University of Alabama School of Law. Selected for the 2021 AALS Administrative Law and Legislation New Voices Program and the 2021 Administrative Law New Scholarship Roundtable. Thanks to William Andreen, Ava Ayers, Bernard Bell, Anya Bernstein, Marie C. Boyd, Shahar Dillbary, Maura Dundon, Heather Elliott, Mirit Eyal-Cohen, Adam Feibelman, Laila Hlass, Amy Kimpel, Jennifer Lee Koh, Ronald Krotoszynski, Nick Parrillo, Sugata Ray, Johan Rochel, Shalev Roisman, David Rubenstein, Michael Sant'Ambrogio, Seema K. Shah, Daiquiri Steele, Karen Tani, Shoba Wadhia, Mary Yanik, and participants in workshops at Tulane Law School, the University of San Diego School of Law, and Villanova Law School for helpful comments and conversations. Seth Brostoff of the Bounds Law Library, Chisolm Allenlundy, Emily Ellis, Miranda Ronnow, and Josie Rykhus provided excellent research assistance. Additional thanks to Vivien Lee and the *Columbia Law Review* editorial staff.

INTRODUCTION

Since the nineteenth century, judges have recognized deportation as a penalty "beyond all reason in its severity."[1] In *Fong Yue Ting v. United States*, the Chinese immigrant plaintiffs allegedly failed to obtain certificates of residence required for lawful presence under section 6 of the Chinese Exclusion Act of 1892, rendering them deportable.[2] Justice Stephen Johnson Field argued in dissent that "neglect to obtain a certificate of residence" hardly warranted forced expulsion without indictment and trial.[3] Such a punishment involves removal from one's place of residence and the "breaking up of all the relations of friendship, family, and business there contracted."[4]

1. See Fong Yue Ting v. United States, 149 U.S. 698, 759 (1893) (Field, J., dissenting). One of the plaintiffs failed to obtain the certificate of residence because he could not present the requisite "white witness" to vouch for his lawful presence. Id. at 729–31.

2. Id. at 725–26.

3. Id. at 758–59.

4. Id. at 759.

Like Justice Field, immigration law scholars have long bemoaned the cruelty of "the deportation state,"[5] focusing specifically on immigration law's overreliance on deportation and the resulting disproportionality in many cases.[6] The black letter law of the Immigration and Nationality Act (INA) specifies deportation as the sanction for nearly all transgressions of immigration law, no matter how minor, and regardless of the personal circumstances of the immigrant.[7] In failing to recognize that deportation lacks adequate justification in many cases, the criticism goes, immigration law contemplates life sentences for the proverbial parking violation.[8] Critics have often pressed analogies to criminal law, arguing that some deportable immigrants warrant penalties short of deportation:[9] Just as those

---

5. See, e.g., Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law 79 (2020) [hereinafter Cox & Rodríguez, The President and Immigration Law].

6. See, e.g., Angela M. Banks, The Normative and Historical Cases for Proportional Deportation, 62 Emory L.J. 1243, 1298 (2013) [hereinafter Banks, Cases for Proportional Deportation] (arguing that immigration law disproportionately sanctions longer-term permanent residents with minor convictions); Jason A. Cade, Enforcing Immigration Equity, 84 Fordham L. Rev. 661, 665 (2015) [hereinafter Cade, Enforcing Immigration Equity] (arguing that "[t]he removal system . . . imposes dire penalties on the basis of a broad range of civil infractions"); Jill E. Family, The Future Relief of Immigration Law, 9 Drexel L. Rev. 393, 406 (2017) (arguing for adopting the European Convention of Human Rights' proportionality analysis in immigration); Laila Hlass, The Adultification of Immigrant Children, 34 Geo. Immigr. L.J. 199, 256 (2020) (noting the need for a system of graduated sanctions in immigration law, especially to distinguish between child migrants and adults); Daniel Kanstroom, Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions, 30 J.L. & Pol. 465, 466 (2015) [hereinafter Kanstroom, Smart(er) Enforcement] (arguing for "tak[ing] the notions of proportionality and graduated sanctions seriously in structural—rather than in discretionary—ways"); Juliet Stumpf, Fitting Punishment, 66 Wash. & Lee L. Rev. 1683, 1684 (2009) (noting that, in immigration law, "[n]either the gravity of the violation nor the harm that results governs whether deportation is the consequence for an immigration violation"); Michael J. Wishnie, Immigration Law and the Proportionality Requirement, 2 U.C. Irvine L. Rev. 415, 416 (2012) (noting widespread public perception of immigration law as "too harsh").

7. See, e.g., 8 U.S.C. § 1227(a)(1)(C) (2018) (listing a violation of nonimmigrant status or a condition of admission, such as overstaying a visa, as a deportable offense). The INA contains waivers from inadmissibility and removability that can soften the application of deportation, but they are not systematic, and little data is available on how frequently they are granted. See Shoba Sivaprasad Wadhia, Darkside Discretion in Immigration Cases, 72 Admin. L. Rev. 367, 402 n.164 (2020); see also U.S. Citizenship & Immigr. Servs., Number of Service-Wide Forms by Fiscal Year To-Date, Quarter, and Form Status 2019, https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY19Q1.pdf [https://perma.cc/G3LQ-4NSD] (last visited July 26, 2021).

8. See Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980) ("This is not to say that a proportionality principle would not come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment.").

9. See Banks, Cases for Proportional Deportation, supra note 6, at 1266–78 (comparing criminal law to immigration law); Stumpf, supra note 6, at 1720–40 (using criminal law as a model for proportionality and discussing alternative sanctions such as fines and delayed access to immigration benefits); see also Wishnie, supra note 6, at 418–24 (describing jurisprudence of proportionality in criminal law).

convicted of crimes must receive proportionate sentences in some cases under the Eighth Amendment, deportation is unwarranted in at least some immigration cases.[10]

Although criminal procedure offers a model for protecting targets of enforcement from civil liberties violations,[11] analogies to criminal law have foundered conceptually and in the courts. Conceptually, criminal law does not offer a compelling example of proportionality.[12] Legislatures retain vast discretion to punish felonies with lengthy terms of imprisonment, and proportionality in criminal law has limited traction outside of capital punishment and life sentences without parole.[13] As the jurisprudence stands today, the Eighth Amendment offers a weak, inadequate check on disproportionate punishment, underscored by rampant overpunishment and overcriminalization.[14]

Federal courts have also roundly rejected efforts to apply constitutional proportionality doctrines to removal orders. Courts have specifically rejected application of the Eighth Amendment to removal orders, instead affirming immigration law's "civil" rather than "criminal" character,[15] notwithstanding recognition of the overlap.[16] Courts have similarly rejected

---

10. See Solem v. Helm, 463 U.S. 277, 299–300 (1983) (reviewing life sentence without parole for proportionality). But see *Rummel*, 445 U.S. at 274 (recognizing that there is legislative prerogative when imposing felony sentences).

11. Michael Kagan, Immigration Law Is Torn Between Administrative Law and Criminal Law, Yale J. on Regul.: Notice & Comment (Feb. 12, 2016), https://www.yalejreg.com/nc/immigration-law-is-torn-between-administrative-law-and-criminal-law-by-michael-kagan/ [https://perma.cc/TYN6-C82V] ("Criminal procedure offers tools that are especially well suited to address the urgent civil liberties concerns in immigration law, especially the manner in which [DHS] arrests and detains people on immigration allegations.").

12. See Stephen F. Smith, Proportionality and Federalization, 91 Va. L. Rev. 879, 883 (2005) (arguing that federal criminal law lacks fidelity to the principle of proportionality, largely because federal judges have construed federal crimes expansively, increasing the number of potential defendants).

13. Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (rejecting the notion that the Eighth Amendment contains a "proportionality guarantee"); see also Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677, 681 (2005) (characterizing the Supreme Court's proportionality jurisprudence in criminal law as "highly unsatisfactory and disappointing; the body of law is messy and complex, yet largely meaningless as a constraint, except perhaps in a few instances in the capital context").

14. See Excessive Punishment, Equal Just. Initiative, https://eji.org/issues/excessive-punishment/ [https://perma.cc/RAE6-ENJ2] (last visited July 26, 2021) (describing "decades of harsh and extreme sentencing"); see also Jones v. Mississippi, 141 S. Ct. 1307, 1317–19 (2021) (holding that, for juveniles who commit homicide, the Eighth Amendment does not require a separate finding of permanent incorrigibility to sentence someone to life in prison without parole).

15. See, e.g., Hinds v. Lynch, 790 F.3d 259, 266 (1st Cir. 2015) (noting "removal's civil character").

16. See Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010) (noting that "deportation is nevertheless inherently related to the criminal process"); see also Daniel Kanstroom, Deportation Nation: Outsiders in American History 122 (2007) [hereinafter Kanstroom,

applying the Fifth Amendment Due Process Clause's proportionality rule for punitive damages to removal orders.[17] At the end of the day, efforts to apply constitutional proportionality doctrines in immigration law have reached a dead end.[18]

This Article takes a different approach to the INA's failure to meaningfully distinguish among deportable immigrants. Rather than pressing constitutional proportionality doctrines or analogies to criminal law, it looks inward to the apparatus of the immigration bureaucracy by examining the many informal, discretionary tools that bureaucrats use to show lenience. These tools include deferred action, administrative closure, and orders of supervision, all of which defer the issuance or execution of a removal order, sometimes indefinitely.[19] These tools comprise a system of shadow sanctions,[20] one that remains largely unregulated and hidden from public view.[21] Most noncitizens likely lack any knowledge of what these shadow sanctions are, how to apply for them, or the standards by which

---

Deportation Nation] (discussing the Supreme Court's "bright-line" between detention incident to removal and "infamous punishment" in Wong Wing v. United States, 163 U.S. 228 (1896)).

17. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996) (noting that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor" (quoting TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 454 (1993))); see also A. Benjamin Spencer, Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence, 79 S. Cal. L. Rev. 1085, 1123 (2006) (critiquing *BMW v. Gore*'s "guideposts" for evaluating punitive damages awards). Because immigration law is federal law, the Fifth Amendment's Due Process Clause applies, but courts and scholars have presumed that the Fifth and Fourteenth Amendment Due Process Clause standards are equivalent. See, e.g., *Hinds*, 790 F.3d at 268 n.8 (treating claims under the Due Process Clauses of the Fifth and Fourteenth Amendments equivalently); Angela M. Banks, Proportional Deportation, 55 Wayne L. Rev. 1651, 1655 (2009) (noting that the Fifth Amendment ensures proportionality "in the civil context" and citing Fourteenth Amendment Due Process cases).

18. See, e.g., *Hinds*, 790 F.3d at 263 (explaining that "federal courts have long described removal orders as non-punitive and, therefore, not punishment").

19. See infra section II.B.

20. One might view forms of lenience as "benefits" rather than "sanctions," but they have elements of both. Although some shadow sanctions come with work authorization and other protections, immigrants pay a price for coming out of the shadows and onto the government's radar. See Asad L. Asad, On the Radar: System Embeddedness and Latin American Immigrants' Perceived Risk of Deportation, 54 Law & Soc'y Rev. 133, 135 (2020) (arguing that immigrants view "documents" as enhancing their visibility to immigration enforcement, fueling the government's power to "surveil and expel" them). Accordingly, this Article characterizes these tools of lenience as "shadow sanctions."

21. See, e.g., Jennifer Lee Koh, Removal in the Shadows of Immigration Court, 90 S. Cal. L. Rev. 181, 184 (2017) (discussing how, in fiscal year 2013, "approximately 83% of all formal removal orders took place through either reinstatement of prior removal orders or expedited removal of individuals seeking admission at the border"—summary proceedings outside of immigration court). Koh further argues that longstanding critiques applicable to standard removal proceedings in immigration courts "are far more pronounced, and far more common, in immigration court's shadows." Id. at 186.

the government imposes them.[22] Public data about the use of these tools are also limited, save for occasional Freedom of Information Act (FOIA) requests.[23] As evidenced by this lack of openness and consistency—key values traditionally associated with the law—the system of shadow sanctions suffers from serious rule of law deficits.[24] Rather than requiring bureaucrats to make reasoned, consistent, and nonarbitrary judgments when distinguishing among deportable immigrants,[25] the system of shadow sanctions creates a zone of unregulated agency discretion.[26]

Structuring, constraining, and checking agency discretion is a core project of administrative law.[27] This Article argues for putting administrative law's doctrinal and conceptual resources to use in mitigating the flaws of the shadow system. Looking to agency practices in other areas of regulation as well as the example of the European Union, this Article argues for specific prudential reforms to promote reasoned immigration administration.

Reasoned administration serves as a necessary foundation for, but does not equal, proportionality.[28] As discussed below, there are many conceptions of proportionality. The immigration law literature has generally taken proportionality to mean that the severity of a penalty should track the severity of the offense and should consider noncitizens' particular circumstances, such as their length of residence in the United States. This Article argues for sanctions better tailored to these considerations and highlights the role of reason giving in attaining this objective.

---

22. See Shoba Sivaprasad Wadhia, Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases, 6 Colum. J. Race & L. 1, 5 (2016) [hereinafter Wadhia, Demystifying Employment Authorization] (noting that there is no form or other information available about deferred action, other than for the Deferred Action for Childhood Arrivals (DACA) program). For discussion of DACA, see infra section II.B.1.)

23. See, e.g., Shoba Sivaprasad Wadhia, The Aftermath of *United States v. Texas*: Rediscovering Deferred Action, Yale J. on Regul.: Notice & Comment (Aug. 10, 2016), https://www.yalejreg.com/nc/the-aftermath-of-united-states-v-texas-rediscovering-deferred-action-by-shoba-sivaprasad-wadhia/ [https://perma.cc/UQ9T-LR86] [hereinafter Wadhia, The Aftermath of *United States v. Texas*] (discussing the results of a FOIA request on USCIS grants of deferred action by a field office).

24. See Gillian E. Metzger & Kevin M. Stack, Internal Administrative Law, 115 Mich. L. Rev. 1239, 1258 (2017) (describing "values traditionally associated with the rule of law—specifically the values of authorization, notice, justification, coherence, and procedural fairness").

25. Cf. Judulang v. Holder, 565 U.S. 42, 55 (2011) (applying administrative law's requirement that agency action be based on nonarbitrary factors relevant to immigration policy).

26. See infra section II.C.

27. See Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 25–26 (1971).

28. See infra section I.B.

I. PROPORTIONALITY IN IMMIGRATION LAW

American law includes many different conceptions of proportionality.[29] With respect to penalties, proportionality often refers to the notion that penalties should track the gravity of the offense,[30] but immigration law does not follow this principle. Black letter immigration law imposes deportation freely, rendering millions of immigrants deportable.[31] As of 2017, the undocumented population hovers around eleven million immigrants,[32] and some additional number of lawful permanent residents are deportable based on violating what Daniel Kanstroom calls "post-entry social control laws."[33] Accordingly, scholars have regularly decried the lack of proportionality—that is, the INA's imposition of a drastic sanction without regard to meaningful distinctions among deportable immigrants.[34] But those arguments have lost traction in recent years, as legislative reform remains elusive[35] and both immigration and federal courts decline to use proportionality to limit or quash deportation orders.[36] Entry without inspection,[37] overstaying

---

29. See E. Thomas Sullivan & Richard S. Frase, Proportionality Principles in American Law: Controlling Excessive Government Actions 6 (2008) (identifying "the many forms that proportionality standards have taken").

30. Andrew von Hirsch, Proportionality in the Philosophy of Punishment, 16 Crime & Just. 55, 56 (1992) (describing the principle of proportionality as embodying the view that "punishments scaled to the gravity of offenses are fairer than punishments that are not"). Proportionality also taps into intuitive beliefs about efficiency and fairness. Cf. George Letsas, Proportionality as Fittingness: The Moral Dimension of Proportionality, 71 Current Legal Probs. 53, 71 (2018) ("According to proportionality as fittingness, every judgment about the proportionality between harms and goods is ultimately a judgment about the social role of the acting agent.").

31. "Deportable" refers to noncitizens present in the country in violation of the inadmissibility provisions of section 212 of the INA as well as the removability provisions of section 237. See 8 U.S.C. §§ 1127, 1182 (2018).

32. Abby Budiman, Key Findings About U.S. Immigrants, Pew Rsch. Ctr. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/ [https://perma.cc/WH6K-WQKN].

33. See Kanstroom, Deportation Nation, supra note 16, at 124–25. Under these provisions, noncitizens are deportable for crimes committed after entering the United States. Id. at 133. The Pew study states that 12.3 million lawful permanent residents reside in the United States, but it declines to speculate as to how many are currently deportable by postentry social control laws. See Budiman, supra note 32.

34. See, e.g., Stumpf, supra note 6, at 1684 (noting the ubiquity of deportation as the sanction for any immigration violation).

35. Hannah Miao, Biden's Immigration Bill Faces an Uphill Battle in Congress, but These Parts Could Find Bipartisan Support, CNBC (Feb. 27, 2021), https://www.cnbc.com/2021/02/27/immigration-biden-bill-faces-uphill-battle-but-these-measures-could-pass.html [https://perma.cc/67RT-T5FM] (noting a comprehensive reform bill would be unlikely to garner support from ten Republican Senators to defeat a filibuster).

36. See, e.g., Hinds v. Lynch, 790 F.3d 259, 262–63, 266 (1st Cir. 2015) (rejecting the application of constitutional proportionality review to removal orders and affirming the immigration judge's decision to refuse a constitutional challenge to removal orders).

37. See 8 U.S.C. § 1227(a)(1)(A) (2018).

a visa,[38] committing any of a long list of crimes,[39] failing to report a change of address,[40] falsifying documents,[41] and engaging in terrorism[42] all render a noncitizen deportable, as does becoming a public charge[43] and voting unlawfully.[44] Under a strict reading of the INA, most immigration law violations make a noncitizen deportable, and the INA fails to draw any systematic distinctions among removable immigrants.[45]

Analysis of penalties in U.S. immigration law would benefit from a broader view of proportionality, one that focuses on the basic notion of controlling excessive government action.[46] This reframing creates an opportunity to learn from other legal systems. Proportionality outside of the United States frequently refers to a multistep process for justifying government action.[47] As understood increasingly around the world, it serves to rein in government excess by requiring adequate justification for government action.[48] More

---

38. See id. § 1227(a)(1)(C).

39. See id. § 1227(a)(2).

40. Id. § 1227(a)(3)(A).

41. Id. § 1227(a)(3)(B).

42. Id. § 1227(a)(4).

43. Id. § 1227(a)(5). As revealed by the recent public charge litigation, the immigration bureaucracy can stretch or contract these grounds as well. See Cook County v. Wolf, 962 F.3d 208, 215–16 (7th Cir. 2020) (describing DHS's new public charge rule as "a striking departure from the previous administrative guidance," which had cabined the definition of public charge to those immigrants who receive cash assistance, rather than other forms of public benefits, or "institutionalization for long-term care at government expense" (internal quotation marks omitted) (quoting Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,689 (May 26, 1999))); City & County of San Francisco v. U.S. Citizenship & Immigr. Servs., 981 F.3d 742, 749 (9th Cir. 2020) (providing background on the public charge litigation).

44. 8 U.S.C. § 1227(a)(6).

45. See supra notes 37–44 and accompanying text.

46. Sullivan & Frase, supra note 29, at 3 (noting increasing visibility of "tensions between the need for administrative and penal regulation, the advancement of social welfare, and individual autonomy" and the common need for reviewing courts "to determine when a challenged action is excessive" or disproportionate).

47. Jacco Bomhoff, Beyond Proportionality: Thinking Comparatively About Constitutional Review and Punitiveness, *in* Proportionality: New Frontiers, New Challenges 148, 156 (Vicki C. Jackson & Mark Tushnet eds., 2017) (noting separate discourses of multistep proportionality review and substantive outcomes).

48. Moshe Cohen-Eliya & Iddo Porat, Proportionality and the Culture of Justification, 59 Am. J. Compar. L. 463, 474 (2011) (describing the "essence of proportionality" as "a requirement of justification"). Proportionality review as conducted around the world "typically consists of a four- or five-step order of decisional march." See Frank I. Michelman, Proportionality Outside the Courts With Special Reference to Popular and Political Constitutionalism, *in* Proportionality: New Frontiers, New Challenges, supra note 47, at 30; Sullivan & Frase, supra note 29, at 28 (describing Germany's proportionality review to involve a series of questions relating to "suitability, necessity, and proportionality in a narrower sense").

severe penalties warrant weightier reasons.[49] Poorly justified penalties cannot be deemed proportionate.[50] Existing scholarship on proportionality in immigration law, however, has largely overlooked the important role of reasons and reason giving in proportionality, to the detriment of the cause.[51]

A. *Critique of the INA's Crude Penalty Scheme*

As a result of the INA's failure to meaningfully distinguish among deportable immigrants, millions face drastic punishment for a wide range of offenses, despite their personal circumstances or functional membership in the polity.[52] In recent years, immigration policy has showcased the role of deportation in separating families,[53] and contemporary research has borne out Justice Field's assessment of the severe consequences of deportation.[54] Deportation imposes material, emotional, and psychological hardships on those left behind and potentially endangers deportees themselves.[55] Some families of deported individuals face poverty, housing insecurity, and hunger, in addition to stress and its sequelae.[56] Deportees

---

49. See Vicki C. Jackson, Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094, 3098 (2015) (stating that proportionality "embod[ies] the idea that larger harms imposed by government should be justified by more weighty reasons and that more severe transgressions of the law be more harshly sanctioned than less severe ones").

50. This inquiry into whether a justification satisfies proportionality has a quantitative and qualitative dimension. Quantitatively, it requires the decisionmaker to have enough information to understand the question and reach a decision. Qualitatively, it requires analyzing the adequacy of the reasoning and asking whether proportionality is satisfied. I thank Johan Rochel for this clarifying point.

51. For relevant scholarship that generally focuses on statutory reform or more robust judicial review, see supra note 6. These works do not discuss immigration law's missing reason-giving infrastructure.

52. The INA provides for discretionary waivers and highly restricted forms of relief, but because those are statutorily defined, they are not considered part of the scheme of shadow sanctions, the focus of this Article. See, e.g., 8 U.S.C. § 1227(a)(3)(C)(ii) (2018) (authorizing the Attorney General to issue a waiver for document fraud as grounds for removal); id. § 1229(b) (authorizing the Attorney General to cancel removal).

53. See Stephen Lee, Family Separation as Slow Death, 119 Colum. L. Rev. 2319, 2322–24 (2019) (characterizing family separation as a principle pervading the U.S. immigration system).

54. See Fong Yue Ting v. United States, 149 U.S. 698, 759 (1893) (Field, J., dissenting) ("As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted.").

55. See Sarah Stillman, When Deportation Is a Death Sentence, New Yorker (Jan. 8, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence (on file with the *Columbia Law Review*) (chronicling the creation of a "shadow database" of deportees who had been killed or otherwise harmed).

56. Samantha Artiga & Barbara Lyons, Family Consequences of Deportation/Detention: Effects on Finances, Health, and Well-Being, Kaiser Fam. Found. (Sept. 18, 2018), https://www.kff.org/racial-equity-and-health-policy/issue-brief/family-consequences-of-detention-deportation-effects-on-finances-health-and-well-being/ [https://perma.cc/CUN7-VT85].

themselves may face "kidnapping, torture, rape, and murder" upon return to their countries of origin.[57]

U.S. immigration law features an ever-widening chasm between statutory mandates and enforcement realities. Despite the severity of deportation, Congress expanded the grounds for deportation in 1996.[58] These expansions have exacerbated Congress's initial failure to systematize qualitative distinctions among violations or among offenders, even though immigration bureaucrats (and the public) hold intuitive notions of more and less serious immigration offenses,[59] as well as the kinds of qualities that warrant lenience.[60] This has prompted substantial scholarly critique, with a particular focus on the destruction of families and lives that results from the deportation of long-term residents.[61] Although many scholars have called for diversifying the types of sanctions imposed for immigration violations,[62] some have simply taken the position that deportation is currently overused.[63] They share a view that immigration law falls short of substantive justice and proportionality by failing to draw meaningful distinctions

---

57. Zachary Mueller, American Psychological Association Report: Consequences of Deportation Are Severe, Sometimes Fatal, Am.'s Voice (Sept. 25, 2018), https://americasvoice.org/blog/american-psychological-association-deportations/ [https://perma.cc/FY5N-RGBT] (citing Soc. for Cmty. Rsch. & Action, Am. Psych. Ass'n, Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities, 62 Am. J. Cmty. Psych. 3, 4 (2018)).

58. See Adam B. Cox & Eric A. Posner, The Second-Order Structure of Immigration Law, 59 Stan. L. Rev. 809, 840 n.114 (2007) (describing the expansion of deportation grounds in two 1996 laws); Nancy Morawetz, Rethinking Retroactive Deportation Laws and the Due Process Clause, 73 N.Y.U. L. Rev. 97, 99 (1998) (same).

59. See, e.g., Shoba Sivaprasad Wadhia, Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases 24 (2017) [hereinafter Wadhia, Beyond Deportation] (describing the memo of former INS commissioner Doris Meissner, which calls for prosecutorial discretion to best expend the agency's resources and identify serious offenders).

60. See Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All Field Off. Dirs., Special Agents in Charge & Chief Couns. 4 (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/7KX5-SE3Y] [hereinafter Morton Discretion Memo] (identifying factors warranting a favorable exercise of discretion).

61. See, e.g., Wishnie, supra note 6, at 430 (noting that deportation can lead to the forcible and permanent severing of important ties of family, community, and friendship, which judges have characterized as a "savage penalty") (internal quotation marks omitted) (quoting Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting))).

62. See, e.g., Stumpf, supra note 6, at 1728–32 (proposing sanctions in addition to or instead of deportation); see also Peter L. Markowitz, Abolish ICE . . . and Then What?, 129 Yale L.J. Forum 130, 143 (2019) (discussing fines as "the most obvious option" of "scalable penalties").

63. See, e.g., Wishnie, supra note 6, at 429 (noting that deportation of persons who arrived in a country at a young age or who have long resided there "bristles with severities").

among deportable immigrants.[64] This view echoes what is expected under widely held notions of justice and fairness.[65]

Some scholars have argued for legislative reform, for the amendment of the INA to include a broader range of sanctions, or at a minimum, for the INA to refrain from imposing deportation on long-term residents.[66] In the sections that follow, this Article considers the leading scholarly critiques of immigration law's lack of proportionality.

1. *Calls for Legislative Reform.* — Scholars have called for legislative reform to establish a scheme of graduated sanctions for immigration violations, but such reform faces perpetual practical obstacles. Juliet Stumpf argues, "Immigration law eschews proportionality."[67] Unlike criminal law and most areas of civil law, immigration law sanctions all violations with a single consequence—deportation.[68] Stumpf observes that the criminalization of immigration over the last few decades has created an urgent need for a proportional remedial scheme to match.[69] Accordingly, Stumpf presents a model for determining the proportionality of deportation in a given case and proposes alternative sanctions, such as delayed access to immigration benefits.[70] Stumpf does not regard the discretion of the Department of Homeland Security (DHS) to withhold deportation as a form of proportionate sanctions because discretion functions simply to turn off or delay a single sanction—it does not create alternative sanctions, such as fines.[71] But Stumpf's exclusion of agency discretion to withhold or delay deportation renders the analysis of proportionality incomplete. Postponing deportation for a long or indefinite period allows deportable immigrants to make life plans and deepen roots in their countries of residence, potentially changing the government's calculus regarding the relative advantages of deporting them.

---

64. Id.

65. Cf. von Hirsch, supra note 30, at 56 ("People have a sense that punishments scaled to the gravity of offenses are fairer than punishments that are not.").

66. See infra section I.A.1.

67. Stumpf, supra note 6, at 1684.

68. Id.

69. Id. at 1689 ("Particularly in light of the criminalization of immigration law, the need is compelling for immigration law to have a system of graduated sanctions like that in criminal law.").

70. Id. at 1737 (describing alternative sanctions of "restricting or delaying access to immigration benefits, imposing probation-like conditions or requiring community service, higher application fees for immigration benefits, or attending remedial courses on citizenship preparedness").

71. Id. at 1706.

Others have argued for proportionality based on history and legislative intent. Angela M. Banks has argued for reclaiming Congress's historical regard for proportionality in meting out deportations.[72] Banks posits that "[t]he proportionality principle provides a basis for balancing the government's interest in punishment and an individual's fundamental rights."[73] The United States began regulating immigrants' postentry conduct with the 1917 Immigration Act by making certain convictions grounds for deportation.[74] In the years leading up to passing this legislation, members of Congress vigorously debated "which crimes were serious enough to warrant deportation."[75] Members of Congress also weighed the effects on families, in terms of both financial hardship and family separation.[76] Early legislation further demonstrated concern for proportionality by empowering criminal trial judges to issue judicial recommendations against deportation (JRADs), thus relying on the judiciary to determine when deportation would be disproportionate.[77] Banks notes that, as a practical matter, many criminal trial judges remained unaware of JRADs and issued them infrequently.[78] But Congress amended the INA in 1952 to provide another avenue for balancing the harshness of deportation against an individual immigrant's equities. This provision is known as section 212(c) relief, which empowered immigration judges (IJs) rather than criminal trial judges.[79] Banks argues that two major laws passed in 1996 eroded this approach by expanding the grounds for deportation and scaling back relief from removal.[80] Yet, Banks believes that deportation should be imposed only "when it is a proportionate response to criminal activity."[81] Anchoring her analysis to *jus nexi*, or the connection principle, Banks argues that lawful permanent residents have a liberty interest in remaining

---

72. See Banks, Cases for Proportional Deportation, supra note 6, at 1246 (noting that "the United States' first comprehensive crime-based deportation regime" used proxies other than citizenship to identify members of the national community and that these proxies "can be utilized today through complex rule-like directives").

73. Id. at 1267.

74. Id. at 1268.

75. Id. at 1270.

76. Id. at 1274 (noting congressional awareness of "financial hardships and family separation" resulting from deportation).

77. Id. at 1275 (noting members of Congress "had faith in the judiciary to determine when deportation would be disproportionate").

78. Id. at 1276 ("The potential power of JRADs was never realized because judicial authority to issue a JRAD was not widely known and was therefore rarely used.").

79. Id. at 1277–78 ("[IJs] were trusted to balance the severity of the criminal act and the connections to the United States to decide if deportation was warranted.").

80. Id. at 1279–80 (discussing the legislative histories of the Anti-Terrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

81. Id. at 1245–46.

in the United States even after a criminal conviction.[82] They should be recognized as members of the polity due to their genuine connection to it,[83] as measured by length of residence, obligations to the polity, and other ties.[84] Banks argues that deportation of such polity members violates proportionality.[85] Other scholars share these concerns.[86] Like Stumpf, Banks focuses on the formal terms of the INA rather than bureaucratic discretion, and as a result, concludes that meaningful reform would require new legislation.[87]

Kanstroom has argued for foundational reform and a scheme of graduated sanctions to constrain immigration enforcement, advance proportionality, and respect immigrants' community affiliations.[88] Such reform follows from the notion of meaningful distinctions among deportable immigrants and a belief in second chances. Deportation frequently amounts to a disproportionate sanction, as it fails to account for the reasonable and often sympathetic motives that drive unlawful entry, unlawful presence, or violation of postentry social controls.[89] Rather than leaving the ultimate judgment entirely to the IJ's discretion, however, Kanstroom argues for structural reform, such as a statute of limitations on deportation.[90] He also advocates for a scheme of graduated sanctions allowing for a fit between the offender and the sanction.[91] Further, IJs could "partner with existing social service and probation networks to craft creative alternatives to removal and lifetime banishment."[92] Thus, deportation would not be the

---

82. Id. at 1252–57.

83. Id. (describing the connection principle for allocating citizenship).

84. Id. at 1253–54 (describing these measures of connection to the polity).

85. Id. at 1246 (noting that deporting permanent residents for crimes such as "perjury, receipt of stolen property, or failure to appear in court can be excessively harsh"). For a discussion of the significance of lengthy residence to membership, see Hiroshi Motomura, Immigration Outside the Law 110–12 (2014) (describing "immigration as affiliation" as the view that the longer a noncitizen resides in the United States, and the deeper their community and family ties here, the more they should be treated like a citizen).

86. For additional discussion of proportionality in immigration law, see supra note 6.

87. Banks, Cases for Proportional Deportation, supra note 6, at 1307 (discussing legislation that members of Congress had sponsored to "allow immigrants' connections to be considered when deportation decisions are made" and describing overcoming challenges to passing such legislation as "necessary"); see also id. at 1303 (describing measures Congress could take to promote proportionality).

88. Kanstroom, Smart(er) Enforcement, supra note 6, at 482, 493 (proposing "an experiment with *graduated sanctions* in removal cases" and stating that "[p]roportionality is a constraint on power that mandates consideration of certain extraneous factors in order to justify removal").

89. Id.

90. Id. at 488–89; see also Andrew Tae-Hyun Kim, Deportation Deadline, 95 Wash. U. L. Rev. 531, 542 (2017) (noting the absence of a statute of limitations in civil immigration enforcement proceedings, contrary to most other civil enforcement contexts).

91. Kanstroom, Smart(er) Enforcement, supra note 6, at 490–92.

92. Id. at 491.

first and only sanction; instead, it would be triggered only after other measures fell short in deterring new unlawful conduct.[93] Such a proposal would likely require congressional action;[94] accordingly, it encounters some of the same difficulties as other proposals for reform discussed above.

In contrast to scholars focusing principally on the formal terms of the INA, Jason A. Cade argues for legislative reform as well as administrative rulemaking to advance equity and proportionality in immigration law.[95] Cade recognizes qualitative and moral distinctions among deportable immigrants but argues that administrations rely excessively on criminal history as a marker of those most suited for deportation.[96] Apart from the executive branch's "criminal history blind spot," Cade notes that agency discretion has limits in advancing equity because it can, at most, preserve the status quo by terminating proceedings or deferring deportation.[97] It does not produce legal status or "durable relief."[98] Accordingly, Cade views agency discretion as offering a potential avenue to promote equity and proportionality, but a highly limited one. Cade ultimately calls for legislative reform and better agency guidance regarding noncitizens with criminal arrests or convictions.[99] Cade takes an important step in recognizing the potential for administrative discretion to advance proportionality but focuses on a subset of deportable noncitizens, namely those with criminal convictions.

2. *Calls for a Robust Role for the Judiciary.* — Other scholars have argued for limiting the imposition of deportation by recognizing the judiciary's role in applying constitutional proportionality doctrines. Michael J. Wishnie has argued that noncitizens have a substantive due process right against disproportionate sanctions, including deportation, based on the Fifth Amendment and, in some cases, the Eighth Amendment.[100] Wishnie further identifies two strands of proportionality review in Supreme Court

---

93. Id.

94. See id. at 493 (proposing "a substantial revision of the aggravated felony category" in the INA, a statute of limitations, and "more creative thinking about *both* the structural components and mechanisms of deportation law").

95. Cade, Enforcing Immigration Equity, supra note 6, at 668–69 (echoing calls for amending the INA but also recognizing the unlikelihood of achieving such reform, and thus also offering practical measures for the executive to undertake).

96. Id. at 668 (noting the Obama Administration's "extremely broad" view of criminal history, including migration crimes, traffic offenses, and misdemeanors, and its use of such criminal history as a proxy for a noncitizen's undesirability).

97. Id. at 712.

98. Id. at 711 (quoting Margaret H. Taylor, What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief From Removal, 30 J.L. & Pol. 527, 532 (2015)).

99. Id. at 720–23 (advancing an argument focused on the treatment of immigrants with criminal convictions but not arguing for overhauling executive branch discretion).

100. Wishnie, supra note 6, at 417.

jurisprudence: case-by-case analysis and categorical analysis.[101] Under case-by-case review, the court reviews the punishment for "gross disproportionality."[102] Wishnie notes that courts overturn very few sentences under this analysis because courts seldom conclude that a sentence "is so excessive in relation to the offense to create an inference of gross disproportionality."[103] But under categorical analysis, the court evaluates the proportionality of "an entire class of criminal punishment for a particular offense . . . or for a particular population."[104] He advocates for proportionality review of removal orders, both case-by-case and categorical, by courts and IJs.[105]

Although the Eighth Amendment applies only to criminal punishment, and the Supreme Court has continually characterized deportation as a "civil" sanction, Wishnie notes that immigration has become "quasi-criminal."[106] Further, the Supreme Court's decision in *Padilla v. Kentucky* recognized deportation as "an integral part" of the penalty for specific crimes.[107] In addition to the Eighth Amendment, the Fifth Amendment's Due Process Clause offers textual support for proportionality review, which the Supreme Court has interpreted to require proportionality in punitive damages.[108] On these grounds, and given deportation's punitive nature, Wishnie argues that removal orders should comply with the proportionality principle.[109] He further notes that, under the current statutory scheme, the IJ would be the proper actor for gauging the proportionality of removal for a given noncitizen.[110]

As a matter of statutory interpretation, however, the Board of Immigration Appeals (BIA) and IJs have generally concluded that IJs lack jurisdiction to review removal orders for proportionality.[111] The governing

---

101. Id. at 419–20.

102. Id. at 420.

103. Id.

104. Id.

105. Id. at 424.

106. Id. at 426.

107. Padilla v. Kentucky, 559 U.S. 356, 364 (2010); see also Wishnie, supra note 6, at 424, 428, 447.

108. Wishnie, supra note 6, at 423. Because immigration law is federal law, the Fifth Amendment's Due Process Clause applies, but courts and scholars have presumed that the Fifth and Fourteenth Amendment Due Process Clause standards are equivalent. See supra note 17; see also, e.g., Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of [undocumented immigrants] within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.").

109. Wishnie, supra note 6, at 423–24.

110. Id. at 418, 444.

111. See, e.g., In re Sunday, 2015 WL 799738, at *1 (B.I.A. Jan. 2, 2015) (affirming the IJ's determination that 8 U.S.C. § 1229a(c)(1)(A) does not authorize proportionality review of removal order); see also In re Brito, 2016 WL 8468279, at *1 (B.I.A. Dec. 8, 2016) (noting that the IJ had "dismissed [respondent's] argument that the Immigration and Nationality

provision of the INA states: "At the conclusion of the proceeding the [IJ] shall decide whether an alien is removable from the United States. The determination of the [IJ] shall be based only on the evidence produced at the hearing."[112] Although Wishnie argues that courts should rely on the canon of constitutional avoidance to interpret the statute to incorporate a proportionality requirement,[113] IJs and the BIA generally have either rejected the argument[114] or declined to reach the question of whether the INA authorizes, let alone requires, proportionality review.[115]

The INA preserves judicial review, however, for "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section,"[116] and advocates have pressed for proportionality review in the federal courts based on this provision and the Supreme Court's decision in *Padilla v. Kentucky*.[117] In *Padilla*, the Supreme Court held that competent criminal defense counsel must advise noncitizen clients about the immigration consequences of a criminal plea.[118] *Padilla* further recognized 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."[119] Scholars and advocates argued that the Court had recognized crime-based deportation as a "quasi-criminal" sanction susceptible to proportionality review.[120]

Federal courts, however, have rejected this reasoning so far. The First Circuit rejected the notion that *Padilla* transformed crime-based deportation into a punishment susceptible to Eighth Amendment analysis, citing the longstanding view of deportation as a nonpunitive sanction.[121] It specifically noted the "illogic[]" of conducting case-by-case proportionality review for noncitizens removed on criminal grounds but not for those removed on other grounds.[122] Similarly, the Second Circuit denied due process proportionality review to a noncitizen ordered removed for having

---

Act requires a proportionality review before an order of removal can be entered"); In re Castro-Cambisaca, 2016 WL 1357987, at *2 (B.I.A. Mar. 11, 2016) (concluding that the statute does not require an IJ to conduct a proportionality review for a removal order).

112. 8 U.S.C. § 1229a(c)(1)(a) (2018).

113. Wishnie, supra note 6, at 442–45.

114. See supra note 111.

115. See, e.g., *Brito*, 2016 WL 8468279, at *1.

116. 8 U.S.C. § 1252(a)(2)(D).

117. 559 U.S. 356, 374 (2010) (holding that counsel must inform clients, regardless of citizenship, whether their pleas carry the risk of deportation).

118. Id. at 373–74 ("The severity of deportation . . . only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.").

119. Id. at 364 (footnote omitted).

120. See Wishnie, supra note 6, at 417, 426.

121. See, e.g., Hinds v. Lynch, 790 F.3d 259, 263–66 (1st Cir. 2015).

122. Id. at 268.

entered without inspection.[123] Petitioner had argued that deportation was disproportionate to his removal ground, thereby violating due process.[124] The court ruled that the Constitution requires proportionality review of punitive civil sanctions out of a concern for fairness and notice but that the penalty of deportation for entry without inspection was "neither novel nor unexpected."[125] As a result, petitioner's case did not present the considerations driving due process proportionality review of civil sanctions. The arguments for proportionality in immigration law to date advance a powerful normative claim about the equity, fundamental fairness, and substantive justice due to immigrants and their families,[126] but as a practical matter, many of these arguments have lost traction. Federal courts have rejected them, and legislative reform remains elusive.[127] In recent years, federal courts have evinced minimal concern for deportable immigrants' constitutional rights.[128] As a result, proponents of proportionality must grapple with the limited avenues remaining beyond analogies to criminal law and constitutional proportionality doctrines.

B. *Proportionality as a Structural Value*

Proportionality describes a relationship between a penalty and an offense, but it also has an important procedural or structural dimension. Scholars have identified proportionality as a fundamental value in the law, relevant to the analyses of both rules and sanctions.[129] According to Moshe Cohen-Eliya and Iddo Porat, proportionality originated in Prussian administrative law and quickly spread to German constitutional law and the European Court of Human Rights.[130] As a precept of justice, it stands for the notion that greater harms should be justified by "more weighty reasons," and that "more severe transgressions of the law be more harshly sanctioned than less severe ones."[131] Vicki C. Jackson has argued that proportionality has a long history in Anglo-American law, as well as a special

123. Marin-Marin v. Sessions, 852 F.3d 192, 193–94 (2d Cir. 2017).

124. Id. at 194.

125. Id.

126. See, e.g., Wishnie, supra note 6, at 429 (noting the painful destruction of family ties that removal often causes).

127. See supra notes 35–36 and accompanying text.

128. See Shalini Bhargava Ray, The Emerging Lessons of *Trump v. Hawaii*, 29 Wm. & Mary Bill Rts. J. 775, 806 (2021) [hereinafter Ray, *Trump v. Hawaii*] (noting that recent cases regard immigrants as "weak rights-holders" with respect to the equal protection component of the Fifth Amendment's due process clause and the First Amendment).

129. See, e.g., Jackson, supra note 49, at 3108 ("[T]he goal of proportionality is implicit in any constitution that aims to produce justice by limiting as well as empowering government.").

130. Cohen-Eliya & Porat, supra note 48, at 465.

131. Jackson, supra note 49, at 3098.

role in a constitutional democracy.[132] Specifically, the constitutional proportionality doctrines in U.S. jurisprudence offer "some limit on otherwise authorized government action, a limit connected to a sense of fairness to individuals or a desire to prevent government abuse of power."[133] Cohen-Eliya and Porat conclude that global trends toward proportionality follow from the "culture of justification," or the requirement that governments justify their actions.[134] On this view, proportionality depends on reasons.

Reason giving offers a tool to mitigate the problem of a lack of fit between penalty and offense in immigration law.[135] In the immigration law literature, scholars regard deportation as disproportionate based on the noncitizen's circumstances and personal qualities, such as their family and community ties, and not simply the INA ground that the noncitizen violated.[136] Requiring the government to consider these specific facts and explain how deportation serves to achieve its ends would promote a more nuanced scheme of sanctions. To reach a well-reasoned decision, however, the government must have enough information before it, and it must engage in analysis and deliberation.[137] A well-reasoned decision, in turn, requires a minimum set of procedures to elicit evidence and to analyze that information.[138]

The emphasis on reasons and reason giving resonates with ordinary U.S. administrative law, specifically through doctrines and structures to

---

132. Id. at 3107–08.

133. Id. at 3098.

134. Cohen-Eliya & Porat, supra note 48, at 474.

135. For a discussion of different conceptions of proportionality in U.S. criminal law, see Youngjae Lee, Why Proportionality Matters, 160 U. Pa. L. Rev. 1835, 1840 (2012) (describing three conceptions of proportionality that the Supreme Court has used in its constitutional jurisprudence, including one that requires courts "to take a particular crime and a particular punishment and set them against each other" regardless of how other crimes are punished). This "matching" conception does not apply cleanly in immigration law, for in immigration law, judgments about the proportionality of deportation have historically involved a much broader range of considerations, including the "seriousness of the crime and what impacts deportation would have on the deportee, his family, his local community, and the country." See Banks, Cases for Proportional Deportation, supra note 6, at 1267–68.

136. See Banks, Cases for Proportional Deportation, supra note 6, at 1268 (describing broad range of factors contributing to proportionality analysis in immigration law); Kanstroom, Smart(er) Enforcement, supra note 6, at 482 (describing the European legal tradition of balancing "the individual's circumstances against the nation-state's interest in removal[]").

137. See Johan Rochel, Working in Tandem: Proportionality and Procedural Guarantees in EU Immigration Law, 20 Ger. L.J. 89, 104 (2019) (noting that proportionality, when applied to the right to a reasoned decision, "would require the public authority to identify the relevant information to be delivered in order to reach a sufficient threshold of quality in the justification").

138. See id. (characterizing the objective of applying proportionality to the right to a reasoned decision as "challeng[ing] the justification presented by the public authority on the quantity and quality of identified empirical considerations and delivered as part of the decision").

avoid arbitrary agency decisionmaking.[139] Jud Mathews describes classic proportionality review as "designed to detect and correct a particular kind of administrative failure: an overreach, in which the government uses measures that are excessive in relation to the ends they are designed to achieve."[140] The Administrative Procedure Act (APA), while making no mention of "proportionality," authorizes federal courts to conduct arbitrary and capricious review of final agency action to correct for both overreach and underreach.[141] Mathews describes this "hard look" version of arbitrary and capricious review as most comparable to classic proportionality review:[142] A court reviews an agency's reasoning and assesses whether the agency gave the issue before it a "hard look."[143]

In the leading case showcasing hard look review, the Supreme Court engaged in a review of agency action resembling proportionality review. In *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, the Court deemed an agency regulation "arbitrary and capricious" when the agency failed to adequately explain its reasoning for adopting a specific policy.[144] Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 to address the national problem of traffic accidents and their resulting deaths and injuries.[145] Through the Act, Congress delegated responsibility to the Secretary of Transportation to promulgate safety standards, and the Department of Transportation initially issued a rule requiring the installation of seatbelts in all cars.[146] But drivers and passengers simply did not use seatbelts consistently.[147] For that reason, the Department of Transportation began considering automatic crash protection in the form of automatic seatbelts and airbags, ultimately issuing a rule requiring car manufacturers to provide either.[148] The National

139. See Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. 461, 464 (2003) (arguing that administrative legitimacy lies principally in its avoidance of arbitrary agency decisionmaking).

140. Jud Mathews, Agency Discretion, Judicial Review, and 'Proportionality' in US Administrative Law, *in* The Judge and the Proportionate Use of Discretion 160, 161 (Sophia Ranchordás & Boudewijn de Waard eds., 2016).

141. 5 U.S.C. § 706(2)(A) (2018); see also Mathews, supra note 140, at 177 (describing arbitrary and capricious review as "symmetrical in a way that classic proportionality review is not: administrative action is subject to challenge . . . whether the claim is that the agency has done too much or that it has not done enough").

142. See Mathews, supra note 140, at 174–80.

143. See id. at 170; see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (providing guidelines for the kinds of reasoning that are arbitrary and capricious and otherwise would not be considered giving the issue a "hard look").

144. 463 U.S. at 46, 48.

145. Id. at 33.

146. Id. at 33–34.

147. Id. at 34 ("It soon became apparent that the level of seatbelt use was too low to reduce traffic injuries to an acceptable level.").

148. Id. at 34–35 (noting the Department's consideration of "passive occupant restraint systems").

Highway Traffic Safety Administration (NHTSA) subsequently determined, after extensive study, that automatic seatbelts would not "produce significant safety benefits"[149] because passengers would simply disable the feature.[150] NHTSA then rescinded the entire rule.[151] Reviewing this rescission, the Court chided NHTSA for failing to explain why it would not simply continue to require airbags, the other automatic crash protection option.[152] The Court noted that "an agency must cogently explain why it has exercised its discretion in a given manner,"[153] and that an agency changing course "must supply a reasoned analysis."[154]

Commentators describe proportionality review as more demanding than the bare minimum of reasoned administration.[155] This makes intuitive sense: Providing a reason for government action does not mean the reason is compelling or well supported. Despite the divergence of proportionality review and arbitrary and capricious review, however, the idea remains: Arbitrary and capricious review serves as a check on the arbitrary exercise of government power by requiring government officials to give reasons for restrictions on liberty.[156]

Guarding against excessive government restriction on liberty relates to a broader norm of reason giving in administrative law. Jerry Mashaw grounds reason giving in the Constitution, statutes, executive orders, and regulations, as well as administrative law doctrine developed in the

---

149. Id. at 38.

150. Id. at 38–39 (noting that passive belts "could be easily detached").

151. Id. at 39 (noting the challenge to NHTSA's rescission).

152. Id. at 46–48 (noting that the effectiveness of airbags "would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags").

153. Id. at 48.

154. Id. at 57 (quoting Greater Bos. Television Corp. v. Fed. Commc'ns Comm'n, 444 F.2d 841, 852 (1970)). But see Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (noting that an agency changing course must supply good reasons for the new policy, but "it need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one").

155. Mathews notes that proportionality review is an integrated element of review in jurisdictions like the EU. See Mathews, supra note 140, at 168 n.40 (referring to proportionality as "a general criterion of review in EU law"). This demands a tight fit between means and ends. See Jud Mathews, Proportionality Review in Administrative Law, *in* Comparative Administrative Law 405, 405 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2017) (describing proportionality review by courts to involve a "sequence of increasingly stringent legal tests, in order to determine whether the measure in fact impinges disproportionately on the rights or interests of a party"). In contrast, arbitrary and capricious review in U.S. administrative law is more tolerant of government action and easier to satisfy. See Mathews, supra note 140, at 168–69.

156. See Bressman, supra note 139, at 473–74 (explaining that the purpose of requiring agencies to provide "reasoned consistency" was to "prevent arbitrary administrative decisionmaking").

courts.[157] The Constitution imposes the barest requirement that government action pursue an authorized public purpose,[158] but the Supreme Court has also imposed reason-giving requirements based on procedural due process.[159] Agencies, moreover, are "awash in statutory requirements for reason giving, analysis, and explanation."[160] Mashaw notes that administrative law imposes reason giving even in settings that lack the traditional instrumental rationales, like "the protection of legal rights or the facilitation of judicial review."[161] Accordingly, reason giving potentially has a role even when the agency's decisions are not subject to judicial review, and the individuals impacted have no legal right at stake, e.g., when someone stands to benefit from a favorable exercise of agency discretion.[162] Unsurprisingly, notice and an explanation are the core of good administration.[163] Building on this connection between proportionality, justification, and arbitrariness, this Article argues for reframing the proportionality discourse to emphasize the central role of reason giving in creating more tailored immigration sanctions. This, in turn, centers the role of the immigration bureaucracy.

II. UNDER THE HOOD OF THE IMMIGRATION BUREAUCRACY

Against the backdrop of failed efforts at legislative reform and rejected constitutional proportionality arguments, this Article examines not the formal terms of the INA, but executive branch implementation as a potential locus of proportionality. It reveals that, contrary to the conventional wisdom, immigration law imposes a range of penalties short of deportation. Given the INA's lack of nuance and the persistent limits on

157. Jerry L. Mashaw, Reasoned Administration and Democratic Legitimacy: How Administrative Law Supports Democratic Government 41 (2018) [hereinafter Mashaw, Reasoned Administration and Democratic Legitimacy] ("Reason-giving and reasonableness requirements come from multiple sources—the Constitution, congressional statutes, executive orders, and administrative regulations, in addition to the case law of judicial review of administrative action. The content of those requirements [is] wonderfully heterogeneous.").

158. Id. at 43.

159. Id. at 44 & n.15.

160. Id. at 44; see also Jerry L. Mashaw, Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance, 76 Geo. Wash. L. Rev. 99, 100 (2007) [hereinafter Mashaw, Reasoned Administration] (citing the Administrative Procedure Act as codified in 5 U.S.C. § 555(e) (2019) as establishing a right "to obtain reasons for administrative decisions").

161. Mashaw, Reasoned Administration and Democratic Legitimacy, supra note 157, at 53.

162. See id.

163. See Mashaw, Reasoned Administration, supra note 160, at 99–100 (noting that EU principles of "good administration" resonate with U.S. law).

enforcement capacity, the INA implicitly delegates substantial policymaking discretion to the President.[164] The agency responsible for enforcing immigration law, DHS, exercises discretion throughout the process of apprehending potentially deportable immigrants, charging them, pursuing final orders of removal, and executing those orders.[165] Like all administrative agencies, DHS frequently decides to pursue a sanction less severe than the one specified in its governing statute due to limited resources, agency convenience, and equitable discretion.[166] Some of these tools have an explicit statutory basis, while others are based on authority implicitly delegated to the agency.[167] But due to their relative informality and poor development, these tools fail to systematically distinguish among those immigrants meriting lenience and those whom the agency will deport. As a result, the immigration bureaucracy currently lacks adequate safeguards to prevent the arbitrary exercise of government power. A system of sufficient justification—what proportionality demands—cannot be realized without the building blocks of reasoned, nonarbitrary administration.

The immigration bureaucracy extends well beyond DHS, encompassing a range of agencies and actors. Although enforcement officials work for DHS,[168] adjudicators work for the Department of Justice (DOJ).[169] Within DOJ, the Executive Office of Immigration Review houses the immigration courts and the BIA, a specialized appellate body.[170] But other agencies play an integral role as well. For example, the Department of State performs consular processing for overseas visa applicants;[171] the Department of Labor adjudicates aspects of petitions for certain employment-based visas;[172] and the Department of Health and Human Services

---

164. See Cade, Enforcing Immigration Equity, supra note 6, at 680–83; Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law, 119 Yale L.J. 458, 463 (2009).

165. See Morton Discretion Memo, supra note 60, at 2–3.

166. See Jason A. Cade, Judging Immigration Equity: Deportation and Proportionality in the Supreme Court, 50 U.C. Davis L. Rev. 1029, 1039–40 (2017) [hereinafter Cade, Judging Immigration Equity].

167. Ben Harrington, Cong. Rsch. Serv., R45158, An Overview of Discretionary Reprieves From Removal: Deferred Action, DACA, TPS, and Others 4–7 (2018).

168. Immigration Enforcement, U.S. Dep't of Homeland Sec., https://www.dhs.gov/topic/immigration-enforcement-overview [https://perma.cc/4EV3-QFZV] (last updated May 24, 2021).

169. About the Office, U.S. Dep't of Just., https://www.justice.gov/eoir/about-office [https://perma.cc/7NZQ-S6L4] (last updated Feb. 3, 2021).

170. Id.

171. Immigrant Visa Processing—General FAQs, U.S. Dep't of State—Bureau of Consular Affs., https://travel.state.gov/content/travel/en/us-visas/immigrate/national-visa-center/immigrant-visas-processing-general-faqs.html [https://perma.cc/38C6-LAHT] (last visited July 26, 2021).

172. Permanent Labor Certification, U.S. Dep't of Lab.: Emp. & Training Admin., https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent/ [https://perma.cc/2MYV-QUFD] (last visited July 26, 2021).

oversees the Office of Refugee Resettlement.[173] However, for the purposes of this Article, the "immigration bureaucracy" refers to enforcement officials and adjudicators who have discretion to impose shadow sanctions.

A. *The Structure of Enforcement*

Understanding how the immigration enforcement bureaucracy decides whom to deport requires understanding the structure of enforcement. Since its debut in the early twentieth century, the core functions of the immigration bureaucracy have shifted from agency to agency. The Treasury Department oversaw the first customs inspectors in the federally centralized system,[174] and the Department of Labor oversaw the first border patrol, founded in 1924.[175] Elements of the immigration bureaucracy eventually united into the Immigration and Naturalization Service (INS), housed within the DOJ.[176] After the attacks of September 11, 2001, Congress dissolved the INS and created DHS as a cabinet-level executive department.[177] The agency consists of several subunits: Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and Citizenship and Immigration Services (USCIS).[178] The attorneys for DHS are part of the Office of the Principal Legal Advisor (OPLA).[179] CBP and ICE are the principal enforcement arms of DHS, whereas USCIS was, at least prior to the Trump Administration, conceived of as a more client-centered, benefits-granting division.[180] The enforcement bureaucracy employs tens of thousands and spans a vast geography. CBP has 60,000 employees,[181] and ICE has more than 20,000 law enforcement and support

---

173. Office of Refugee Resettlement, U.S. Dep't of Health & Hum. Servs.: Admin. for Child. & Fams., https://www.acf.hhs.gov/orr [https://perma.cc/fs3y-bexu] (last visited July 26, 2021).

174. See Cox & Rodríguez, The President and Immigration Law, supra note 5, at 93; U.S. Citizenship & Immigr. Servs., Overview of INS History 4 (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf [https://perma.cc/MGJ9-DFNV].

175. Kelly Lytle Hernández, Migra!: A History of the U.S. Border Patrol 32 (2010).

176. U.S. Citizenship & Immigr. Servs., supra note 174, at 8.

177. George W. Bush, The Department of Homeland Security 8, 10–11 (2002), https://www.dhs.gov/xlibrary/assets/book.pdf [https://perma.cc/X43L-PWMB].

178. Operational and Support Components, U.S. Dep't of Homeland Sec., https://www.dhs.gov/operational-and-support-components [https://perma.cc/4KP6-RMJL] (last updated Dec. 3, 2020).

179. Office of the Principal Legal Advisor, U.S. Immigr. & Customs Enf't, https://www.ice.gov/about-ice/opla/ [https://perma.cc/SLA5-JAXY] (last updated June 21, 2021).

180. See, e.g., Elliot Spagat & Sophia Tareen, Under Trump, Citizenship and Visa Agency Focuses on Fraud, AP News (Nov. 1, 2020), https://apnews.com/article/virus-outbreak-immigration-san-diego-0a7a62c68ecf79c884208a6dd5d719b4/ (on file with the *Columbia Law Review*) (noting USCIS's shift under the Trump Administration to "[m]aking it tougher [for noncitizens] to get permission to live and work in America").

181. About CBP, U.S. Customs & Border Prot., https://www.cbp.gov/about/ [https://perma.cc/4LES-FUS6] (last updated Dec. 18, 2020).

personnel in more than 400 offices around the world.[182] CBP enforces immigration law at the U.S. border, and ICE enforces immigration law in the interior.[183] Within ICE, Homeland Security Investigations (HSI) focuses on investigating criminal organizations.[184] A separate unit, Enforcement and Removal Operations (ERO) "identifies and removes" immigrants for ordinary immigration law violations.[185] ERO has over twenty field offices, which each employ deportation officers.[186] Among other things, these deportation officers supervise nondetained immigrants awaiting their removal hearings and those ordered removed whom the government permits to stay as long as they check in periodically.[187] Both CBP and ICE proclaim antiterrorism missions,[188] and training opportunities beyond the entry level generally emphasize surveillance, marksmanship, and threat response.[189] But the national security rhetoric of both subagencies defies the benign profile of a substantial proportion of deportees.[190]

DHS runs on billions in appropriations every year,[191] and appropriations have increased in real terms since the agency's inception.[192] In addition to robust annual funding, DHS routinely receives supplemental

182. U.S. Immigration and Customs Enforcement, U.S. Immigr. & Customs Enf't, https://www.ice.gov/about-ice/ [https://perma.cc/LA9E-44DU] (last updated July 6, 2021).

183. About CBP, supra note 181.

184. Homeland Security Investigations, U.S. Immigr. & Customs Enf't, https://www.ice.gov/about-ice/homeland-security-investigations/ [https://perma.cc/QA9P-DME9] (last updated July 6, 2021).

185. Enforcement and Removal Operations, U.S. Immigr. & Customs Enf't, https://www.ice.gov/about-ice/ero# [https://perma.cc/MHD4-NLKV] (last updated May 20, 2021).

186. Id. (noting that the Field Operations division of ERO "[o]versees, directs, coordinates, and supports ERO's 24 field offices").

187. Id.

188. ICE's Mission, U.S. Immigr. & Customs Enf't, https://www.ice.gov/mission/ [https://perma.cc/2LBT-S3A9] (last updated May 13, 2021).

189. Training Catalog, Fed. L. Enf't Training Ctrs., https://www.fletc.gov/training-catalog/ [https://perma.cc/C5F6-PY2Z] (last visited July 26, 2021).

190. Clara Long, Brian Root & Grace Meng, The Deported: Immigrants Uprooted From the Country They Call Home, Hum. Rts. Watch (Dec. 5, 2017), https://www.hrw.org/report/2017/12/06/deported/immigrants-uprooted-country-they-call-home/ [https://perma.cc/BPW3-4VTT] (describing increase in arrests of noncitizens without criminal convictions under the Trump Administration).

191. Am. Immigr. Council, The Cost of Immigration Enforcement and Border Security 2 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf (on file with the *Columbia Law Review*).

192. William L. Painter, Cong. Rsch. Serv., R44604, Trends in the Timing and Size of DHS Appropriations: In Brief 6 (2019) (showing growth in DHS's regular budget in constant dollars); see also Assessing DHS 10 Years Later: How Wisely Is DHS Spending Taxpayer Dollars?: Hearing Before the H. Subcomm. on Oversight & Mgmt. Efficiency of the H. Comm. on Homeland Sec., 113th Cong. 2 (Feb. 15, 2013) (statement of Rep. Duncan) (noting growth in the agency's budget from $39 billion at inception to $60 billion in 2013).

appropriations.[193] In 2018, for example, funding for CBP, ICE, and the Office of Biometric and Identity Management (OBIM) hit $24 billion, surpassing funding of all other principal federal criminal law enforcement agencies.[194] Commentators have questioned the justification for this level of spending and how the public should gauge enforcement efforts.[195]

At the same time, scholars have critiqued this standard narrative and emphasized the challenges of enforcement against a growing population of deportable immigrants.[196] Now a California Supreme Court Justice, Mariano-Florentino Cuéllar previously observed that, throughout the 1990s, immigration enforcement officials became responsible for a much larger population of deportable immigrants.[197] Adjusted for the size of the removable population, enforcement budgets decreased until 2005.[198] Ultimately, the immigration bureaucracy is large and growing, funded at consistent or rising levels not accounting for the size of the deportable population.

Scholars attribute the growth of the modern enforcement bureaucracy to history and demography.[199] Commercial desire for cheap migrant labor led to the deliberate underenforcement of the immigration laws through the mid-twentieth century, and the Bracero program created a channel for Mexican migration to the American Southwest, which continued long after the program ended.[200] As Congress expanded the grounds

---

193. Painter, supra note 192, at 3.

194. Doris Meissner & Julia Gelatt, Migration Pol'y Inst., Eight Key U.S. Immigration Policy Issues: State of Play and Unanswered Questions 4 (2019), https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationIssues2019_Final_WEB.pdf [https://perma.cc/7TXP-PQ94].

195. Id.

196. Mariano-Florentino Cuéllar, The Political Economies of Immigration Law, 2 U.C. Irvine L. Rev. 1, 64 (2012) (characterizing "the apparent upward trajectory in nominal enforcement budgets for interior immigration enforcement [as] wildly misleading" because of the "major new responsibility of removing a potentially vastly greater proportion of aliens because of the expanded criminal-related bases for removal").

197. Id.

198. Id. at 65 & fig.3.

199. Cox & Rodríguez, The President and Immigration Law, supra note 5, at 106.

200. The Bracero program was a "bilateral system of state-managed labor migration" from Mexico to the United States. See Hernández, supra note 175, at 110. Through this program, "healthy, landless, and surplus male agricultural workers from regions not experiencing a labor shortage within Mexico were qualified to apply" for agricultural labor contracts on American farms. Id. For discussion of the legacy of the Bracero program for patterns of Mexican migration to the United States, see Cox & Rodríguez, The President and Immigration Law, supra note 5, at 42–44, 107–08 (describing the Bracero program and noting that "[w]hen Congress finally abolished the Bracero program in 1964, its decision immediately and directly produced illegal immigration"); Hernández, supra note 175, at 122–23 (providing data on immigrant returns to Mexico from the years preceding and following the Bracero program); Hiroshi Motomura, The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line, 58 UCLA L.

for deportability and limited relief from deportation, the undocumented immigrant population accreted, creating what Adam B. Cox and Cristina M. Rodríguez call "the shadow system."[201] They argue that the profound "mismatch"[202] between the formal law and enforcement realities effected a "de facto delegation" of screening authority from Congress to the President.[203] Although Congress formally determines the grounds of deportability, the enforcement bureaucracy decides whom the government actually deports.[204]

In such a regime, the President has substantial policymaking discretion, at least in theory. Under 6 U.S.C. § 202, Congress tasks the DHS Secretary with the responsibility of setting enforcement priorities, but the President can establish them through executive order.[205] Although the statute does not obligate the DHS Secretary to set priorities, it does evince congressional approval of priority setting rather than mechanical execution.[206] It recognizes that the agency will pursue some violators over others.[207]

The Supreme Court has acknowledged the executive branch's discretion not to pursue the deportation of every deportable immigrant.[208] In *Arizona v. United States*, the Supreme Court invalidated certain provisions of an Arizona statute relating to unauthorized immigrants.[209] The Court

---

Rev. 1819, 1832 (2011) (noting that the "chronic and knowing underenforcement of immigration law has been an essential part of U.S. immigration history for over a century").

201. Cox & Rodríguez, The President and Immigration Law, supra note 5, at 111.

202. Id.

203. Id. at 112.

204. Id. ("Executive officials effectively wield power to decide who belongs in the polity, and on what terms, simply by making the day-to-day judgments involved in enforcing the law.").

205. See, e.g., Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021).

206. See Cade, Enforcing Immigration Equity, supra note 6, at 681–82 (discussing 6 U.S.C. § 202(5)).

207. The President cannot suspend the INA, but a considerable gray zone exists between priority setting and suspension. For example, a district court judge enjoined President Biden's proposed moratorium on deportations for 100 days based on the conclusion that the INA obligated the government to remove noncitizens with final orders of removal within ninety days of the orders becoming final. See Texas v. United States, No. 6:21-CV-00003, 2021 WL 2096669, at *3 (S.D. Tex. 2021). But the Biden Administration defended the moratorium as an exercise of prosecutorial discretion. See Miriam Jordan, In the First Blow to Biden's Immigration Agenda, a Federal Judge Blocks 100-Day Pause on Deportations, N.Y. Times (Jan. 26, 2021), https://www.nytimes.com/2021/01/26/us/politics/biden-immigration-deportation.html (on file with the *Columbia Law Review*).

208. See Arizona v. United States, 567 U.S. 387, 396 (2012); see also Cade, Judging Immigration Equity, supra note 166, at 1048 (characterizing *Arizona* as recognizing enforcement as the principal site of equitable discretion).

209. 567 U.S. at 400–04 (invalidating section 3 of Arizona's S.B. 1070, which created a new state misdemeanor for "failure to complete or carry an alien registration document" in violation of federal law).

observed that "[f]ederal governance of immigration and alien status is extensive and complex."[210] And as a threshold matter, immigration officials "must decide whether it makes sense to pursue removal at all."[211] The Court further recognized that the decision not to enforce often reflects meaningful distinctions among deportable immigrants. For example, "[u]nauthorized workers trying to support their families . . . likely pose less danger than alien smugglers or aliens who commit a serious crime."[212] The Court did not address the expansive categories of crime that trigger deportability or the fact that the contemplated categories often blur— for instance, immigrants with criminal convictions often also work hard to support their families—but it did recognize that unauthorized immigrants have diverse characteristics calling for complex qualitative judgments.[213]

Ultimately, the logic of prioritization reflects longstanding principles of prosecutorial discretion, but scholars contest its contours.[214] Faced with limited resources, enforcement officials must select whom to pursue and whom not to. In *Heckler v. Chaney*, the Supreme Court confirmed that, outside of immigration law, courts lack the authority to review agency decisions setting enforcement priorities because they typically lack "law to apply" for determining the propriety of nonenforcement in a particular case.[215] A robust scholarly debate has ensued, however, over the extent to

---

210. Id. at 395.

211. Id. at 396.

212. Id.

213. See id. at 396–97.

214. See, e.g., Cox & Rodríguez, The President and Immigration Law, supra note 5, at 227 (rejecting the argument that "the Constitution prohibits agency leaders from using rules to guide the exercise of enforcement discretion by line-level officials within the administrative state"); Patricia L. Bellia, Faithful Execution and Enforcement Discretion, 164 U. Pa. L. Rev. 1753, 1800 (2016) (expressing skepticism about the categorical exercise of enforcement discretion embodied in the Deferred Action for Parents of Americans (DAPA) program based on the "dubious" notion that such exercises of discretion are permitted if not statutorily prohibited); Robert J. Delahunty & John C. Yoo, Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause, 91 Tex. L. Rev. 781, 784 (2013) (arguing that the Take Care Clause imposes on the President a duty of full enforcement); Anil Kalhan, Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration, 63 UCLA L. Rev. Discourse 58, 94 (2015) (defending DACA and DAPA as forms of supervised and centralized enforcement discretion as a logical mechanism for implementing enforcement priorities); Zachary S. Price, Enforcement Discretion and Executive Duty, 67 Vand. L. Rev. 671, 760 (2014) (arguing that DACA amounts to a categorical, prospective suspension of the INA and is therefore "presumptively beyond the scope of executive authority"); Shalini Bhargava Ray, Abdication Through Enforcement, 96 Ind. L.J. 1325, 1371(2021) [hereinafter Ray, Abdication Through Enforcement] (arguing that faithful execution requires priority setting at a minimum and permits categorical exercises of discretion); Shoba Sivaprasad Wadhia, Response: In Defense of DACA, Deferred Action, and the DREAM Act, 91 Tex. L. Rev. 59, 70 (2013) (arguing that longstanding agency precedent supports centralized exercise of enforcement discretion in immigration law).

215. 470 U.S. 821, 826 (1985).

which the President or DHS Secretary has discretion to decline to enforce the law categorically. Some argue that categorical nonenforcement amounts to suspension of a congressional enactment, a power the President lacks.[216] Others defend categorical nonenforcement when liberty is at stake or on other grounds.[217]

Despite the logic behind enforcement priorities, DHS has seldom offered sufficient guidance to enforcement officers. Under George W. Bush's Administration, for example, a newly formed ICE aimed to remove every single removable immigrant,[218] otherwise known as "full enforcement."[219] Echoing this approach, the Trump Administration explicitly directed line officers to pursue any removable person they encountered.[220] The Executive Associate Director of ERO further required line officers to initiate removal proceedings against all such persons encountered, which some deemed inconsistent with the Trump Administration's guidance.[221]

In recent years, the Obama Administration stands out for accepting the logic of priorities explicitly and thoroughly prioritizing enforcement efforts.[222] President Obama's DHS used the logic of priorities throughout the shadow system, and not only at the front end of enforcement.[223] His

---

216. See, e.g., Price, supra note 214, at 674–75.

217. See, e.g., Peter L. Markowitz, Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty, 97 B.U. L. Rev. 489, 494 (2017).

218. U.S. Dep't of Homeland Sec., Bureau of Immigr. & Customs Enf't, Endgame: Office of Detention and Removal Strategic Plan, 2003–2012: Detention and Removal Strategy for a Secure Homeland 2 (2003), https://www.hsdl.org/?view&did=470051 [https://perma.cc/RM2Z-WSYP] ("We must strive for 100% removal rate.").

219. Delahunty & Yoo, supra note 214, at 799–800 (describing the duty of "strict enforcement"); Sam Kamin, Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle, 14 Ohio St. J. Crim. L. 183, 196 n.62 (2016).

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

221. Memorandum from Matthew T. Albence, Exec. Assoc. Dir., U.S. Immigr. & Customs Enf't, to All ERO Employees (Feb. 21, 2017), https://www.cato.org/sites/cato.org/files/wp-content/uploads/icememofeb21.pdf [https://perma.cc/P737-A93U]. For discussion of these inconsistencies, see Ray, Abdication Through Enforcement, supra note 214, at 1360.

222. See Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees (Mar. 2, 2011), https://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf [https://perma.cc/2EFN-Z2UM] [hereinafter Morton Priority Memo] (creating different priority levels based on specific criteria); Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Patrol, Alejandro Mayorkas, Director, U.S. Citizenship & Immigr. Servs. & John Morton, Dir., U.S. Immigr. & Customs Enf't (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/3VYL-QD3W] [hereinafter Napolitano, DACA Memo] (creating DACA).

223. See, e.g., Devitri v. Cronen, 289 F. Supp. 3d 287, 290 (D. Mass. 2018) (describing "Operation Indonesian Surrender," which encouraged Indonesian immigrants who had been ordered deported to come "out of the shadows" and enter an ICE program of supervised release); Nina Bernstein, Church Works With U.S. to Spare Detention, N.Y. Times

DHS recognized that robust enforcement priorities help enforcement officials systematically and meaningfully distinguish among deportable immigrants.[224] The Obama Administration further claimed the authority to exercise prosecutorial discretion at numerous points in the enforcement process, from apprehension to removal.[225] As explained by former ICE director John Morton, enforcement officers face discretionary decisions at every point in the enforcement process, from issuance of a Notice to Appear, to stopping, questioning, or arresting a noncitizen for an administrative violation; to settling or dismissing proceedings; to pursuing an appeal; and to deciding whether to execute a removal order.[226] Enforcement priorities apply at the front end, offering guidance to line officers about whom to target, as well as on the backend, potentially guiding officers at countless points after a final order of removal has been issued.[227]

Efforts to rationalize immigration enforcement discretion face many challenges.[228] But the long history of immigration prosecutorial discretion demonstrates that the immigration bureaucracy can articulate the relevant

---

(Dec. 12, 2009), https://www.nytimes.com/2009/12/13/nyregion/13indonesians.html (on file with the *Columbia Law Review*) (describing Obama-era deals to permit immigrants ordered deported to remain on supervised release with work permits).

224. Scholars have noted that line officers often ignore, resist, and resent enforcement priorities, creating the need for a way to bind line officers' discretion. See Michael Kagan, Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions, 50 U. Rich. L. Rev. 665, 686 (2016) [hereinafter Kagan, Binding the Enforcers] (noting that the Obama Administration's approach to enforcement discretion followed in part from the challenge of trying "to induce a government agency to exercise self-restraint against what it sees as its core mission"). On those grounds, a program like DACA effectively centralizes enforcement discretion and deprives line officers of the power to undermine executive judgments about priorities. See Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law: Redux, 125 Yale L.J. 104, 183–86 (2015) [hereinafter Cox & Rodríguez, The President and Immigration Law Redux] (stating that DACA's centralization of decisionmaking has been a "significant improvement[] on the practices of diffused prosecutorial discretion that preceded [it]"). In a recent article, I argue that enforcement priorities are essential to faithful execution of the immigration laws, in part because of the formal lack of graduated sanctions on the backend. See Ray, Abdication Through Enforcement, supra note 214, at 1368.

225. Cox & Rodríguez, The President and Immigration Law Redux, supra note 224, at 676–77.

226. See Morton Discretion Memo, supra note 60, at 2–3.

227. See Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law, 9 Conn. Pub. Int. L.J. 243, 244, 255 (2010) [hereinafter Wadhia, The Role of Prosecutorial Discretion] (discussing when prosecutorial discretion applies).

228. Streamlining or regularizing the use of prosecutorial discretion in immigration law can be challenging due to the law's structural features. For instance, immigration officers have authority both to arrest and charge noncitizens, and typical equitable variables to guide discretion, such as the existence of exculpatory evidence, don't apply as directly in immigration law. See id. at 274–76 (describing the differences between prosecutorial discretion in the criminal and immigration contexts, and noting that variables to guide discretion "do not apply neatly to the civil immigration context").

factors.[229] Enforcement priorities convey the government's understanding of the qualities that might render someone fit to remain in the United States despite having violated immigration law.[230] They also promote the quick (even if transient) resolution of straightforward cases, promoting efficiency and the agency's convenience.[231] Ultimately, pervasive discretion shapes the structure of immigration enforcement.

B. *Backend Shadow Sanctions*

Enforcement priorities are one tool for coping with the inadequacies of the INA, but beyond that, the immigration bureaucracy uses discretionary tools of lenience on the backend. These backend sanctions constitute a system of shadow sanctions. They encompass those explicitly authorized by statute and those based on an implied delegation of authority to the agency.[232] Protection from removal based on Temporary Protected Status or DHS's parole power are based explicitly on statutory text.[233] Some reprieves, however, such as deferred action, Deferred Enforced Departure (DED), or Extended Voluntary Departure (EVD), are not defined in the INA but are inferred as exercises of prosecutorial discretion.[234] Finally, some reprieves are granted "[e]xclusively in [c]onnection with the [r]emoval process."[235] These forms of reprieves include administrative closure, voluntary departure, stays of removal, and orders of supervision.[236] Although these reprieves do not grant affirmative immigration status, they typically come with benefits such as work authorization, and in some cases,

---

229. See id. at 255 (discussing the Meissner Memo's identification of humanitarian factors to guide prosecutorial discretion).

230. See, e.g., Arizona v. United States, 567 U.S. 387, 396 (2012) (noting that federal immigration officials might decide not to pursue removal in light of "immediate human concerns").

231. See Wadhia, The Role of Prosecutorial Discretion, supra note 227, at 268 (noting the cost-based justification for enforcement discretion); see also Kanstroom, Smart(er) Enforcement, supra note 6, at 491 (noting that graduated sanctions also promote efficiency). Justice Clarence Thomas recently characterized deferred action as solely a matter of the agency's convenience, belying historical understandings of prosecutorial discretion. See Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1919–32 (2020) (Thomas, J., dissenting in part).

232. See Harrington, supra note 167, at 6 (noting that criteria for granting reprieves are generally set forth in agency manuals and policy memos, but for some reprieves, it can be difficult to locate a controlling document).

233. Id. at 2; see also 8 U.S.C. § 1254a (2018) (Temporary Protected Status); 8 C.F.R. § 212.5 (2020) (parole power).

234. See Harrington, supra note 167, at 12–15.

235. Id. at 18–20.

236. Id. at 20; see also Geoffrey Heeren, The Status of Nonstatus, 64 Am. U. L. Rev. 1115, 1129–33 (2015) (discussing the status of deportable noncitizens whom the government declines to deport in an exercise of discretion).

the ability to obtain a driver's license.[237] Opportunities for lenience vary, but the sanctions surveyed in this section are among the more numerically significant of the lot.[238] The following sections describe the most relevant shadow sanctions and explain their significance for advancing proportionality through the administration of immigration law.

1. *Deferred Action.* — Deferred action is "a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion."[239] It can be offered before a deportable immigrant is apprehended to encourage them to come forward, but it has historically been used to defer deportation for an immigrant already in the system—either in removal proceedings or with a final order of removal. [240]

Over a decade ago, Shoba Sivaprasad Wadhia uncovered deferred action's long (and lost) history in U.S. immigration law.[241] Wadhia discovered that the INS first issued guidance for grants of deferred action in 1975, initially labeling it as "nonpriority status" for certain cases.[242] In its Operations Instructions, the agency considered factors including the age of the noncitizen, the length of presence in the United States, "physical or mental condition[s] requiring care or treatment in the United States," family situation, and "criminal, immoral, or subversive activities or affiliations."[243] Because of the prominence of medical need as a justification for deferred action, commentators often refer to it as "medical" deferred action.[244] Wadhia has observed that one of the first federal appellate decisions discussing the nonpriority status program referred to it as "an informal administrative stay of deportation."[245] Subsequent appeals courts characterized nonpriority status either as a

---

237. See Heeren, supra note 236, at 1170, 1172 (discussing eligibility for driver's licenses and work authorization).

238. See Harrington, supra note 167, at 12–15 (discussing generally available reprieves premised upon enforcement discretion or executive powers).

239. Frequently Asked Questions, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/archive/frequently-asked-questions [https://perma.cc/PQ4X-8QXV] (last updated July 27, 2021).

240. Wadhia, The Role of Prosecutorial Discretion, supra note 227, at 263 (noting that deferred action is typically offered "to suspend removal proceedings against a particular individual or group of individuals for a specific timeframe").

241. See id. at 246–48 (discussing the history of prosecutorial discretion, as "revealed by INS in 1975 as a consequence of litigation involving John Lennon and Yoko Ono").

242. Id.

243. Id. at 248.

244. See Letter from Sen. Edward J. Markey, Sen. Elizabeth Warren, Rep. Ayanna Pressley & Sen. Cory A. Booker, to Kenneth T. Cuccinelli, Senior Off. Performing the Duties of the Dir., U.S. Citizenship & Immigr. Servs. (Apr. 23, 2020) (on file with the *Columbia Law Review*) (discussing medical deferred action).

245. Wadhia, The Role of Prosecutorial Discretion, supra note 227, at 248 (internal quotation marks omitted) (quoting Lennon v. Immigr. & Naturalization Serv., 527 F.2d 187, 191 n.7 (2d Cir. 1975)) (describing "nonpriority status" in these terms).

matter of the then-INS's administrative convenience or humanitarian purposes.[246] The INS later rescinded this guidance.[247]

INS and then what became ICE have issued guidance on prosecutorial discretion since that time,[248] but the most significant guidance in recent years came from the Obama Administration. In the first of two memoranda (the Morton Memos), John Morton, the head of ICE, issued interpretive guidance to direct enforcement efforts toward public safety risks rather than long-term residents without criminal convictions.[249] Building on a long history of INS interpretive guidance on enforcement priorities, the first Morton Memo identified as the first priority "aliens who pose a danger to national security or a risk to public safety."[250] The second priority was "recent illegal entrants," and the third priority was noncitizens subject to removal who had absconded, i.e., "fugitives," or noncitizens who "otherwise obstruct immigration controls."[251] These priorities convey a familiar set of concerns: public safety, valuing the ties of long-term residents, and preserving the integrity of immigration controls. In a second memo, Morton identified the factors that would warrant a favorable exercise of discretion.[252]

The extensive commentary on the Morton Memos typically focuses on their mixed success. Overall, the memos had a limited impact on how line officers directed their efforts.[253] The Morton Memos faced considerable headwinds within ICE.[254] In addition, the Morton Memos identified factors to consider but offered little guidance to line officers about how to weigh

---

246. See id. at 249.

247. Kate M. Manuel & Todd Garvey, Cong. Rsch. Serv., R42924, Prosecutorial Discretion in Immigration Enforcement: Legal Issues 25 (2013).

248. See Wadhia, The Role of Prosecutorial Discretion, supra note 227, at 259–60 (discussing agency guidance memoranda).

249. See Morton Priority Memo, supra note 222, at 3 ("Resources should be committed primarily to advancing the priorities set forth . . . in order to best protect national security and public safety and to secure the border."); Morton Discretion Memo, supra note 60, at 2 (noting how ICE must prioritize national security, border security, and public safety).

250. See Morton Priority Memo, supra note 222, at 1.

251. Id. at 2.

252. See Morton Discretion Memo, supra note 60, at 4–5 (identifying factors warranting a favorable exercise of discretion).

253. See, e.g., David Leopold, Detroit ICE Director Adducci Missed the Morton Memo, Hill (June 10, 2014), https://thehill.com/blogs/congress-blog/civil-rights/208821-detroit-ice-director-adducci-missed-the-morton-memo/ [https://perma.cc/YFM4-NJTE] (describing ICE enforcement practices as failing to conform to the Morton Memo's guidance); see also Cuéllar, supra note 196, at 51 (noting limits on the President's policymaking in immigration law given agency resistance).

254. Kalhan, supra note 214, at 94 (noting "active resistance [to the Morton Memos] from rank-and-file officials").

the factors, hindering change in enforcement patterns.[255] But scholars note that the Morton Memos represented an important step in the right direction, even if, on their own, they failed to change the agency's culture.[256]

The Obama Administration eventually rescinded the Morton Memos and adopted more structured guidance.[257] Through new interpretive guidance issued in 2012, it announced Deferred Action for Childhood Arrivals (DACA).[258] Benefitting more than 825,000 noncitizens to date, [259] DACA shields from deportation noncitizens who had been brought to the United States before sixteen years of age, who fulfill specific criteria, and who lack lawful status.[260] In addition to shielding recipients from removal for renewable two-year periods, DACA also made recipients eligible for benefits, such as work authorization.[261] The Supreme Court recently observed that DACA recipients have pursued higher education, bought homes and cars,

---

255. See Kagan, Binding the Enforcers, supra note 224, at 679 (discussing an ACLU attorney's frustration at the Morton Memos' failure to produce the intended effect of helping individuals in "low-priority" categories).

256. See, e.g., Cox & Rodríguez, The President and Immigration Law, supra note 5, at 172 ("While it would be easy to label the Morton Memos a failure . . . [they] should be understood as inaugurating a remarkably difficult project of bureaucratic redirection that hardly could have been expected to bear fruit in just a few months."); Kagan, Binding the Enforcers, supra note 224, at 676–80 (describing how the Morton Memos were notable for the transparency they signaled, even if they remained vague on how prosecutorial discretion should be exercised); Shoba Sivaprasad Wadhia, Immigr. Pol'y Ctr., Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion 4 (2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/Shoba_-_Reading_the_Morton_Memo_120110.pdf [https://perma.cc/H746-AQ4H] [hereinafter Wadhia, Reading the Morton Memo] ("[T]he 'Morton Memo' potentially marks a new phase in the enforcement of immigration law.").

257. See Kagan, Binding the Enforcers, supra note 224, at 679 (noting the rescission of the Morton Memos).

258. See Napolitano, DACA Memo, supra note 222 (establishing the DACA program).

259. Nichole Prchal Svajlenka & Philip E. Wolgin, What We Know About the Demographic and Economic Impacts of DACA Recipients: Spring 2020 Edition (Apr. 6, 2020), https://www.americanprogress.org/issues/immigration/news/2020/04/06/482676/know-demographic-economic-impacts-daca-recipients-spring-2020-edition/ [https://perma.cc/V5RX-43K3].

260. Consideration of Deferred Action for Childhood Arrivals (DACA), U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/archive/consideration-of-deferred-action-for-childhood-arrivals-daca/ [https://perma.cc/99ZU-DEXT] (last updated July 19, 2021).

261. See 8 C.F.R. § 274a.12(c)(14) (2020) (permitting recipients of deferred action to apply for work authorization). The mass-grant of work authorization led critics, like former Attorney General Jeff Sessions, to argue that DACA was illegal. See Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1911 (2020) (describing Attorney General Sessions's opinion, based on the Fifth Circuit's analysis of a related deferred action program known as DAPA, that the "core" issue was the class-wide grant of eligibility for benefits "to unauthorized aliens" (internal quotation marks omitted) (quoting Texas v. United States, 809 F.3d 134, 170 (5th Cir. 2015))).

gotten married, and further integrated into U.S. society in their adulthood.[262]

DACA represents a relatively structured exercise of discretion, despite the Obama Administration's decision not to undertake notice-and-comment rulemaking in establishing the program.[263] By establishing public criteria, DHS eliminated one traditional source of arbitrariness, but DHS also recognized that public criteria alone, as seen with the Morton Memos, cannot necessarily overcome institutional resistance. DACA therefore exploited the structure of DHS to create enforcement priorities that line officers would have to honor.[264] Instead of empowering ICE agents to accept and adjudicate DACA applications for individuals not already in removal proceedings, DHS assigned the task to USCIS.[265] In so doing, the DHS Secretary ensured that the "benefits-granting component" of the agency would have responsibility for adjudicating the applications of eligible noncitizens.[266]

2. *Administrative Closure.* — Administrative closure refers to the practice of IJs or the BIA temporarily closing cases without adjudicating the merits.[267] IJs and BIA members are not part of DHS. Instead, as discussed above, they are part of the Executive Office for Immigration Review, housed within the DOJ.[268] Often, these adjudicators closed cases to permit

---

262. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1914.

263. See Napolitano, DACA Memo, supra note 222, at 1–2 (setting forth clear criteria for considering deferred action and exercising prosecutorial discretion); see also *Regents of the Univ. of Cal.*, 140 S. Ct. at 1918 (Thomas, J., concurring in the judgement in part and dissenting in part) (describing the "impasse" over the status of undocumented children, which led President Obama to take "matters into his own hands" without delegated authority from Congress and "without undertaking a rulemaking").

264. Cox & Rodríguez, The President and Immigration Law Redux, supra note 224, at 179–80 (explaining how DACA's structure significantly limits prosecutorial discretion).

265. Id. at 193–94 (describing DHS's decision to shift responsibility from ICE to USCIS).

266. Id. at 194. Ming Hsu Chen's research complicates this narrative about USCIS's benefits-granting culture. See Ming H. Chen, Administrator-in-Chief: The President and Executive Action in Immigration Law, 69 Admin. L. Rev. 347, 388 (2017) [hereinafter Chen, Administrator-in-Chief]. Chen reveals that, prior to DACA, USCIS routinely issued Notices to Appear to immigrants denied benefits, seamlessly shifting from benefits adjudication to enforcement. She describes this as a vestige of USCIS's culture of "following rules literally." Id. at 387. Once DACA was announced, and USCIS received additional resources to adjudicate DACA applications, new attorneys joined the agency "for the express purpose of furthering the agency's DACA mandate." Id.

267. Maria Baldini-Potermin, Immigration Trial Handbook, Motion for Administrative Closure § 5.25 (2019) (noting that administrative closure "permits removal of cases from the calendar for administrative convenience" but "does not result in a final order"); Elizabeth Montano, The Rise and Fall of Administrative Closure in Immigration Courts, 129 Yale L.J. Forum 567, 567 (2020) (noting that administrative closure allows an IJ or the BIA to "temporarily remove a case from their active docket or calendar").

268. About the Office, supra note 169.

noncitizens to seek relief outside of the removal proceeding, such as appealing a criminal conviction or applying for a visa.[269] The Fourth Circuit has described administrative closure as a "procedural mechanism primarily employed for the convenience of the adjudicator (namely, IJs and the BIA) in order to allow cases to be removed from the active dockets of immigration courts, often so individuals can pursue alternate immigration remedies."[270] The court has emphasized that administrative closure amounts to a temporary pause in proceedings rather than a final adjudication or a form of lasting relief from removal.[271]

Judges and agency officials have typically understood the authority for administrative closure to emanate from the inherent docket management powers of IJs and the BIA. Under 8 C.F.R. § 1003.10(b), IJs and the BIA are authorized to "take any action consistent with their authorities under the [INA] and regulations that is appropriate and necessary for the disposition of . . . cases."[272] According to Elizabeth Montano, the practice developed in the 1980s after a DOJ memorandum identified administrative closure as an authorized tool for IJs to pause cases in which the respondent had failed to appear for a hearing.[273] As with deferred action or nonpriority status, a guidance document articulated for the first time latent discretion authorized by statute.[274] During this era, administrative closure was available whenever both sides consented to it.[275]

In 2012, however, the BIA extended the availability of administrative closure. In *In re Avetisyan*, the BIA ruled that requiring the consent of both sides interfered with IJs' and the BIA's independent judgment about the propriety of administrative closure.[276] As a result, IJs and the Board could independently determine that administrative closure was warranted, even

---

269. See Montano, supra note 267, at 574 (noting that "[IJs] routinely granted administrative closure when an outstanding action or event was relevant to the necessity or merits of the removal proceedings," such as "the processing of a visa petition or the appeal of a criminal conviction, which, if successful, would render the removal proceedings moot").

270. Romero v. Barr, 937 F.3d 282, 286–87 (4th Cir. 2019).

271. Id. at 286. But see Memorandum from Brian M. O'Leary, Chief Immigr. Judge, U.S. Dep't of Just., to All Immigr. Judges, Ct. Adm'rs, Att'y Advisors & Jud. L. Clerks & Immigr. Ct. Staff 3 (Mar. 7, 2013), https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf [https://perma.cc/72GK-5H8C] (describing administrative closure as a "type of completion in our docketing system, [which] results in the case being closed").

272. 8 C.F.R. § 1003.10(b) (2020).

273. Montano, supra note 267, at 570–71.

274. See Wadhia, Beyond Deportation, supra note 59, at 55 ("INS first used the term 'deferred action' in an internal memorandum known as an 'Operations Instruction.'"); Montano, supra note 267, at 570–71.

275. See Montano, supra note 267, at 571 (describing earlier BIA precedent establishing the rule that administrative closure should not be used if either side objects).

276. 25 I&N Dec. 688, 690 (B.I.A. 2012) ("We now find that it is improper to afford absolute deference to a party's objection, and we hold that an [IJ] or the Board has the authority to administratively close a case, even if a party opposes, if it is otherwise appropriate under the circumstances.").

over the objection of one of the parties.[277] *Avetisyan* marked the start of an era in which IJs granted administrative closure to accommodate events "relevant to the necessity or merits of the removal proceedings."[278]

DHS has also sought administrative closure of "low-priority" cases to direct resources toward high-priority cases. The 2011 Morton Memo stated, "Cases deemed as 'low priority' will be administratively closed, and respondents in those cases may be eligible to apply to the USCIS for an employment authorization document."[279] In this way, administrative closure suspended deportation (sometimes indefinitely), thereby serving as a prioritization tool.[280]

Then-Attorney General Jeff Sessions revoked this power in his decision, *In re Castro-Tum*.[281] The National Association of Immigration Judges defended administrative closure as an essential tool of docket management,[282] and immigrants' rights advocates noted its role in protecting noncitizens' due process rights,[283] but Sessions viewed the practice as conflicting with the "expeditious enforcement of our immigration laws."[284] Sessions referenced statistics from the Executive Office for Immigration Review (EOIR) indicating that the use of administrative closure had accel-

277. Montano, supra note 267, at 572.

278. Id. at 574.

279. Philip Hornik, Nat'l Immigr. Project of the Nat'l Laws. Guild, 1 Immigration Law and Defense § 8.52 (2021); see also Fatma E. Marouf, Executive Overreaching in Immigration Adjudication, 93 Tul. L. Rev. 707, 746 (2019) (noting Sessions's complaint that "DHS had used this practice under the Obama Administration 'as a way to decline to prosecute low priority cases'" (quoting In re Castro-Tum, 27 I&N Dec. 271, 276 (A.G. 2018))). But some have observed that anecdotal evidence undermines this narrative of the "equitable" use of administrative closure. See Cade, Enforcing Immigration Equity, supra note 6, at 694 ("There is also anecdotal evidence that, even when administrative closure is offered, many ICE attorneys do so 'not to buffer overly harsh applications of immigration law in low-priority cases, but rather to avoid having to litigate hearings when the noncitizen may be eligible for more far-reaching relief.'" (quoting Jason A. Cade, The Challenge of Seeing Justice Done in Removal Proceedings, 89 Tul. L. Rev. 1, 34 (2014))).

280. See Ming H. Chen, Where You Stand Depends On Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers, 33 Berkeley J. Emp. & Lab. L. 227, 292 (2012) (discussing this function of administrative closure).

281. *Castro-Tum*, 27 I&N Dec. at 272 ("I hold that [IJs] and the Board do not have the general authority to suspend indefinitely immigration proceedings by administrative closure.").

282. See Montano, supra note 267, at 578 (discussing the letter from the National Association of Immigration Judges to Sessions).

283. Am. Immigr. Lawyers' Ass'n, AILA Policy Brief: Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts (2017), https://www.aila.org/infonet/aila-policy-brief-imposing-numeric-quotas-judges [https://perma.cc/AKT9-KARX] (explaining that when dockets are overloaded, judges are forced to move more quickly through each case, compromising their ability to consider each case's unique facts).

284. See *Castro-Tum*, 27 I&N Dec. at 290.

erated from 2011 to 2017, which saw over 200,000 administrative closures.[285] In *Castro-Tum*, Sessions opined: "DHS used administrative closure as a way to decline to prosecute low priority cases without formally terminating them."[286] After finding no express authorization for the practice in the INA or regulations, Sessions concluded that IJs' inherent powers to manage the docket did not include indefinitely suspending an adjudication.[287]

A year after the revocation, the Fourth Circuit held that the applicable regulations unambiguously confer on IJs and the BIA the authority to administratively close cases.[288] In *Romero v. Barr*, the Fourth Circuit interpreted the regulation and determined that its plain meaning granted IJs and the BIA the power to manage their dockets in any way.[289] The Seventh Circuit interpreted the regulation similarly.[290] In *Morales v. Barr*, the court held that, "[o]n its face, 8 C.F.R. § 1003.10(b) grants [IJs] broad authority."[291] In permitting "any action consistent with their authorities . . . that is appropriate and necessary for the disposition of such cases," the regulation used "capacious" phrasing and, the court concluded, plainly authorized administrative closure.[292] The Third Circuit recently joined the Fourth Circuit's reasoning in *Arcos Sanchez v. Attorney General United States*.[293]

Facing defeat in the federal appeals courts, the Trump Administration turned to regulatory reform. In August 2020, EOIR proposed a new rule to strip IJs of closure authority, underscoring the precarity of relying on discretion to enact substantive justice.[294] In December 2020, the agency published the final rule and amended the applicable regulations to "make clear that those provisions . . . provide no freestanding authority for [IJs]

---

285. Id. at 273 ("Statistics . . . reveal that over three decades . . . 283,366 cases were administratively closed. But in a mere six years, from October 1, 2011 through September 30, 2017, [IJs] and the Board ordered administrative closure in 215,285 additional cases, nearly doubling the total number of cases . . . .").

286. Id. at 276.

287. Id. at 284.

288. Romero v. Barr, 937 F.3d 282, 292 (4th Cir. 2019).

289. See id.

290. Morales v. Barr, 963 F.3d 629, 639 (7th Cir. 2020).

291. Id.

292. Id.

293. 997 F.3d 113, 121 (3d Cir. 2021) ("We are fully persuaded that, as discussed in *Romero* and *Meza Morales*, the regulations afford IJs and the Board authority to take *any action* (including administrative closure) as is *appropriate and necessary* . . . for the *disposition of such case* . . . ."). But see Hernandez-Serrano v. Barr, 981 F.3d 459, 461 (6th Cir. 2020) (holding that the regulations did not unambiguously authorize the general use of administrative closure).

294. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52,491, 52,493 (proposed Aug. 26, 2020) (to be codified at 8 C.F.R. pts. 1003, 1240).

or Board members to administratively close immigration cases absent an express regulatory or judicially approved settlement basis to do so."[295] A district court preliminarily enjoined this rule nationwide,[296] and Attorney General Merrick Garland overruled *Castro-Tum* a few months later.[297]

Administrative closure has helped facilitate lawful status for thousands of immigrants in removal proceedings.[298] The Transactional Records Access Clearinghouse (TRAC) at Syracuse University found that each removal from the docket typically closed a case for an average of around three years.[299] When administratively closed cases were recalendared and then decided, over 60% of immigrants whom the government initially sought to remove qualified for remaining in the United States legally.[300] This means that, in most cases, closing the case temporarily allowed the noncitizen to acquire lawful status. However, not all administratively closed cases have been recalendared.[301] Over 292,000 cases remained closed as of July 2020, about one-quarter of which were closed due to Obama-era prosecutorial discretion policies.[302] TRAC's analysis demonstrates that eliminating administrative closure would push the active workload from over 1.2 million cases to over 1.5 million, a jump of nearly one-quarter of currently active cases.[303] The recent push to end administrative closure also reveals the precarity of the shadow system.

During the Obama Administration, administrative closure protected a significant number of deportable immigrants on equitable grounds.[304] According to TRAC's data, 376,439 cases were removed from the immigration courts' "active workload and associated hearing calendar" from 1986

---

295. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588, 81,590 (Dec. 16, 2020) (codified at 8 C.F.R. §§ 1003, 1240 (2020)).

296. Centro Legal de la Raza v. Exec. Off. for Immigr. Rev., No. 21-cv-00463-SI, 2021 WL 916804, at *1 (N.D. Cal. Mar. 10, 2021) (granting a preliminary injunction based on the plaintiffs' likelihood of success on a claim that the rule violated the APA).

297. In re Cruz-Valdez, 28 I&N Dec. 326, 329 (A.G. 2021) (overruling *Castro-Tum* "in its entirety").

298. The Life and Death of Administrative Closure, Transactional Recs. Access Clearinghouse Immigr. (Sept. 10, 2020), https://trac.syr.edu/immigration/reports/623/ [https://perma.cc/2WVL-FH6H] [hereinafter TRAC, Administrative Closure].

299. Id.

300. Id.

301. See id.

302. Id.

303. Id.

304. See Cecilia Muñoz, Immigration Update: Maximizing Public Safety and Better Focusing Resources, White House: President Barack Obama (Aug. 18, 2011), https://obamawhitehouse.archives.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources/ [https://perma.cc/B52V-LQLS] (explaining that DHS prioritized the removal of people convicted of crimes in the United States over "low priorit[y]" deportations).

to July 2020.[305] Use of administrative closure reached a peak under the Obama Administration, particularly during the second term, when administrative closure accounted for between 8.3% and 26.6% of all case closures.[306] Apart from the standard use of administrative closure, under the Obama Administration, some 88,249 cases were closed as an exercise of prosecutorial discretion to clear "low-priority" cases from the docket.[307] Used in this way, administrative closure embodies a government judgment that lenience is warranted.

3. *Post-Order Forbearance.* — Enforcement officials use other tools to select some immigrants for lenience. Courts, as well as DHS, have authority to stay removal.[308] A judicial stay of removal requires a federal judge to exercise discretion.[309] But the government also has the authority to delay execution of a final order of removal if removal is impracticable or otherwise not in the public interest.[310] Here, as well, with respect to DHS, internal guidance documents identify and define important aspects of this discretionary power.[311]

Judicial stays are not automatic upon filing of a petition for review in a federal court of appeals. Under 8 U.S.C. § 1252(b)(3)(B), "[s]ervice of the petition [for review] on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."[312] Some federal appeals courts have issued standing orders that automatically confer stays upon the filing of a motion to

---

305. TRAC, Administrative Closure, supra note 298.

306. Id.

307. Id.

308. 8 U.S.C. § 1231 (2018).

309. See id. § 1252(b)(3)(B) ("Service of the petition [for review] on the officer or employee [of the DOJ] does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise."); see also Nken v. Holder, 556 U.S. 418, 433 (2009) (describing a stay as "an exercise of judicial discretion" (quoting Virginian Ry. Co. v. United States, 272 U.S. 658, 672 (1926))).

310. DHS may issue work authorization to immigrants on supervised release. See 8 U.S.C. § 1231 (permitting the Attorney General to issue work authorization to immigrants on supervised release); 6 U.S.C. § 557 (2018) (transferring that power to the DHS Secretary); see also Shoba Sivaprasad Wadhia, Employment Authorization and Prosecutorial Discretion: The Case for Immigration Unexceptionalism, Yale J. on Regul.: Notice & Comment (Feb. 10, 2016), https://www.yalejreg.com/nc/employment-authorization-and-prosecutorial-discretion-the-case-for-immigration-unexceptionalism-by-s/ [https://perma.cc/R2YD-CXMA] (clarifying that DHS may issue work authorization to immigrants on supervised release).

311. See Metzger & Stack, supra note 24, at 1251 (describing internal administrative law as consisting "of measures governing agency functioning that are created within the agency or the executive branch and that speak primarily to government personnel," whereas external administrative law comes primarily from Congress or the courts).

312. 8 U.S.C. § 1252(b)(3)(B).

stay removal or a petition for review that contains a request for a stay.[313] For example, the Second Circuit entered into an agreement with DHS known as the "forbearance policy."[314] Pursuant to this policy, once a final order of removal is issued and the noncitizen has filed a motion to stay removal, the government will not execute the removal order until the court has adjudicated the stay motion.[315]

Apart from a judicial stay of removal, DHS has the discretion to stay a deportation upon the noncitizen's application.[316] 8 U.S.C. § 1231 and the implementing regulation[317] authorize supervised release for a noncitizen ordered removed whose removal is not practicable or would be "contrary to the public interest."[318] ICE's Form I-246 provides individuals ordered removed with the opportunity to stay their deportation and receive an order of supervision instead.[319] If DHS grants the application, it may issue a Form I-220B, Order of Supervision (OSUP).[320] More than one million noncitizens have been ordered removed but will not be deported immediately, provided they check in regularly with ICE pursuant to their OSUPs.[321]

---

313. De Leon v. Immigr. & Naturalization Serv., 115 F.3d 643, 644 (9th Cir. 1997) (adopting a procedure that temporarily stayed the petitioner's deportation upon a filing of a motion to stay). The Supreme Court has ruled that, in adjudicating motions to stay removal, courts should consider the "traditional factors" for adjudicating stays, rather than the more stringent standards that the INA imposes for "injunctive relief" under 8 U.S.C. § 1252(f)(2). See *Nken*, 556 U.S. at 433.

314. See In re Immigr. Petitions for Rev. Pending in the U.S. Ct. of Appeals for the Second Cir., 702 F.3d 160, 162 (2d Cir. 2012); Trina Realmuto, Jessica Chicco, Nancy Morawetz & Beth Werlin, Seeking a Judicial Stay of Removal in the Court of Appeals 10 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/seeking_a_judicial_stay_of_removal_fin_1-21-14.pdf [https://perma.cc/CS3X-27J6].

315. See Realmuto et al., supra note 314, at 10.

316. See 8 C.F.R. § 241.6 (2021).

317. Id. § 274a.12(c)(18).

318. Wadhia, Demystifying Employment Authorization, supra note 22, at 7–9 (describing OSUPs and other factors that an official may consider when adjudicating an application for employment authorization).

319. U.S. Dep't of Homeland Sec., OMB No. 1653-0021, Application for a Stay of Deportation or Removal.

320. 8 C.F.R. § 241.5.

321. See Michael E. Miller, They Fear Being Deported. But 2.9 Million Immigrants Must Check In With ICE Anyway., Wash. Post (Apr. 25, 2019), https://www.washingtonpost.com/local/they-fear-being-deported-but-29-million-immigrants-must-check-in-with-ice-anyway/2019/04/25/ac74efce-6309-11e9-9ff2-abc984dc9eec_story.html (on file with the *Columbia Law Review*) ("For the people presenting themselves to immigration authorities, including more than a million already facing final orders of removal from the United States, each check-in can feel perilous."). Shoba Sivaprasad Wadhia obtained internal ICE policy documents revealing a host of other alternatives to detention, namely "Order of Recognizance (ROR) . . . , release on bond, release using Enhanced Supervision Reporting (ESR), and the Intensive Supervision Appearance Program." See Letter from Shoba Sivaprasad Wadhia to

The applicable regulation further identifies noncitizens as eligible for work authorization to include those "against whom a final order of deportation or removal exists and who is released on an order of supervision under the authority contained in 8 U.S.C. § 1231(a)(3)."[322] In determining whether to grant employment authorization under this regulation, the district director may consider factors such as the economic necessity for employment, dependent spouse or children who rely on the noncitizen for support, and the "anticipated length of time before the [noncitizen] can be removed from the United States."[323] Echoing the second Morton Memo's consideration for factors such as family ties and economic necessity, OSUPs have an equitable dimension.

Moreover, internal guidance memoranda reveal qualitative judgments about the relative position of different kinds of noncitizens. For example, research shows that, as far back as November 2004, ICE officials sought to "standardize the reporting requirements for those aliens released from detention under an OSUP."[324] Under this framework, removable noncitizens with criminal convictions who have some status other than legal permanent residence must check in most frequently—every month.[325] Legal permanent residents (LPRs) with criminal convictions (crimes involving moral turpitude, specifically) were required to check in every two months.[326] Noncitizens without criminal convictions must check in every three months, and finally, asylum applicants must check in much less frequently—every six months.[327] Even this simple table of check-ins offers a revealing ordering. First, the highest preferences are for asylum seekers (who are awaiting adjudication of their claims and thus might obtain lawful status yet). Noncitizens without criminal convictions (who are perceived to be less of a threat to public safety regardless of resident status) are second, LPRs with criminal convictions (who are perceived as more of a threat to public safety but privileged for their long-term residence) are third, and non-LPRs with criminal convictions (who are immigrants lacking long-term residence in the United States and perceived to pose a safety

---

Interested Parties 2, 11 (May 4, 2015), https://works.bepress.com/shoba_wadhia/33/ (on file with the *Columbia Law Review*). For simplicity, this Part focuses on OSUP.

322. 8 C.F.R. § 274a.12(c)(18).

323. Id. § 274a.12(c)(18)(i)–(iii).

324. Rutgers Sch. of L.-Newark Immigrant Rts. Clinic & Am. Friends Serv. Comm., Freed but Not Free: A Report Examining the Current Use of Alternatives to Immigration Detention 6 (2012), https://www.afsc.org/sites/default/files/documents/Freed-but-not-Free.pdf [https://perma.cc/DCK3-2VJR].

325. Id.

326. Id.

327. Id.

threat) are last. An assessment of relative priority based on a mix of status and conduct helps explain this sorting.[328]

Immigrants with OSUPs live and work under constant threat of the revocation of their status, highlighting the way in which the immigration bureaucracy lords its discretion over those shown leniency.[329] In *Devitri v. Cronen*, the petitioners, Indonesian Christians, had unsuccessfully sought asylum and had been ordered removed.[330] Under an Obama Administration humanitarian program, the government encouraged them to come forward and receive protection under OSUPs.[331] The petitioners checked in with ICE every thirty days and lived and worked for seven years "without incident" until the Trump Administration abruptly ended this particular humanitarian program.[332] At that time, ICE informed the petitioners that they would have to depart for Indonesia no later than thirty days after their next check-in.[333] Apart from upending their residence in the United States, the termination jeopardized their lives due to the worsening plight of religious minorities in Indonesia, especially for Evangelical Christians such as the petitioners.[334] Accordingly, the petitioners sought to reopen their cases on account of changed country conditions.[335] Given delays inherent in BIA procedure, the petitioners were able to seek a preliminary injunction in federal court.[336] The court determined that the petitioners demonstrated a likelihood of success on the merits of their due process claim regarding a motion to reopen their cases.[337] As a result, a federal district court issued an injunction prohibiting the petitioners' deportation until seven days "after the BIA rule[d] on a timely motion to reopen."[338] Although the court had no occasion for opining whether OSUP amounted to a protected liberty interest, it did note that adjacent

---

328. OSUPs are analogous to parole in the criminal legal system, and release on one's own recognizance is essentially no-bail release. See Parole, Cornell L. Sch., Legal Info. Inst., https://www.law.cornell.edu/wex/parole [https://perma.cc/T6NU-57AB] (last visited July 26, 2021) (describing parole as "conditional release of prisoners before they complete their sentence"); Release on One's Own Recognizance, Cornell L. Sch., Legal Info. Inst., https://www.law.cornell.edu/wex/release_on_one%27s_own_recognizance [https://perma.cc/8FGE-AFEP] (last visited July 26, 2021) (describing release on one's own recognizance as the practice of a court releasing a defendant pending trial without bail).

329. See Miller, supra note 321.

330. 289 F. Supp. 3d 287, 289–90 (D. Mass. 2018).

331. Id. at 290.

332. Id. at 290–91.

333. Id. at 291.

334. Id.

335. Id. at 290; see also 8 U.S.C. § 1231(b)(3)(A) (2018) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's . . . religion.").

336. *Devitri*, 289 F. Supp. 3d at 290.

337. Id. at 295.

338. Id. at 298.

statutory and constitutional rights remain unaffected by a grant of OSUP.[339]

4. *The Significance of Shadow Sanctions.* — These shadow sanctions are, for the most part, enshrouded in secrecy. Absent a FOIA request, detailed information about when and how many reprieves are granted is unavailable.[340] But if there are at least eleven million deportable noncitizens in the United States currently, and one million have been ordered removed but are on OSUPs, three-quarters of a million have DACA, nearly 90,000 had their cases closed due to low-priority status, and tens of thousands are shielded by other measures, a sizeable share of the deportable population has received a punishment other than deportation for their status as a removable noncitizen.[341] Shadow sanctions merit much more attention than they have received so far.

All of this demonstrates that the government possesses tools at various points in the enforcement process to implicitly prioritize cases, deciding to pursue some but not others. Prioritization reveals qualitative judgments about different immigration offenders and offenses.[342] Despite overreliance on the single penalty of deportation in the INA, the INA creates a foundation for other discretionary sanctions, which the immigration bureaucracy has defined largely through internal administrative law.[343] The tools discussed above might promote administrative convenience, but they also enable DHS to set priorities in enforcement and to rationally distinguish among removable immigrants.

C. *Rule of Law Deficits*

As chronicled above, the scheme of shadow sanctions in immigration enforcement instantiates all sorts of qualitative judgments, largely shielded from public scrutiny, about the relative priority of enforcement against various immigrants. They also produce potential rule of law deficits. The lack of transparency, a lack of consistent (or any articulated) standards in some

339. Id. at 295 (describing a "statutory right to move to reopen and an entitlement to not be deported to a country where persecution would occur" as the basis of petitioners' due process claim).

340. See Heeren, supra note 236, at 1120 n.14 (describing ICE data obtained through a FOIA request).

341. See Budiman, supra note 32 (noting that there are currently around eleven million undocumented immigrants in the United States); Miller, supra note 321 (noting that over one million noncitizens have been ordered removed but remain present on supervised release); Svajlenka & Wolgin, supra note 259 (noting that 825,000 noncitizens have benefited from DACA); TRAC, Administrative Closure, supra note 298 (noting cases that were closed using administrative closure based on their low-priority status).

342. See supra section II.B.

343. See supra section II.B.

instances, and the lack of factual development or evidence-based decisions all create the potential for arbitrariness.[344]

Although the immigration bureaucracy, like all administrative agencies, enjoys substantial discretion in implementing congressional commands and presidential policy preferences, the Supreme Court has confirmed that its policies must not be arbitrary.[345] In *Judulang v. Holder*, the Supreme Court invalidated a BIA policy as "arbitrary and capricious" when the policy defined eligibility for relief from removal on reasons as "extraneous to the merits of the case as a coin flip would be."[346] In that case, the Court considered a challenge to a BIA policy regarding relief from removal. Immigrants on the cusp of entry with certain criminal convictions are excludable under immigration law, and certain criminal convictions also trigger deportability for immigrants already here.[347] The INA previously offered relief from exclusion to some immigrants with criminal convictions, and the doctrine evolved to require some version of this relief also to be made available to immigrants facing deportation based on criminal convictions.[348] The BIA decided to extend eligibility for relief to deportable immigrants based on whether their deportation ground "consists of a set of crimes 'substantially equivalent' to the set of offenses making up an exclusion ground."[349] Absent a sufficient match in the sets of offenses, the immigrant would be ineligible.[350]

The Court chided the agency for failing to consider any factors relating to the immigrant's "fitness to reside in this country."[351] For a policy to constitute reasoned decisionmaking, it must bear relation "to the purposes of the immigration laws or the appropriate operation of the immigration system."[352] Such a connection, however loose, must be evident even with

---

344. For example, filmmakers working on a documentary about ICE note that the ICE agent whom they profiled lacked basic information about targets. When apprehending a lawful permanent resident (LPR), the agent had no idea whether the LPR was the breadwinner for his family, how many children he had, or what immigration status his spouse had. Those questions arose only after the agents had apprehended him and placed him in their car. See Five Years North (Optimist Films 2021).

345. See Judulang v. Holder, 565 U.S. 42, 53–54 (2011) ("Agencies, the BIA among them, have expertise and experience in administering their statutes that no court can properly ignore. But courts retain a role . . . in ensuring that agencies have engaged in reasoned decisionmaking.").

346. Id. at 56.

347. See id. at 46 (referencing criminal grounds that serve as grounds for exclusion and deportation).

348. Id. at 49 (extending the availability of relief from an exclusion proceeding to a deportation proceeding).

349. Id.

350. Id. at 51.

351. Id. at 53.

352. Id. at 55.

respect to discretionary relief for deportable immigrants.[353] Although the Court did not identify specific factors related to an immigrant's fitness to remain, it approvingly noted the BIA's consideration of a variety of factors when determining whether to ultimately award relief to eligible immigrants: "the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien's residence, the impact of deportation on the family, the number of citizens in the family, and the character of any service in the Armed Forces."[354] These factors overlap somewhat with the tone and content of the Morton Memos described above—they stand for the notion that persons posing serious public safety risks should be priorities for removal, or that the severity of one's offense should weigh against relief from removal.[355] Moreover, both the BIA factors and the Morton Memos at least superficially acknowledge the value of U.S. citizen family ties, an immigrant's lengthy residence in the community, and service to the nation.[356] All of this suggests that such factors are articulable, even if the immigration bureaucracy has substantial leeway in defining them.

Non-DACA deferred action, administrative closure, and OSUP all lack adequate articulated standards, and therefore, adequate notice of those standards.[357] Although the law provides for a range of potential reprieves from deportation, few noncitizens have legal counsel in removal proceedings,[358] meaning that most noncitizens are unlikely to know about them. Unsurprisingly, the process of obtaining deferred action has remained "opaque."[359] As Wadhia notes, "[T]here is no current form, fee, or public information about how to apply except for the DACA program."[360] Similarly, OSUPs have a statutory basis and implementing regulations, but the bulk of ICE policy on these orders remains internal, known publicly only through Wadhia's FOIA request.[361] Without public criteria, or noncitizens

353. This reasoning suggests that APA claims might advance deportable immigrants' well-being better than constitutional rights-based claims. See Ray, *Trump v. Hawaii*, supra note 128, at 786–89 (explaining that recent constitutional challenges to executive action in immigration law have tended to fail because courts apply rational basis review even amid allegations of presidential animus).

354. *Judulang*, 565 U.S. at 48.

355. See Morton Priority Memo, supra note 222, at 1–3 (listing factors).

356. Id.

357. For a discussion of the value of notice in the realm of discretionary reprieves from removal, see Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 321–24 (2001).

358. See Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1, 2 (2015) (finding that, from 2007 to 2012, only 37% of all immigrants secured legal representation).

359. See Wadhia, The Aftermath of *United States v. Texas*, supra note 23 (describing deferred action as "opaque" outside of DACA).

360. Wadhia, Demystifying Employment Authorization, supra note 22, at 5.

361. Id. at 9.

even knowing of the existence of shadow sanctions, the immigration bureaucracy operates in a zone of arbitrariness.

Recent efforts to eliminate use of various shadow sanctions highlight their crucial role. Purporting to strip enforcement officials and IJs of all discretion by, say, eliminating enforcement priorities or administrative closure,[362] does not actually eliminate discretion; it hides or displaces it.[363] The realities of enforcement mean that enforcement officials will always have to use their discretion to pursue some offenders over others. Accordingly, the power to regulate deportation must be subject to a more rational, durable system of sanctions to satisfy rule of law values. Tools like administrative closure, post-order forbearance, and deferred action all merit greater consistency and openness to limit the potential for the arbitrary exercise of government power. To achieve proportionality, however, the immigration bureaucracy requires not only a well-reasoned basis for distinguishing among deportable immigrants; it also requires understanding the outcomes of each shadow sanction. For example, how many immigrants eventually obtain lawful status after receiving deferred action versus administrative closure or an OSUP? How long does a noncitizen typically live and work in the United States on one of these shadow sanctions? Once more empirical information becomes available, we can better understand how harsh or lenient a particular shadow sanction is in practice. Only then does the task of assigning proportionate penalties become possible.

III. TOWARD REASONED ADMINISTRATION AND PROPORTIONALITY

Although a statutory code that imposes deportation for every offense appears consistent, transparent, and nonarbitrary, enforcement realities mean only some will be deported, while others receive a shadow sanction or none.[364] This relatively unregulated possibility for lenience produces both the potential to rationally distinguish among removable immigrants,

---

362. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52,491, 52,493 (proposed Aug. 26, 2020). However, a federal district court enjoined this rule from going into effect. See Centro Legal de la Raza v. Exec. Off. for Immigr. Rev., No. 21-cv-00463-SI, 2021 WL 916804, at *1 (N.D. Cal. Mar. 10, 2021) (granting a preliminary injunction based on the plaintiffs' likelihood of success on a claim that the rule violated the APA).

363. Cf. Elizabeth E. Joh, The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing, 10 Harv. L. & Pol'y Rev. 15, 30 (2016) (discussing hidden discretion). By declining to set priorities, and in the absence of more resources for enforcement, the Executive devolves that discretion to line officers, who then make choices about whom to apprehend and pursue for removal. As a result, discretion merely migrates to another actor, but it does not disappear. See Cox & Rodríguez, The President and Immigration Law, supra note 5, at 178 ("Like mass or energy, discretion within complex organizations cannot typically be destroyed. But the locus of discretion can be shifted."); Ray, Abdication Through Enforcement, supra note 214, at 3–4.

364. See Davis, supra note 27, at 184.

and the potential for arbitrariness, featuring the rule of law deficits discussed above. Where deferred action, administrative closure based on low-priority status, and OSUP exist (or once existed) as distinct forms of lenience with basis in law (albeit in an underdeveloped form), noncitizens are entitled to a reasoned decision on their applications for such lenience. The principle of proportionality further dictates that the government, in exercising its enforcement discretion, should do no more harm than it must to effectuate the purposes of the immigration system,[365] even if U.S. immigration law allows it to. Immigration officials should substantiate their decisions using specific facts, and reasoned administration offers a guiding principle.

Considering the dim constitutional status of deportable immigrants, this Article does not contend that due process requires reforms to promote reason giving.[366] Similarly, given the INA's displacement of the APA in immigration adjudication,[367] this Article does not argue that the APA itself requires greater notice, consistency, and transparency in the imposition of shadow sanctions. Instead, this Article offers prudential reasons for reform, grounded principally in the normative value of reasoned administration, a prerequisite to proportionality.

A. *The Tools of Reasoned Administration*

Other areas of administrative regulation, while distinct, offer lessons for immigration law. As earlier noted, the challenge of structuring discretion pervades the administrative state, as do opportunities for lenience.[368] Opportunities for lenience are an important part of a regulatory scheme because traditional tools for challenging an administrative regulation are

---

365. Cf. Judulang v. Holder, 565 U.S. 42, 48 (2011) (discussing the arbitrariness of BIA policy that drew distinctions without reference to purposes of the immigration system). This would require government officials to identify, articulate, and consider the purposes of the immigration system and explain how their enforcement work in specific cases furthers those purposes.

366. See Henry J. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1297 (1975) (discussing the lower standard of process due for a "concededly deportable alien" seeking discretionary relief).

367. For example, the APA does not apply to removal proceedings. See Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 133 (1991) (describing Congress's decision to supersede the APA's hearing provisions through the INA). In addition, the INA precludes judicial review of certain discretionary forms of relief established by statute. See 8 U.S.C. § 1252(a)(2)(B)(ii) (2018). Nonetheless, the APA retains an important role in checking exercises of executive discretion, such as the denial of a continuance. See Wadhia, Beyond Deportation, supra note 59, at 115–16.

368. See Alfred C. Aman, Jr., Administrative Equity: An Analysis of Exceptions to Administrative Rules, 1982 Duke L.J. 277, 280 ("Administrative equity serves as a bridge between collectively determined rules and the reality of the particular case.").

often unavailable.[369] As a result, many regulatory domains offer opportunities for lenience. For example, environmental law authorizes the Environmental Protection Agency (EPA) Administrator to grant variances to a known violator of the Safe Drinking Water Act.[370] Similarly, the Secretary of the Department of Energy has the power to "make 'adjustments' to rules of general applicability," in the form of a declaratory judgment or an advisory opinion.[371] As a result, this Article looks across substantive areas of regulation for inspiration.

As immigration law comes to be appreciated as administrative law, it makes sense to learn how other administrative agencies navigate the tradeoffs between formality and informality, or rules and discretion, and what kind of procedures agencies devise beyond those strictly required by the Constitution or the APA (and for what reasons).[372] Elizabeth Magill identifies several possible incentives for agencies to self-regulate.[373] First, agencies that distribute benefits routinely issue guidelines to produce more objective decisionmaking.[374] Second, government actors make "credible commitments" about future behavior to promote the agency's mission.[375] Finally, self-regulation may serve as an important tool to improve internal operations and to produce valuable public goods, such as information or agency reputation.[376] Gillian Metzger observes that agencies voluntarily adopt measures that limit their discretion out of more

---

369. Id. at 285–86 ("[I]ndividualized judicial remedies are usually not available, pre-enforcement judicial review is often too limited, and prosecution is too high a price to pay for noncompliance . . . ."). For recent scholarship on administrative equity, see Maggie Blackhawk, Equity Outside the Courts, 120 Colum. L. Rev. 2037, 2042 (2020) (noting that the work of granting exceptions from general rules on account of "unfortunate or unforeseen consequences" is "largely done by the courts and the administrative state" rather than Congress).

370. Drinking Water Requirements for States and Public Water Systems, U.S. Env't Prot. Agency (Dec. 14, 2020), https://www.epa.gov/dwreginfo/variances-and-exemptions [https://perma.cc/4LUZ-FNZ9].

371. Aman, supra note 368, at 286.

372. Jill E. Family, DAPA and the Future of Immigration Law as Administrative Law, 55 Washburn L.J. 89, 89 (2015) (arguing that the litigation over DAPA has demonstrated the need to recognize the applicability of mainstream administrative law principles to immigration law).

373. Elizabeth Magill, Agency Self-Regulation, 77 Geo. Wash. L. Rev. 859, 861 (2009) (describing the need to understand the consequences of agency self-regulation as "what an agency can accomplish by self-regulating, and hence why it might do so").

374. Id. at 867.

375. Id. at 871. Magill offers the example of the government's commitment to respect contract and property rights in the future, to "induce investment by private parties and foster economic growth." Id.

376. Id. at 891.

"basic contemporary normative commitments with respect to how government should operate."[377]

The immigration bureaucracy could potentially recognize and respond to some of these incentives. In an immigration system that consists of a benefits-granting component that views immigrants as "clients" as well as an enforcement branch that views removable immigrants as "targets," the agency leadership could benefit from attending to both missions, facilitating lawful migration, and not simply sanctioning those lacking lawful status. An indiscriminate or inhumane approach to enforcement potentially deters lawful migration as well.[378] President Obama encouraged deportable immigrants to come out of the shadows and make their presence known in exchange for a sanction short of deportation, at least temporarily.[379] By giving deportable immigrants an opportunity to exhibit law-abiding conduct and taking a benefits-granting approach to a subset of the deportable population, the Obama Administration enhanced both missions. In addition, the immigration bureaucracy has a reputation problem, one that predates President Trump but that only intensified through the indiscriminate enforcement of his administration.[380] Although scholars have suggested that DHS pays a political cost for any perceived nonenforcement,[381] it turns out that it also pays a political cost for perceived overenforcement.[382] For example, public opinion decisively favors not merely shielding DACA recipients from deportation but providing them with legal status;[383] communities offer sanctuary to deportable immigrants in

---

377. See Gillian E. Metzger, Ordinary Administrative Law as Constitutional Common Law, 110 Colum. L. Rev. 479, 510 (2010); see also William N. Eskridge Jr. & John Ferejohn, A Republic of Statutes 1–2 (2010) (describing "small 'c' constitutionalism" as "a modality of public life and discourse, facilitating the building and editing of structures within which we as citizens can live flourishing lives").

378. The Trump Administration also actively eroded legal immigration pathways, turning lawful presence into unlawful presence. See Amanda Holpuch, How Trump's 'Invisible Wall' Policies Have Already Curbed Immigration, Guardian (Jan. 15, 2019), https://www.theguardian.com/us-news/2019/jan/15/invisible-wall-trump-policies-have-curbed-immigration [https://perma.cc/H53L-EM5V].

379. An anti-immigration President, however, easily undermines those incentives toward reform; the Trump Administration specifically sought to crater lawful immigration and spread fear among deportable immigrants. Id.

380. See Rachel Levinson-Waldman, The Abolish ICE Movement Explained, Brennan Ctr. for Just. (July 30, 2018), https://www.brennancenter.org/our-work/analysis-opinion/abolish-ice-movement-explained [https://perma.cc/Z2D7-9VDV] (noting "outrage" following the uptick in ICE arrests under the Trump Administration).

381. See Cuéllar, supra note 196, at 51.

382. Indeed, indiscriminate enforcement under the Trump Administration prompted calls to abolish ICE as a standalone agency. See Levinson-Waldman, supra note 380.

383. Jens Manuel Krogstad, Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children, Pew Rsch. Ctr. (June 17, 2020), https://www.pewresearch.org/fact-tank/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children/ [https://perma.cc/5CG6-5RM2].

their midst;[384] and neighbors form human chains to prevent ICE agents from apprehending one of their own.[385] If reasoned immigration administration became the norm, broad swaths of the public might hold DHS in more esteem. For all these reasons, the immigration bureaucracy could have the incentive to pursue prudential reform, despite potential costs.

1. *Notice-and-Comment Rulemaking*. — Agencies have at times established legislative rules through notice-and-comment rulemaking to constrain enforcement discretion and promote consistency. In *Discretionary Justice*, Kenneth Culp Davis emphasized the due process values central to discretionary justice: openness[386] and consistency.[387] Openness guards against arbitrariness by exposing enforcement officials' judgments to public scrutiny. In theory, this promotes accountability and robs them of a secret space of whimsy or vendetta. Consistency also guards against arbitrariness by encouraging enforcement officials to treat like cases alike, whether in granting a benefit or imposing a burden.[388] Although not unalloyed virtues, openness and consistency have greater urgency with respect to enforcement against noncitizens, who lack voting rights,[389] which are conceived of as one of the traditional checks on government power and the basis for theorizing about majoritarian consent.

Davis applied his insights equally to the power to show lenience and the power to punish, thereby encompassing the kinds of discretionary reprieves at issue in so many areas of administration.[390] In his view, "Logically, discretionary power to favor an individual cannot exist without discretionary power not to favor him."[391] In other words, he argues that sanctions and reprieves are two sides of the same coin. Concern for the dangers of

---

384. Rose Cuison Villazor & Pratheepan Gulasekaram, Sanctuary Networks, 103 Minn. L. Rev. 1209, 1211 (2019) (describing new forms of sanctuary that have emerged, including protective action taken by employers, universities, and other actors). For a discussion of the types of state and local sanctuary policies that seek to insulate undocumented immigrants from immigration enforcement, see Ava Ayers, Missing Immigrants in the Rhetoric of Sanctuary, 2021 Wis. L. Rev. 473, 486–97.

385. Julia Jacobo, Tennessee Neighbors Form Human Chain to Prevent ICE From Arresting Father in Driveway, ABC News (July 23, 2019), https://abcnews.go.com/US/tennessee-neighbors-form-human-chain-prevent-ice-arresting/story?id=64508277 [https://perma.cc/4TL5-U6FY] (describing neighbors' human chain).

386. Davis, supra note 27, at 98 ("Openness is the natural enemy of arbitrariness and a natural ally in the fight against injustice.").

387. Cf. id. at 170 ("[T]he question of what is justice in any particular case may not be determined by considering only the one case but must be determined in the light of what is done in comparable cases.").

388. See Yoav Dotan, Making Consistency Consistent, 57 Admin. L. Rev. 995, 996 (2005) (connecting consistency to "the integrity of legal systems under the idea of the rule of law").

389. United States v. Carolene Prods., 304 U.S. 144, 154 n.4 (1938) (articulating the "insular minorities" rationale); see also 18 U.S.C. § 611 (2000) (severely limiting a noncitizen's right to vote in a federal election).

390. Davis, supra note 27, at 172.

391. Id.

selective enforcement drove Davis's recommendation that agencies make greater use of rulemaking.[392] Accordingly, scholars have cast notice-and-comment rulemaking as "the best method for making general policy."[393]

Considering this reasoning, scholars have argued for greater use of legislative rules to constrain agency discretion in setting penalties.[394] For example, Wadhia has argued for greater use of rulemaking to structure prosecutorial discretion in immigration law,[395] and with respect to deferred action specifically.[396] Legislative rules establish a binding norm.[397] They also offer clear guidance to enforcement officials and law for federal courts to apply when reviewing an agency's compliance with its own rules.[398] Wadhia argues that internal guidance can provide enough applicable law to evaluate a denial of deferred action.[399] But federal judges disagree about the reviewability of decisions governed by internal guidance.[400] Accordingly, legislative rules offer a clearer path to judicial review than internal guidance.

Although agencies might be reluctant to limit their own discretion through legislative rules, it is possible for them to do so. For example, NHTSA promulgated a rule that committed the agency to grant a petition to commence proceedings upon finding a "'reasonable possibility' of a

---

392. Id.

393. Bressman, supra note 139, at 543; Wadhia, The Role of Prosecutorial Discretion, supra note 227, at 279.

394. Calls for rulemaking extend beyond immigration law. In his study of administrative sanctions imposed by the SEC, Fredrich H. Thomforde, Jr. argued that administrative agencies should explore possibilities for constraining discretion in the issuance of sanctions against offenders. Frederich H. Thomforde, Jr., Controlling Administrative Sanctions, 74 Mich. L. Rev. 709, 758 (1976). Given the impossibility of legislative rules contemplating every combination of factors that a given offense might present, Thomforde noted the inevitable role for agency discretion to ensure a fit between the offense and the sanction. Id. at 716; see also Sherry Lynn Peel, Administrative Law and Procedure, 19 Tex. Tech L. Rev. 223, 241 (1988). This vast power to "impose sanctions upon a regulated person found to have violated relevant standards of conduct" has gone largely unchecked. Thomforde, supra, at 710. As a result, agency rulemaking, while helpful, does not eliminate the danger of arbitrariness in sanctions.

395. Wadhia, The Role of Prosecutorial Discretion, supra note 227, at 294–99.

396. Shoba Sivaprasad Wadhia, Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law, 10 U.N.H. L. Rev. 1, 60 (2012) (recommending that deferred action be published as a rule).

397. Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 947 (D.C. Cir. 1987) (describing "mandatory, definitive language" suggesting that the policy was a substantive rule and binding norm); see also William F. Funk, Sidney A. Shapiro & Russell L. Weaver, Administrative Procedure and Practice: A Contemporary Approach 352 (6th ed. 2018) ("According to the court, a rule is legislative if it is binding on an agency, regardless of whether it is also binding on regulated entities.").

398. See Wadhia, The Role of Prosecutorial Discretion, supra note 227, at 279.

399. See Wadhia, Beyond Deportation, supra note 59, at 131–32.

400. See, e.g., Morales de Soto v. Lynch, 824 F.3d 822, 826 (9th Cir. 2016) (denying review of ICE's denial of prosecutorial discretion toward a deportable immigrant).

safety-related defect in the manufacturers' cars."[401] The D.C. Circuit held that the "reasonable possibility" standard constituted law for the court to apply, bringing the agency's decision out of the zone of unreviewable discretion described in *Heckler v. Chaney*.[402] The NHTSA rule illustrates that agencies can use legislative rules to limit their own discretion.

Legislative rules, however, involve tradeoffs. Converting shadow sanctions into clear rules for penalizing deportable immigrants would promote consistency but could potentially undermine agency incentives to provide shadow sanctions in the first place.[403] Pressure on agencies to centralize and standardize enforcement discretion by adopting legislative rules could then render the agency vulnerable to litigation over its compliance with those rules.[404] If the agency declines to formalize its own internal administrative law, a court might nonetheless interpret its guidance as a legislative rule that violated procedural requirements for its adoption—ruling, essentially, that it should have adopted the rule via notice-and-comment rulemaking.[405] Finally, if an agency seeks to avoid these outcomes, it could adopt "less specific, less decisive, and less clear" guidance.[406] But, as Gillian Metzger and Kevin Stack reason, these undermine internal administrative law.[407] Pressuring agencies to promulgate standards for deferred action, OSUP, and the like—especially through rulemaking—would increase costs, trigger judicial review, and lead the agency to drastically reduce its willingness or ability to impose sanctions less than deportation. For that reason, imposing a requirement of notice-and-comment rulemaking might prove too costly.

Transparency also threatens to thwart enforcement. In the realm of environmental law, for example, transparency in sanctions often runs counter to the agency's objective. The EPA has a penalty policy to guide different enforcement regions.[408] That policy emphasizes secrecy: It instructs officials that the "deterrence" figure that the agency computes as

---

401. 49 C.F.R. § 552.8 (1987); see also Ctr. for Auto Safety v. Dole, 828 F.2d 799, 801 (D.C. Cir. 1987) (discussing the regulation).

402. *Ctr. for Auto Safety*, 828 F.2d at 803 (noting that the regulation provided "law to apply").

403. Cf. Richard M. Thomas, Prosecutorial Discretion and Agency Self-Regulation: *CNI v. Young* and the Aflatoxin Dance, 44 Admin. L. Rev. 131, 156 (1992) (noting that "an agency bent on doing its work outside of judicial review and formal procedures will often find a way to evade many of the well-intentioned 'external' restrictions on its discretion by resorting to even more informal and nonpublic processes for its decisionmaking").

404. See Metzger & Stack, supra note 24, at 1279.

405. See id. at 1281.

406. Id. at 1288.

407. See id. ("[T]o the extent that agencies craft their internal law to avoid judicial cognizance, this doctrine undermines the capacity of internal administrative law to serve its political, managerial and legal accountability roles.").

408. See U.S. Env't Prot. Agency, A Framework for Status-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties 2 (1998),

its desired penalty—which the agency sets internally "as a goal at the outset of settlement negotiations"—should generally not be revealed to the offender.[409] Similarly, commentators have argued that transparency surrounding categorical nonenforcement in tax essentially legalizes entire sets of tax violations.[410] Likewise, if ICE officers informed noncitizens in removal proceedings of shadow sanctions, making deportable immigrants aware that they will not be deported, it could diminish the deterrent effect of each apprehension.[411]

Finally, one might worry that greater procedural requirements will lead an agency to phase out shadow sanctions as not worth the trouble, reducing the production of internal law and fueling unchecked enforcement.[412] Although successful administration—both effective and humane—requires a mix of formality and informality, rules and standards, and centralization and decentralization, the realities of immigration enforcement do not support this feared gutting of shadow sanctions. Congressional appropriations for enforcement have risen steadily since DHS was created in 2003.[413] From a combined CBP–ICE budget of $9.6 billion in fiscal year 2003, appropriations have grown to $25.3 billion in fiscal year 2020.[414] But as is often quoted, "only" about 400,000 of the eleven million deportable noncitizens can be removed annually.[415] The agency simply cannot execute removals at any greater scale, and the notion that the government will substitute deportation for OSUPs, deferred action, and such has more theoretical than practical purchase. In theory, the agency could simply leave deportable immigrants living under orders of removal but without any of the components for a livable residence, like

---

https://www.epa.gov/sites/production/files/documents/penasm-civpen-mem.pdf [https://perma.cc/YS24-NW9B].

409. Id.

410. Cf. Leigh Osofsky, The Case for Categorical Nonenforcement, 69 Tax L. Rev. 73, 80 (2015) (discussing a scholarly critique of "customary deviations," through which the IRS "acquiesces in widespread noncompliance"). But see id. at 131 (defending the legitimacy of categorical nonenforcement on the grounds of accountability, deliberation, and nonarbitrariness).

411. See Cox & Rodríguez, The President and Immigration Law, supra note 5, at 233 ("Generally speaking, when an offense can be committed in multiple ways or in multiple places, publicizing who or what law enforcement officials will be looking for can make it easier for would-be violators to avoid detection.").

412. See Wadhia, The Role of Prosecutorial Discretion, supra note 227, at 291 (discussing David Martin's argument that judicial review can depress agency policymaking); see also Metzger & Stack, supra note 24, at 1288 ("The more clearly internal law constrains the agency's discretion, the greater the risk of procedural invalidation for not employing notice and comment or of external judicial enforcement.").

413. Am. Immigr. Council, supra note 191.

414. Id.

415. Dara Lind, Obama Is Deporting More Immigrants Than Any President in History: Explained, Vox (Apr. 9, 2014), https://www.vox.com/2014/4/9/5575006/2-million-immigrants-have-been-deported-under-obama/ (on file with the *Columbia Law Review*).

work authorization. This is the real danger, especially if the President seeks to induce "self-deportation."[416] Even if an administration retains shadow sanctions amid greater procedural requirements, the agency might lose the incentive to say much about shadow sanctions if it will be used against them subsequently in court.[417]

2. *Interpretive Guidance and Centralized Discretion.* — The principal alternative to legislative rules is interpretive guidance,[418] which is "not supposed to have the force of law."[419] Interpretive guidance allows agencies flexibility in articulating general statements of policy or managing internal operations.[420] Enforcement guidelines often take the form of interpretive guidance.[421] Guidance documents offer another avenue for mitigating rule of law deficits without the costs associated with greater formalization. The immigration enforcement bureaucracy has relied on interpretive guidance throughout its history, but the quality of guidance issued has varied. For instance, the Morton Memos provided guidance to line officers on enforcement priorities and equitable factors, and many commentators praised the memos for explicitly articulating priorities.[422] Ultimately, however, the guidance proved too vague on key questions and notoriously difficult to enforce against wayward line officers.[423] These deficiencies fueled calls for better, more precise guidance (or even resort to rulemaking).[424]

---

416. See K-Sue Park, Self-Deportation Nation, 132 Harv. L. Rev., 1878, 1880–82 (2019) (defining self-deportation and describing government efforts to induce self-deportation).

417. See Chen, Administrator-in-Chief, supra note 266, at 423 (noting perverse incentives of demanding more procedure).

418. 5 U.S.C. § 553(b)(3)(A) (2018) (exempting "general statements of policy" and "interpretive rules" from rulemaking procedure).

419. Blake Emerson & Ronald M. Levin, Opinion, Interpretive Rules in Practice, Regul. Rev. (Oct. 30, 2019), https://www.theregreview.org/2019/10/30/emerson-levin-interpretive-rules-practice/ [https://perma.cc/XR24-DC5Y].

420. See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1441 (1992) (describing policymaking through "policy statements, interpretive rules, and guidance documents" as an option that "would maximize the agency's flexibility to change its mind and to amend its policy in the future by merely changing its policy or interpretation in the same spontaneous way it first issued the policy").

421. See Magill, supra note 373, at 866 n.9 (collecting scholarship discussing enforcement guidelines but noting a lack of "systematic discussion or analysis"); id. at 886 (describing how self-regulation constrains line officers' discretion).

422. See, e.g., Cox & Rodríguez, The President and Immigration Law Redux, supra note 224, at 186–87; Shoba Sivaprasad Wadhia, Immigr. Pol'y Ctr., The Morton Memo and Prosecutorial Discretion: An Overview 3 (2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Shoba_-_Prosecutorial_Discretion_072011_0.pdf [https://perma.cc/9HM7-LXSC] (praising the Morton Memos).

423. See Kagan, Binding the Enforcers, supra note 224, at 688 (characterizing DACA and DAPA as a "managerial strategy to overcome resistance by frontline Executive Branch employees" in contrast to mere enforcement priorities that call for "open-ended balancing of factors" by front line officers).

424. Wadhia, The Role of Prosecutorial Discretion, supra note 227, at 286 (arguing that "promulgating a rule on deferred action is essential").

For example, the Morton Memos prioritized deportation of noncitizens posing risks to "public safety," but some line officers interpreted this to cover minor crimes.[425] After all, reasonable people can differ in what they regard as a threat to "public safety,"[426] and ICE enforcement culture was already biased toward apprehension and deportation of all deportable immigrants.[427] As a result, the Morton Memos had only a limited impact, if at all, on patterns of enforcement.[428] This ultimately led DHS leadership to centralize discretion across the agency, culminating in President Obama announcing DACA.[429]

Other agencies also use guidance rather than legislative rules to guide enforcement discretion.[430] For example, the EPA promulgated a policy statement establishing incentives for self-policing of environmental violations.[431] Specifically, the agency promised not to seek "gravity-based penalties for violations of Federal environmental requirements discovered and disclosed by the entity."[432] It also promised not to recommend a regulated entity for criminal prosecution under specified circumstances.[433] Moreover, the policy exempted certain offenders from environmental audits.[434] The policy evinced the agency's willingness to limit its discretion in investigating and penalizing offenders in exchange for self-disclosure of violations.[435]

Similarly, the EPA headquarters has produced a robust corpus of interpretive guidance on civil penalties[436] that still guides all ten regional

---

425. See Wadhia, Reading the Morton Memo, supra note 256, at 5 (noting ICE's "long history" of interpreting dangerousness under enforcement priorities "beyond its ordinary meaning").

426. Cox & Rodríguez, The President and Immigration Law, supra note 5, at 173 (noting that "political officials outside of ICE might not have considered an immigrant cited for . . . [a DUI as] a public safety threat, but an ICE agent almost certainly would have").

427. Id. (discussing the ICE union president's testimony before Congress suggesting that enforcement priorities required ICE agents to "knowingly fail to enforce the law").

428. Id. at 170 (noting internal agency data, obtained through a FOIA request, "reveals no immediate changes in arrest patterns" following the issuance of the Morton Memos).

429. See id. at 174 (noting that President Obama's immigration initiative aimed to help secure the presence of certain young people in the United States).

430. Joseph F. Guida & Jean M. Flores, From Here to a Penalty: Anatomy of EPA Civil Administrative Enforcement, 43 Tex. Env't L.J. 129, 146 (2013) ("Rather than developing regulations to implement these instructions, EPA has issued penalty policies intended to give the public notice of EPA's internal efforts to follow these statutory mandates.").

431. Robert V. Percival, Christopher H. Schroeder, Alan S. Miller & James P. Leape, Environmental Regulation: Law, Science, and Policy 1076 (7th ed. 2013).

432. Id.

433. Id.

434. Id.

435. Id.

436. General Civil Enforcement Penalty Policies, U.S. Env't Prot. Agency, https://www.epa.gov/enforcement/enforcement-policy-guidance-publications#models [https://perma.cc/6PAK-D8X6] (last updated Aug. 16, 2021).

offices.[437] Unlike ICE field offices that operate relatively autonomously, EPA regional offices are expected to follow national guidance.[438] The EPA also issues interpretive guidance to structure and constrain equitable decisionmaking regarding, for example, variances and exemptions from its principal statutes.[439] This helps the public understand the scope of equitable remedies and the rationale underlying them.

More or better interpretive guidance could help immigration enforcement agencies fulfill their mission. The OSUP program, for example, suffers from a lack of standards and priorities, which undermines the supervision of noncitizens ordered removed.[440] An Office of the Inspector General report in April 2017 found that ICE failed to adequately supervise those noncitizens granted OSUP, mainly due to inadequate staffing.[441] The report found that, in four field offices, the average number of cases involving nondetained immigrants per deportation officer varied widely. In the Seattle, Washington field office, that number was 1,720 per officer, but in Washington, D.C., it was over 10,000.[442] In addition to poor staffing, the agency had not "clearly and widely communicated Department priorities for deportation to [deportation officers]; not issued up-to-date, comprehensive, and accessible procedures for supervising aliens; and not provided sufficient training."[443] This led to inadequate supervision. For example, deportation officers sometimes lacked basic information essential to implementing OSUPs, such as news that a noncitizen had relocated to their region and that their field office was now responsible for supervising them.[444] Sometimes they were unaware of a supervisee's criminal history.[445] Instead of ramping up staffing in an already expensive agency, reforms could infuse deportation officers' work with priorities, concentrating on improving information and focusing deportation officers' attention on those cases warranting the most intensive supervision. As this example illustrates, the lack of current, comprehensive guidance potentially harms

437. Regional and Geographic Offices, U.S. Env't Prot. Agency, https://www.epa.gov/aboutepa/regional-and-geographic-offices [https://perma.cc/JS3B-RFVZ] (last updated July 9, 2021).

438. See id.

439. See Water Quality Standards Variances, U.S. Env't Prot. Agency, https://www.epa.gov/wqs-tech/water-quality-standards-variances [https://perma.cc/Y6JF-CQCT] (last updated Sept. 3, 2021).

440. See U.S. Dep't of Homeland Sec., Off. of the Inspector Gen., OIG-17-51, ICE Deportation Operations 6 (2017), https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-51-Apr17.pdf [https://perma.cc/5TLK-GEDJ].

441. Id. at 3.

442. Id. at 4.

443. Id. at 3.

444. Id. at 7.

445. Id. at 8 ("Without checking on criminal history, [deportation officers] may be unaware of aliens who have committed crimes and should be detained.").

noncitizens but also undermines the agency's objective. Self-interest could induce the agency to produce more and better guidance.

Apart from better guidance, centralization also cultivates consistency, an important rule of law value and safeguard against arbitrariness.[446] Just as opportunities for lenience appear at different points in the enforcement process, so too do the opportunities to adjudicate reside in different parts of the enforcement bureaucracy. USCIS, for example, evaluates applications for deferred action for individuals not in removal proceedings.[447] But ERO officers evaluate requests for OSUPs,[448] and IJs or the BIA grant or deny administrative closure.[449] Multiple agencies with distinctive institutional cultures and competencies draw qualitative distinctions among deportable immigrants every day. USCIS adjudicates benefits,[450] whereas ERO apprehends, detains, and removes deportable immigrants.[451] EOIR similarly has an enforcement orientation, as it is housed in DOJ and oversees removal proceedings and appeals.[452] In adjudicating claims for lenience at different points in the enforcement process, centralization could have advantages. Specifically, centralized guidance from high-level officials at DHS and DOJ regarding the factors supporting a favorable exercise of discretion could help promote consistency across these different institutional cultures.[453]

Agency design shapes the efficacy of interpretive guidance. For example, commentators have observed the Obama Administration's greater success in implementing priorities by assigning responsibility for adjudicating DACA applications to USCIS, the benefits-granting arm of DHS.[454] ICE's rank and file resented the Morton Memos and chafed under

---

446. See Chen, Administrator-in-Chief, supra note 266, at 426.

447. Frequently Asked Questions, supra note 239. Wadhia notes that, prior to 2012, ICE granted deferred action to several hundred noncitizens already in removal proceedings, but data on these cases are sparse. Wadhia, Beyond Deportation, supra note 59, at 74–75.

448. Phil Kuck, OSUP: The Grim Reality of Orders of Supervision, Kuck Baxter Immigr. (May 10, 2019), https://www.immigration.net/2019/05/10/osup-the-grim-reality-of-orders-of-supervision/ [https://perma.cc/Y7KM-LX5R].

449. Montano, supra note 267, at 567.

450. Chapter 1—Purpose and Background, Policy Manual, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/policy-manual/volume-1-part-b-chapter-1 [https://perma.cc/JF5E-656T] (last updated Aug. 12, 2021) (describing USCIS's role in adjudicating immigration benefit requests).

451. Enforcement and Removal Operations, supra note 185.

452. About the Office, supra note 169.

453. See Chen, Administrator-in-Chief, supra note 266, at 353 (noting the "three C's—coherency, consistency, and coordination—are the internal tasks of administration . . . inextricably related to the success and effectiveness of policies").

454. Cox & Rodríguez, The President and Immigration Law Redux, supra note 224, at 194; see also Chen, Administrator-in-Chief, supra note 266, at 387.

President Obama's more rule-like limits on enforcement.[455] Accordingly, the Administration shifted responsibility for the exercise of favorable discretion. Similarly, the initial granting of an OSUP might properly reside with ICE, which makes custody determinations, but higher-level agency guidance from DHS's leadership on priorities applicable to all DHS subunits could help improve the procedure and substance of decisions regarding OSUPs.[456] EOIR is not part of DHS, and thus, high-level interpretive guidance from DHS will not apply to IJs. But the more unified a voice with which DHS speaks, the more the message will be heard across the bureaucracy. More and better interpretive guidance is sorely needed. The absence of robust interpretive guidance in immigration law possibly follows from the agency's desire not to admit that it does not deport all deportable immigrants.

Outside of immigration law, scholars have touted the benefits of "centralized instruction" of agency personnel, as inconsistency across regional offices could produce unfairness.[457] To guard against this result, agencies publish staff manuals to "regulariz[e] employee action."[458] For example, OSHA publishes a reference manual to establish enforcement guidelines for its inspectors.[459] Conceivably, the same could be done through coordination among leaders of different agencies within the immigration bureaucracy.

3. *Procedural Innovation to Promote Reason Giving*. — Short of agency rulemaking or better interpretive guidance, however, the immigration bureaucracy should create opportunities for reason giving to promote line officers' and adjudicators' ability to draw meaningful distinctions among removable immigrants. Examples of procedural innovation across the administrative state abound,[460] and other jurisdictions like the European

---

455. See Kagan, Binding the Enforcers, supra note 224, at 685 (discussing the fragmented structure of DHS that ensures "aggressive immigration enforcement from one presidential administration to the next," constraining presidential discretion).

456. The Office of the Inspector General's report on OSUP revealed that deportation officers struggled with their vast and varied workload, which included "working with embassies and consulates to obtain travel documents necessary for deportation," running criminal background checks, and interviewing noncitizens under supervision. Off. of the Inspector Gen., supra note 440, at 4.

457. See Funk et al., supra note 397, at 342 (noting the "widely dispersed regional offices" of most agencies and how "[a]bsent centralized instruction, these different offices could develop different responses to similar problems," and consequently, "politically responsive officials in Washington, D.C., would not be able to take care that the laws would be faithfully executed").

458. Id.

459. Id.

460. See Emily S. Bremer & Sharon B. Jacobs, Agency Innovation in *Vermont Yankee*'s White Space, 32 J. Land Use & Env't L. 523, 533 (2017) ("In recent decades, however, courts and scholars have increasingly understood the APA . . . as a skeletal framework that leaves substantial latitude for agency procedural innovation.").

Union offer insights for promoting reasoned administration as well as proportionality.[461] Meaningful reform would encourage line officers to gather facts, analyze evidence, and articulate reasons in support of a judgment, however informal.[462] In the aggregate, such interpretive guidance could also have an educative function in society when slogans and conclusory arguments dominate public discourse.[463] Supplying more factual analysis and reasoning could introduce desperately needed nuance Congress has not provided.

Notable examples of procedural innovation that promote reason giving appear across the administrative state. Famously, for example, the FDA subjects its interpretive guidance to a public commenting process—one not required by the APA or other authority.[464] Similarly, scholars in immigration law have called for greater public input on enforcement priorities outside of an official notice-and-comment rulemaking procedure.[465] Centralized enforcement priorities promote consistency, but meaningful feedback would most likely be obtained from the public. For example, a nonenforcement unit of DHS, such as DHS's Office for Civil Rights and Civil Liberties[466] could convene a committee of stakeholders, including, for example, representatives from immigrant communities, labor unions,

---

461. See Mashaw, Reasoned Administration, supra note 160, at 101 (discussing "the right to reasons and the practice of administrative reason giving" in the European Union and the United States).

462. See Rochel, supra note 137, at 101 ("[T]he main objective is to force the public authority to interact transparently with the affected person in order to secure this person enough information to be able to understand, reconstruct, and perhaps contest a decision.").

463. Cf. Alise Coen, Opinion, Changes in US Immigration Conversation Signal Departure From Responsibility Sharing, Globe Post (June 24, 2019), https://theglobepost.com/2019/06/24/us-immigration-conversation/ [https://perma.cc/3L7C-TBTT] (noting shifting political rhetoric in the Trump Administration that placed blame on Mexico and Central American countries for unauthorized migration).

464. See, e.g., Oversight of Clinical Investigations—A Risk-Based Approach to Monitoring, U.S. Food & Drug Admin. (Sept. 6, 2018), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/oversight-clinical-investigations-risk-based-approach-monitoring/ [https://perma.cc/6DZ3-GL52]; see also Jill E. Family, Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and *Not Really* Binding Rules, 47 U. Mich. J.L. Reform 1, 15–16 (2013) (describing USCIS practice of soliciting public comments on draft policy memoranda). In October 2019, President Trump issued an executive order requiring federal agencies to "take public input into account when appropriate in formulating guidance documents," but he exempted DHS from this requirement without explanation. See Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 9, 2019). President Biden subsequently rescinded this order. See Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

465. Cox & Rodríguez, The President and Immigration Law Redux, supra note 224, at 219 ("Some form of public input into the development of enforcement priorities with more formality than private meetings convened by the Executive and less than notice-and-comment rulemaking would be a valuable contribution . . . .").

466. Office for Civil Rights and Civil Liberties, U.S. Dep't of Homeland Sec., https://www.dhs.gov/office-civil-rights-and-civil-liberties/ [https://perma.cc/7G25-9MYG] (last updated Feb. 12, 2021).

the Chamber of Commerce, hospitals, police, schools, faith-based institutions, and other civic organizations to seek input on enforcement patterns, priorities, and community concerns.[467]

Prudential reason giving takes many forms. Consider the SEC no-action letter, which provides a nonbinding legal opinion to an entity contemplating a transaction that might be prohibited by law.[468] The agency issues these letters (among a host of informal avenues for giving advice)[469] to educate regulated parties and induce deliberation among SEC staff attorneys.[470] The SEC issues these opinions to mitigate public confusion about an intricate statutory scheme and to further its mission.[471] Donna Nagy notes that "effective capital formation and the success of the securities markets depend on public confidence in issuers, financial institutions, and market professionals."[472] No-action letters facilitate the public's understanding.

Similarly, decisions on various shadow sanctions could take the form of a "no imminent removal" letter. These letters could inform deportable immigrants of the agency's assessment of each individual in the scheme of priorities for deportation. These letters could be made available (redacted for noncitizens' privacy) in a searchable database to educate noncitizens and the public and to induce deliberation and consistency among line officers.[473] Ultimately,

---

467. Executive orders can induce agency consultation with stakeholders as well. Cf. Metzger & Stack, supra note 24, at 1302 (discussing executive orders that require agencies to consult with state, local, and tribal officials before imposing regulations affecting those entities). One question that warrants further analysis is whether this kind of advisory body would trigger the Federal Advisory Committee Act and its associated requirements, including public meetings. See 5 U.S.C. app. §§ 1, 10 (2019).

468. Donna M. Nagy, Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework, 83 Cornell L. Rev. 921, 924 (1998) (describing no-action letters as "informal and advisory").

469. These include "face-to-face meetings or telephone conversations between SEC staff members and securities law practitioners; . . . staff letters commenting on filed material; . . . speeches and presentations at professional conferences; [and] congressional testimony." Id. at 935.

470. See id. at 934–35 (explaining why the SEC offers informal advice to the public).

471. Id. at 934.

472. Id.

473. Such a database of decisions could be used alongside guidance documents to create an evolving, flexible source of guidance. See, e.g., Admin. Conf. of the U.S., Administrative Conference Recommendation 2017-5: Agency Guidance Through Policy Statements 8 (Dec. 14, 2017), https://www.acus.gov/sites/default/files/documents/Recommendation%202017-5%20%28Agency%20Guidance%20Through%20Policy%20Statements%29_2.pdf [https://perma.cc/QL72-J4Z9] (recommending that agencies make "flexible use of policy statements in a manner that still takes due account of needs for consistency and predictability"). The Administrative Conference of the United States recommends, "[W]hen the agency accepts a proposal for a lawful approach other than that put forward in a policy statement and the approach seems likely to be applicable to other situations, the agency should disseminate its decision and the reasons for it to other persons who might make the argument, to other affected stakeholders, to officials likely to hear the argument, and to members of the public." Id.; see also Adoption of Recommendations, 82 Fed. Reg. 61,728, 61,734 (Dec. 29, 2017) ("[F]lexible

procedural innovation should promote the analysis of facts and evidence. DHS has created and maintained a vast and costly surveillance system,[474] making the dearth of information provided to deportable immigrants and the broader public about the agency's reasoning (if any) simply striking. The norm of reasoned administration requires more.

As noted previously, reasoned administration has potential practical shortcomings and faces structural obstacles.[475] Imposing duties to analyze and deliberate would likely increase the costs of enforcement.[476] Depending on how immigration enforcement officials interpret their mission, they might regard increased regulations as thwarting the goals of enforcement.[477] Incentives to adopt reform might be weak, again, especially if enforcement officials interpret their mission to be the removal of all deportable immigrants.[478] Until

---

use of policy statements may also be helpful with respect to agencies' use of interpretive rules."); Nicholas R. Parrillo, Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries, 36 Yale J. Reg. 165, 241–44 (2019) (proposing a regime of "principled flexibility" in agency use of policy statements to create a "rationally evolving precedent that informs future decisions about [requests to depart from agency guidance]").

474. For a discussion of the early border patrol's vast surveillance efforts, see Hernández, supra note 175, at 53.

475. See supra section I.A.1.

476. See supra section III.A.1.

477. See, e.g., Nick Miroff & Maria Sacchetti, Trump Takes 'Shackles' Off ICE, Which Is Slapping Them on Immigrants Who Thought They Were Safe, Wash. Post (Feb. 11, 2018), https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5_story.html (on file with the *Columbia Law Review*) (noting Trump officials' characterization of more indiscriminate enforcement as "taking 'the shackles off'" ICE agents).

478. See id. However, developments in the early months of the Biden Administration suggest that leadership can induce change. For example, after the Biden Administration announced new enforcement priorities, ICE launched a new "case review" process in early 2021 to allow detained immigrants to argue that they are no longer an enforcement priority. See Aaron Reichlin-Melnick, ICE's New Case Review Process Lets Immigrants Appeal Detention and Deportation, Immigr. Impact (Mar. 9, 2021), https://immigrationimpact.com/2021/03/09/ice-case-review-process-2021/#.YNSgmOhKiUk [https://perma.cc/E7YA-ZN3Y]. Similarly, the Principal Legal Advisor for DHS issued interim guidance to all Office of the Principal Legal Advisor (OPLA) attorneys to identify and describe opportunities for the exercise of discretion at every stage of the enforcement process. Memorandum from John D. Trasviña, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, to All OPLA Attorneys (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf [https://perma.cc/W53E-RH2H]. But implementation of this guidance remains "spotty." Dara Lind, Immigration Prosecutors Were Told Not to Push for Deportation in Cases Like His. He Was Ordered Deported the Next Day., ProPublica (July 27, 2021), https://www.propublica.org/article/immigration-prosecutors-were-told-not-to-push-for-deportation-in-cases-like-his?utm_source=sailthru&utm_medium=email&utm_campaign=dailynewsletter&utm_content=feature [https://perma.cc/5KBL-RHMV] (describing ICE's pursuit of "exactly the sorts of deportation cases" the new guidance sought to prevent). News reports indicate that John Trasviña told ICE officers in August of 2021 to no longer use the memo he had issued because of a recent federal court ruling on prosecutorial discretion. See Hamed Aleaziz, ICE Prosecutors Have Been Told to No Longer Use a Biden Memo That Provided More Power to Decide Which

the enforcement bureaucracy embraces the logic of priorities, the system will invite arbitrary judgments.[479]

Immigration law has resisted the development of internal administrative law to guide and constrain agency officials, and full exploration of the reasons for the status quo merit further analysis. At least superficially, the government has powerful incentives for continuing to hold arbitrary power over millions of deportable immigrants.[480] The President and the immigration bureaucracy also potentially face political and reputational costs of telling the public the truth that not every deportable immigrant can, should, or will be deported.[481] In the face of these obstacles, it is no wonder that scholars and advocates have looked to external constraints rather than internal administrative law.

B. *From Here to Proportionality*

Once the immigration bureaucracy builds a foundation for reason giving, the public has a basis for assessing the quality of those reasons. At this point, proportionality, which calls for a well-justified sanction, becomes possible. The plenary power doctrine notoriously gives Congress and the executive branch free rein over immigration policy,[482] thereby limiting the role of judicial review in immigration law. But structures to promote reason giving will ensure public scrutiny of government reasoning, even if not judicial scrutiny. This means that proportionality remains an important, realizable normative ideal, despite doctrines limiting the role of the courts.

Immigration Cases to Drop, BuzzFeed (Aug. 20, 2021), https://www.buzzfeednews.com/article/hamedaleaziz/ice-prosecutors-biden-memo [https://perma.cc/XY28-6Q9G].

479. In addition, one might worry that increased transparency regarding shadow sanctions ex ante might serve as a pull factor ex post, as many migrants will know they are unlikely to be priorities for deportation. Empirical research on migration patterns, however, undermines a clear link between programs of relief or forbearance and increased migration. When push factors are great, increased pull factors have little to no effect. See Push or Pull Factors: What Drives Central American Migrants to the U.S.?, Nat'l Immigr. F. (July 23, 2019), https://immigrationforum.org/article/push-or-pull-factors-what-drives-central-american-migrants-to-the-u-s/ [https://perma.cc/P3TX-W42D] (concluding that "it is reasonable to conclude that push factors—social, political, and economic realities forcing people to leave their home countries—outweigh the pull factors in the U.S. that make it a more attractive place to live").

480. See Cox & Rodríguez, The President and Immigration Law, supra note 5, at 111 (describing the empowerment of the executive branch by the operation of overbroad laws rendering a large population of people in violation and the executive's power to choose who among that population to "investigate, arrest, and prosecute").

481. Cuéllar, supra note 196, at 63–64.

482. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889) (establishing Congress's plenary power to regulate immigration). But see Zadvydas v. Davis, 533 U.S. 678, 679 (2001) (noting the plenary power doctrine "is subject to constitutional limitations").

The EU offers an intriguing example of the role of reasoned administration in advancing proportionality in immigration law. As a general principle of EU law, proportionality "runs like a thread through" the EU Return Directive, which governs the expulsion of irregularly staying migrants.[483] The Return Directive obligates Member States to issue return decisions to irregular migrants,[484] but a return decision may be separate from a removal order.[485] It may simply order voluntary departure. When implementing the Return Directive, Member States must consider "the best interests of the child, family life, and the state of health of the persons concerned, and respect the principle of non-refoulement."[486] Ultimately, this analysis encourages adjudicators to resolve cases using voluntary departure over coercive removal when possible.[487]

Although the Return Directive does not specify the procedures nations must use in deciding to expel a migrant, EU law requires reasoned administration. Specifically, the Court of Justice of the European Union has ruled that general principles of EU law apply, namely, the right to a hearing, which includes the noncitizen's right to correct an error or submit information relevant to the decision.[488] The government, in turn, must provide "a detailed statement of the reasons for its decision, which are specific, concrete, and understandable."[489] The Return Directive further requires Member States to provide irregular migrants with a "fair and transparent procedure for return decisions."[490] Decisions should be made on a "case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay."[491] Commentators have noted that boilerplate or "stereotyped reasons" violate the duty to give reasons.[492] Instead, adjudicators must demonstrate that they considered the particular circumstances of the case. In this way, procedures of reasoned administration facilitate consideration of interests relevant for proportionality analysis.

---

483. Izabella Majcher & Tineke Strik, Legislating Without Evidence: The Recast of the EU Return Directive, 23 Eur. J. Migration & L. 103, 105 (2021).

484. Fabian Lutz, Termination of Illegal Stay, *in* EU Immigration and Asylum Law: A Commentary 685, 687 (Kay Hailbronner & Daniel Thym eds., 2d ed. 2016).

485. Id. at 699.

486. Steve Peers, 1 EU Justice and Home Affairs Law 506 (4th ed. 2016).

487. Id. at 502.

488. Id. at 508.

489. Id.

490. Migration and Home Affairs: Return & Readmission, Eur. Comm'n, https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en/ [https://perma.cc/P9JL-V8VP] (last visited July 27, 2021).

491. Council Directive 2008/115, art. 6, 2008 O.J. (L 348) 98, 98 (EC).

492. Sergo Mananashvili, Procedural Safeguards, *in* EU Immigration and Asylum Law: A Commentary, supra note 484, at 714, 718.

EU human rights law contemplates even stronger protection of migrants' right to remain in the EU on the basis of proportionality.[493] Article 8 of the European Convention on Human Rights guarantees the right to respect for family and private life.[494] The European Court of Human Rights has ruled that this right encompasses the "totality of social ties between settled migrants and the community in which they are living."[495] To analyze deportation orders that implicate Article 8, the Court has developed a standard that requires the government to consider factors such as "[t]he nature and seriousness of the offense, the duration of residence in the host country, the period of time that has passed since the offense and the applicant's conduct during that period, the nationalities of the various persons concerned, and the applicant's family situation."[496] This standard advances proportionality because it "recognize[s] that a public authority should interfere in the least harmful way necessary to attain its objective."[497] It requires the government to assess each deportable immigrant qualitatively, according to factors that might sound familiar to Americans.[498] Johan Rochel argues that this approach could also apply in admissions, not merely removal, and powerfully illustrates the link between proportionality and procedure.[499] Rochel argues that proportionality applies to immigrants' procedural interests.[500] Where a legal channel exists for an application for admission, the immigrant is entitled to a reasoned decision.[501] When the lens of proportionality is applied as well, immigrants are entitled to more: an analysis of the "different interests at stake," both for the government and the applicant, as well as a justification supported by empirical considerations.[502] In other words, they are entitled to a well-justified decision. Rochel emphasizes data and evidence to ensure "the best possible quality of the administration of the law" and avoid arbitrary

493. Rochel, supra note 137, at 93 ("[P]roportionality has long been applied to the issue of deportation.").

494. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 230.

495. Eur. Ct. Hum. Rts., Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence 62 (2020), https://www.echr.coe.int/documents/guide_art_8_eng.pdf [https://perma.cc/3DSL-EVXE].

496. Rochel, supra note 137, at 93.

497. Id.

498. See Morton Discretion Memo, supra note 60.

499. Rochel, supra note 137, at 99 (arguing that proportionality applies when the government offers a procedure for considering a person's interests, even in the absence of a legal right).

500. Id. at 98. In contrast, where immigrants lack a legal channel for migration, they lack procedural interests that could be protected by proportionality. Id. at 99.

501. Id. at 101.

502. Id. at 104 ("Applied to the right to a reasoned decision, a proportionality assessment would require the public authority to identify the relevant information to be delivered in order to reach a sufficient threshold of quality in the justification. This task presupposes a mapping of the different interests at stake . . . .").

decisions.[503] Proportionality forces the government to analyze the application of power in an individual case, based on specific facts.[504] Using the example of an IT professional seeking an employment visa, Rochel illustrates the type of reasoning a public authority owes this worker under the joint principles of proportionality and reasoned administration.[505] In such a case, the government should consider and disclose information about the number of current labor immigrants, current unemployment statistics, and how specific economic sectors are faring.[506] Boilerplate concerns for competition with EU workers will not do. Ultimately, Rochel describes proportionality as a "lever to exercise a pressure towards better decisions . . . [that are] more comprehensive in the availability of the reasons justifying specific decisions and in the quality of these reasons."[507]

If true for Rochel's IT professional seeking admission, the case is even clearer for deportable immigrants who typically have substantial ties to their country of residence. They should receive, at a minimum, a reasoned account for a denial of a request for a sanction short of deportation.[508] To reflect the value of proportionality, the bureaucracy should go further and strive to provide well-documented, empirically supported decisions.[509] The key implication for shadow sanctions in the United States is that, even in the absence of a legal right to lenience, deportable noncitizens are entitled, under proportionality, to a fair procedure—more than a cursory analysis of their interests and more than a conclusory decision.

In other settings outside the realm of discretionary sanctions, federal courts have interpreted the APA to require the kind of robust, evidence-based reasoning envisioned here. In *United States v. Nova Scotia Food Products Corp.*, for example, a federal court held a regulation invalid when

503. See id. (noting that proportionality exerts pressure on public authorities "to go further than a [conclusory] justification mentioning legal sources and quickly summing up the reasoning followed").

504. See id. ("The objective is to challenge the justification presented by the public authority on the quantity and quality of identified empirical considerations and delivered as part of the decision.").

505. Id. at 98–100.

506. See id. at 105.

507. See id. at 104.

508. See id. at 101–03; see also 5 U.S.C. § 555(e) (2018) (establishing a right to an explanation for a denial of a written application, petition, or other request in connection with an agency proceeding).

509. See Rochel, supra note 137, at 90 ("[P]roportionality should be drawn upon by exercising normative pressure towards better documented decisions."); id. at 106 (discussing how a government rejecting an employment visa due to, for example, the high domestic unemployment rate, should, pursuant to proportionality, identify specific data underlying its decision and publicly articulate its interpretation of that data).

the government failed to disclose evidence upon which it based its decision.[510] Similarly, in *Portland Cement Ass'n v. Ruckelshaus*, the court deemed the EPA Administrator's reasoning defective when the agency failed to timely disclose test results and procedures it used in devising its emission control rule.[511] Transparency and evidence-based decisionmaking are core aspects of reasoned administration. The APA offers no textual hook for proportionality, but the principle of proportionality resonates with longstanding ideals of administrative law.

C. *Objections*

Proportionality in administration requires the government to have a coherent sense of what makes a violation more or less severe. The judgment as to the severity of an offense will typically depend on the purposes of enforcement—what harms the rules at issue were designed to address. In many areas of administrative law, the nature of harms at issue are evident. For example, the EPA regulates entities in order to protect the public from pollution, promote the dissemination of accurate information about environmental risks, review chemicals in the marketplace, and clean up contaminated lands.[512] The SEC works to "protect[] investors, maintain[] fair, orderly, and efficient markets, and facilitat[e] capital formation."[513] Theoretically, at least, these agencies might arrive at a sense of the severity of a violation by referencing these goals. For example, a massive, ongoing chemical spill is probably more serious than a company's failure to obtain a license for some activity that would otherwise be permissible.

Immigration law presents certain challenges by comparison, which arise from a lack of clarity as to the harms that immigration law can be thought to address. Congress created DHS in response to a specific event—the attacks of September 11, 2001—and the agency now operates to "prevent future attacks . . . , respond[] decisively to natural and manmade disasters, and advance[] American prosperity and economic security long into the future."[514] Thus, broadly, the purposes of immigration enforcement might include at least national security, public safety, and economic welfare.

---

510. See 568 F.2d 240, 243 (2d Cir. 1977) (finding that the FDA's failure to share evidence motivating a food-safety regulation rendered it arbitrary and thus invalid).

511. See 486 F.2d 375, 392 (D.C. Cir. 1973). I thank Anya Bernstein for noting the relevance of this case.

512. See Our Mission and What We Do, U.S. Env't Prot. Agency, https://www.epa.gov/aboutepa/our-mission-and-what-we-do [https://perma.cc/FHJ5-KCEL] (last updated July 2, 2021).

513. What We Do, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/Article/whatwedo.html [https://perma.cc/2Q74-UXR5] (last updated Dec. 18, 2020).

514. Mission, U.S. Dep't of Homeland Sec., https://www.dhs.gov/mission [https://perma.cc/8CDA-MT8Y] (last updated July 3, 2019).

But if immigration enforcement has the goal of preventing or remedying harm in these areas, that goal can and should shape the government's understanding of the "severity" of an immigration law violation, enabling the government to identify those offenses meriting greater penalties from those meriting lesser penalties. For example, it might seem that a severe violation would involve some form of unlawful entry—a disregard of entry controls altogether.[515] But as fixated as portions of the public are on noncitizens who have entered unlawfully, many are equally concerned about noncitizens, even lawful entrants, with some record in the criminal legal system, especially convictions for felonies.[516] Thus, "severity" might instead have something to do with a disregard for borders, but it might also sweep in considerations about the perceived harm to society of the noncitizen's continued presence—lawful entry notwithstanding.

An approach sensitive to harm would seek to prevent, remediate, or penalize purported harms resulting from unlawful entry or continued presence after violation of postentry conditions, such as those relating to public safety, national security, or economic welfare. Such an approach would also invite critique of the premise that deportable immigrants cause harm by their presence. On this harm-oriented conception, inquiry into each deportable noncitizen's conduct, situation, and equities becomes relevant. This conception supports proportionality analysis because it recognizes qualitative differences among immigration violations and noncitizens themselves.

In contrast, some question the propriety of proportionality as a normative ideal for immigration enforcement. Some commentators view the purpose of the immigration system as protecting the nation's sovereignty, with only secondary attention to the purported safety and economic harms discussed above. Under this view, every border transgression and violation of postentry controls violates the nation's sovereignty and the right of citizens to choose members of the polity.[517] No metric exists for ranking greater and lesser violations: They are all the same. This approach to conceptualizing the purpose of enforcement shaped executive branch policy

---

515. See Meagan Flynn, An 'Invasion of Illegal Aliens': The Oldest Immigration Fear-Mongering Metaphor in America, Wash. Post (Nov. 2, 2018), https://www.washingtonpost.com/nation/2018/11/02/an-invasion-illegal-aliens-oldest-immigration-fear-mongering-metaphor-america/ (on file with the *Columbia Law Review*) (recounting the long history of rhetoric about immigrant "invasions").

516. See Angélica Cházaro, The End of Deportation, 67 UCLA L. Rev. (forthcoming 2021) (manuscript at 35), https://ssrn.com/abstract=3415707 [https://perma.cc/2M25-3UFG] (noting widespread public support for deporting so-called "criminal aliens" (citing Peter H. Schuck & John Williams, Removing Criminal Aliens: The Pitfalls and Promises of Federalism, 22 Harv. J.L. & Pub. Pol'y 367, 372 (1999))).

517. Cf. Joseph H. Carens, The Ethics of Immigration 271 (2013) (characterizing the "assumption that controlling borders is essential to sovereignty" as "actually of relatively recent vintage").

during the Trump Administration.[518] Under this view of immigration law, proportionality has no place. But such a view denies enforcement realities and the inevitability of "policymaking through enforcement" in immigration law.[519]

At the same time, scholars have critiqued the underpinnings of proportionality from the other side of the ideological spectrum. Proportionality requires drawing qualitative distinctions among deportable immigrants. These scholars argue that sorting deportable immigrants based on fitness for deportation most often results in the vilification of immigrants with criminal convictions.[520] Given the racial biases rampant in the criminal legal system, the automatic reliance on criminal arrests or convictions merely perpetuates these biases.[521] Elizabeth Keyes argues that relying on criminal convictions reifies a simplistic division between "good" immigrants and "bad" ones.[522] Angélica Cházaro critiques proportionality specifically as a misguided reform that assumes the inevitability of deportation and merely buttresses the premises of a violent system.[523] Cházaro powerfully challenges basic assumptions of the current system by imagining immigration

---

518. See, e.g., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration, U.S. Dep't of Just. (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions/ [https://perma.cc/9QD2-5NN4] ("Immigrants should ask to apply lawfully before they enter our country. Citizens of other countries don't get to violate our laws or rewrite them for us. People around the world have no right to demand entry in violation of our sovereignty.").

519. Cf. Cox & Rodríguez, The President and Immigration Law, supra note 5, at 196 (describing "policymaking through enforcement" and noting that "examples abound of underenforcement motivated by policy and ideological judgments").

520. See Cházaro, supra note 516, at 42 ("Accepting the deportation of people who may present a risk of harm to others . . . requires accepting the idea that one can quantify 'dangerousness' in any sort of dependable way, when . . . controlling danger through crime has primarily been a racialized project in the US."); see also Elizabeth Keyes, Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System, 26 Geo. Immigr. L.J. 207, 221 (2012) (noting how, even when attempting to combat anti-immigrant narratives, progressives fuel them by promulgating "good immigrant" narratives of hardworking, family-oriented immigrants who only take jobs no American would want anyway).

521. See Cházaro, supra note 516, at 38 ("The very instability of 'crime' has led to a rich and fruitful critique of how criminal enforcement is meted out, with scholars pointing to how arrest, conviction, incarceration, and, by extension, deportation are distributed in race-specific ways, rather than on the basis of conduct.").

522. See Keyes, supra note 520, at 211; see also Rachel E. Rosenbloom, Beyond Severity: A New View of Crimmigration, 22 Lewis & Clark L. Rev. 663, 705 (2018) (noting "rhetoric revol[ving] around tropes of worthiness and blamelessness" with respect to noncitizen children brought to the United States by their parents in violation of immigration law); Rebecca Sharpless, "Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration, 53 Hous. L. Rev. 691, 707, 711 (2016) ("The respectable immigrant narrative deepens the link between crime control and immigration enforcement, reifies our carceral state, and endorses extant societal inequalities that foster criminal activity.").

523. Cházaro, supra note 516, at 36 (discussing literature decrying the racially biased impact of the criminal legal system).

law without deportation and destabilizing the concepts of "safety" and "sovereignty."[524] But in the current nation-state system, one in which nations establish laws that render some noncitizens deportable, the U.S. government will inevitably select some for deportation while shielding others. In such a system, proportionality has a role as a check on arbitrary government power. The principle need not lead the government to valorize some immigrants and villainize others, but it does demand a link between immigration enforcement and the purposes of the immigration system.

CONCLUSION

This Article acknowledges the normative force of the ideal of proportionality and argues for understanding it in terms of the justification offered for a given penalty. Under this view, penalties are disproportionate when they are poorly justified; the government's reasons are insufficiently "weighty."[525] Deportation strikes many as disproportionate for this very reason: The government often lacks an adequate justification for uprooting and banishing a specific deportable immigrant based on the nature of the offense or its implications for the purposes of the immigration system.[526] As this Article observes, prevailing arguments for proportionality have lost traction in recent years, as legislative reform remains unlikely, and the federal courts have rejected proportionality-based arguments in immigration law.[527] It turns out that immigration law cannot realize proportionality without the federal bureaucracy.

Looking to the workings of the immigration bureaucracy reveals a host of "shadow sanctions" about which the public knows next to nothing. Contrary to the conventional wisdom that the government imposes one drastic sanction for every immigration violation, the reality is quite different.[528] But seldom does the government reveal data about shadow sanctions or reasons for imposing them.[529] Frequently, the government articulates no criteria at all. In this setting, the traditional safeguards against the arbitrary exercise of government power are missing.[530] Although proportionality requires the government to offer sufficiently good reasons for a particular government action, the status quo of no reasons is worlds away. Only by building the infrastructure for reasoned administration can immigration law one day realize proportionality. The first step is addressing immigration law's arbitrariness problem.

---

524. See id. at 46–47.
525. See supra section I.B.
526. See supra section I.A.
527. See supra section I.A.
528. See supra section II.B.
529. See supra section II.C.
530. See supra section II.C.