ESSAY

RETURN OF THE JRAD

JASON A. CADE*

INTRODUCTION

When Ignacio Diaz Aguilar pleaded guilty to document forgery, he became a priority for deportation.[1] The conviction also means that an immigration judge cannot consider whether the hardship to Mr. Aguilar's family or other equitable considerations warrant setting aside his removal.[2] Already detained under an immigration hold, it became all but guaranteed that Ignacio Aguilar soon will be banished from the United States.

And yet, when Federal District Court Judge Jack B. Weinstein sentenced Mr. Aguilar on August 14, 2015, he did something unusual.[3] Judge Weinstein's sentencing order described at length Mr. Aguilar's "otherwise legal way of life" and his productive contributions to this country for more than a decade, despite facing a childhood full of hardship, including physical abuse.[4] The sentencing order also contained detailed findings about the health and economic impacts that Mr. Aguilar's deportation would have on his young United States citizen children. Judge Weinstein concluded his opinion in an unorthodox way: He recommended

* Assistant Professor, University of Georgia Law School. My gratitude to Dan Coenen, Kevin Lapp, Usha Rodrigues, Jenny Roberts, Muneer Ahmad, Mark Weidemaier, Sharon Rush, Richard Boswell, and participants at the Southeast Junior-Senior Faculty Workshop and the Clinical Law Review Writers Workshop for very helpful comments and suggestions. "Joey" Wai Shan Fong, UGA Law '17 provided terrific research assistance. I also appreciate the editorial assistance of the NYU Law Review staff. Thanks to Dean Peter Rutledge and the University of Georgia for research support.

1 *See* Memorandum from Jeh Charles Johnson, U.S. Sec'y of Homeland Sec., for Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 3 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (establishing that noncitizens convicted of any felony fall within the agency's "highest priority" for removal).

2 Although Mr. Aguilar is an undocumented noncitizen, and deportable on that basis alone, his long-term residence in the United States, family ties, and other positive factors suggest that he would be eligible to seek discretionary cancellation of removal but for the nature of his criminal conviction. *See infra* notes 50–53 and accompanying text.

3 United States v. Aguilar, Statement of Reasons for Sentence Pursuant to 18 U.S.C. § 3553(c)(2), 14-CR-0668 (E.D.N.Y. Aug. 14, 2015).

4 *Id.* at 2; *see also id.* 20–21 (describing Mr. Aguilar's individual circumstances in more detail).

that the government not deport Mr. Aguilar, even though no legal rules provided him with a route to that result.[5]

This essay places Judge Weinstein's recommendation in a broader context and explains its importance within the modern deportation regime. Statutory reforms and new agency practices have made criminal history the primary marker of noncitizen undesirability.[6] This criminal history proxy has become so prominent that even longtime lawful permanent residents (LPRs) with only minor convictions and significant contributions or family ties often cannot escape removal. Convictions and even mere arrests are also used to determine enforcement targets among the more than eleven million undocumented noncitizens in the United States, who under earlier law could appeal to an immigration judge's discretion to set aside deportation based on factors such as the nature and severity of the offense, the length of the noncitizen's residence, the hardship that deportation would visit on the noncitizen's family members, and evidence of rehabilitation.[7] As a result, the immigration system, as it operates today, is in deep tension with the principle that under a humane system of justice the penalty should fit the crime.[8]

Judge Weinstein's unusual sentencing order in *Aguilar* both highlights the severity of modern deportation law and points the way to an important administrative reform that would decrease the likelihood of unjustified

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5 *See id.* at 2 ("The facts of this case lead to a recommendation of this court that the general practice of deportation *not* be followed.").

6 *See* Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 665–68 (2015) (examining the causes and consequences of the immigration enforcement regime's embrace of noncitizen's criminal history as a "near-irrevocable proxy" for undesirability); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 125–30 (2012) (analyzing and critiquing various justifications underlying the U.S. criminal-immigration enforcement model).

7 *See* former Immigration and Nationality Act § 244, 8 U.S.C. § 1254 (1994) (repealed Sept. 30, 1996) (providing for suspension of deportation for non-LPRs based on a balancing of positive and negative equities).

8 *See, e.g.*, Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1246 (2013) ("Deportation should only be utilized when it is a proportionate response to criminal activity."); DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 146, 156–57, 211, 219 (2012) (evaluating deportation sanctions in light of international human rights principles of proportionality); Steven H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 520 (2007) (observing the social costs of "crime-related deportations [that] are grossly out of proportion to the underlying misconduct"); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1730 (2009) ("The criminalization of immigration law has highlighted the striking disparity between the proportionality norms that animate criminal punishment and the lack of such proportionality in immigration law."); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416–17 (2012) (defining proportionality as "the notion that the severity of a sanction should not be excessive in relation to the gravity of an offense," and arguing that removal orders should be subject to "constitutional proportionality review").

removals in cases that involve noncitizens with a criminal history. In the not-too-distant past, Judge Weinstein's recommendation against deportation would have been unremarkable, if not routine. When Congress enacted the first criminal removal statute in 1917, it provided for the deportation of noncitizens convicted of a "crime involving moral turpitude" (CIMT), if the conviction occurred within five years of the noncitizen's entry to the United States.[9] But Congress also provided a mechanism for sentencing judges to issue a Judicial Recommendation Against Deportation (JRAD).[10] Throughout the twentieth century, JRADs were considered binding on federal executive officials.[11] Thus, as recognized by the United States Supreme Court, JRADs gave sentencing judges a powerful tool to avert unjust deportations, based on their knowledge of the nature of the crime and the defendant's individualized circumstances.[12] In 1990,

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9 *See* Immigration Act of 1917, Pub. L. No. 301, ch. 29, § 19, 39 Stat. 889, codified at 8 U.S.C. § 155(a) ("[A]ny alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry . . . shall, upon the warrant . . . , be taken into custody and deported.").

10 *Id.* ("[T]he provision . . . respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply . . . if the court, . . . make[s] a recommendation . . . that such alien shall not be deported in pursuance of this Act . . . ."); *see also* 53 CONG. REC. 5171 (1916) (statement of Rep. Powers) ("[A]t the time the judgment is rendered and at the time the sentence is passed, the [criminal sentencing] judge is best qualified to make these recommendations."); 53 CONG. REC. 5169 (statement of Rep. Sabath) ("[N]o judge would deliberately order that deportation be not made unless there was good reason for it.").

11 The JRAD barred both deportation and exclusion on the basis of the underlying conviction. *See, e.g.*, United States *ex rel.* Santarelli v. Hughes, 116 F.2d 613, 617 (3d Cir. 1940) (deportation); United States v. Castro, 26 F.3d 557, 558 (5th Cir. 1994) (exclusion). But courts were split whether a JRAD would prohibit a discretionary denial of relief from removal. *Compare* Giambanco v. Immigration & Naturalization Serv., 531 F.2d 141, 146–47, 149 (3d Cir. 1976) (holding that JRAD bars the use of conviction in an application for adjustment of status or other discretionary relief), *and* Matter of Gonzalez, 16 I. & N. Dec. 134, 136–37 (B.I.A. 1977) (holding JRAD removes statutory bar to administrative determination of good moral character in a voluntary departure hearing), *with* Hassan v. Immigration & Naturalization Serv., 66 F.3d 266, 269 (10th Cir. 1995) (holding that JRAD does not preclude consideration of conviction in a request for discretionary relief), *and* Delgado-Chavez v. Immigration & Naturalization Serv., 765 F.2d 868, 870 (9th Cir. 1985) (holding that conviction may be considered in a voluntary departure hearing, notwithstanding JRAD).

12 Padilla v. Kentucky, 559 U.S. 356, 362–64 (2010) (discussing how the loss of the JRAD and other statutory changes in immigration law "dramatically raised the stakes of a noncitizen's criminal conviction" and, correspondingly, the "importance of accurate legal advice for noncitizens accused of crimes"). In practice, however, JRADs were not widely requested, in part due to the relative infrequency of conviction-based removals until the late twentieth century. *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1148–50 (2002) (discussing the reasons behind low visibility of JRADs); Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, 14–02 IMMIGR. BRIEFINGS 1, 5 (Feb. 2014) (outlining three primary reasons why JRADs were rarely used in practice, namely: (1) low rate of crime-based deportations prior to 1990s, (2) the nonexistence of comprehensive system to identify noncitizens with criminal convictions, and (3) sentencing judges' reluctance to interpret immigration law by issuing JRADs).

however, Congress repealed this judicial authority.[13]

Despite the elimination of the statutory JRAD, a sentencing judge's decision to recommend against deportation in criminal cases has the potential to offer immigration enforcement authorities an efficient, reliable, and cost-effective means of assessing a noncitizen's positive and negative equities and determining whether removal is an appropriate part of the total penalty for the noncitizen's transgression. This judicial pronouncement—which might be called a "Nonstatutory Judicial Recommendation Against Deportation" (NJRAD)—could serve as a disproportionality rule of thumb, tempering and refining the role that criminal history plays in immigration authorities' decisions about who to place into deportation proceedings. Other disproportionality rules of thumb are available as well. Pardons, expungements, deferred adjudications, and similar forms of relief from all-out criminal punishments typically require a balancing of the egregiousness of the underlying offense and the case-specific mitigating factors.

This essay argues that immigration enforcement officials could adopt a policy of presuming that the award of such relief within the criminal justice system itself signals that a noncitizen's encounter with the criminal system alone should not lead to deportation. To be sure, in some cases, that presumption can and should be overcome, particularly when the government can establish the noncitizen's dangerousness or otherwise demonstrate social undesirability. But deportation should be the exception, not the rule (much less, the all-but-inexorable rule) in cases where the end result of the criminal process involves elimination or mitigation of the underlying criminal conviction. So long as Congress fails to restore adjudicative discretion to immigration judges or to rollback over-inclusive deportation grounds through legislative means, the system must rely on second-best solutions to achieve proportionality.

In the remainder of this essay, I develop these ideas. Part I explains the context of Judge Weinstein's recommendation against deportation in the modern deportation system. Part II lays out the benefits of recognizing new disproportionality rules of thumb. Finally, Part III considers potential objections to the policy I propose here.

I
THE RISE OF THE CRIMINAL HISTORY PROXY AND THE DECLINE OF FORMAL EQUITY IN IMMIGRATION LAW

The late twentieth century ushered in an era of far-reaching

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[13] *See* Immigration Act of 1990, Pub. L. No. 101-649, § 505(a), 104 Stat. 4978, 5050 (Nov. 29, 1990) ("Elimination of Judicial Recommendations Against Deportation"); *see also infra* note 17 and accompanying text (finding little evidence of congressional reflection on the repeal of JRADs in the legislative history).

immigration reform, much of it aimed at noncitizens with criminal histories. During this period, Congress dramatically expanded the grounds that supported deportation based on immigration violations and criminal convictions.[14] It also took a meat cleaver to the longstanding statutory mechanisms that offered opportunities for obtaining relief from removal.[15] The authority of immigration judges to set aside removals based on the equities of particular cases was drastically curtailed. In similar fashion, Congress stripped away the power sentencing judges held to issue JRADs. Congress first cut back on judicial authority in this area when it enacted legislation that made JRADs inapplicable in cases involving noncitizens convicted of narcotics offenses.[16] But it was removed entirely in 1990.[17] Other legislation adopted during this same time frame also narrowed the ameliorative effect of pardons, expungements, and deferred adjudications for purposes of immigration law.[18]

The upshot of these statutory changes was that noncitizens in the United States, including longtime LPRs, became broadly deportable for the

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[14] For a discussion of modern immigration law's increased focus on enforcement, criminalization, and deportation, see Cade, *supra* note 6, at 671–75 (discussing the history of Congress's expansion of immigration penalties and noncitizen deportations based on criminal convictions); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1937–42 (2000) (explaining how Congress's 1996 immigration laws affected LRPs by increasing the likelihood of mandatory deportation for any criminal conviction); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 378–86 (2006) (discussing historical convergence of immigration and criminal law due to policymakers' efforts to increase deportations of noncitizens with criminal convictions, criminalization of immigration violations, and national anti-terrorism movement's purported link to immigration).

[15] *See* Cade, *supra* note 6, at 671–79 (detailing the government's exclusion of noncitizens with criminal convictions from discretionary equitable relief from removal); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Promises and Pitfalls of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 437–38 (1999) (providing historical and political account of immigration policy developments aimed to effectuate deportations including proposals to streamline removal procedures, increase immigration agents' authority to arrest noncitizens, and reduce noncitizen due process rights and opportunities for relief).

[16] *See* Torrey, *supra* note 12, at 5 (explaining how post-World War II concern over the rise in drug addictions in the United States resulted in Congress's focus on noncitizens with drug-related convictions as primary targets for deportation and exemption from the JRAD relief). In 1988, however, the JRAD statutory authority was expanded briefly to guard against unfair applications of a newly created aggravated felony deportation category. *Id.*

[17] *Id.* at 5, 12 (noting the statutory provision repealing JRAD); *see also supra* note 13 and accompanying text. Very little legislative history sheds any additional light on Congress's decision to repeal the JRAD. *See* Taylor & Wright, *supra* note 12, at 1151 n.75 ("A search of the Congressional Record does not reveal any debate on the floor over JRAD repeal."); Torrey, *supra* note 12, at 5 (same).

[18] Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 368 (2012) (explaining the circumstances in which such processes will not preclude removal based on the underlying criminal history); Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 701, 707–08 (2008) (same); *see also infra* Part II.B.

commission of criminal offenses. Indeed, the amendments were so expansive that deportation has become the norm based on misdemeanors and even criminal events that the state itself did not consider to give rise to an initial or continuing conviction.[19] Too few opportunities remain for such noncitizens to argue to an adjudicator that equitable considerations (including longtime connections to the United States) outweigh the gravity of their infractions. In short, under current law many noncitizens are detained, deported, and often permanently banished, without any adjudicative consideration being given to whether such extreme sanctions fit the underlying crime or comport with justice in light of the countervailing equities of the particular case.

Congress's decision to remove equitable discretion from adjudicative decisionmaking, however, does not eliminate it from the system altogether. Enforcement actors at both state and federal levels wield considerable equitable power as they set priorities and undertake individual enforcement actions.[20] Indeed, as the literature in criminal law suggests, prosecutorial discretionary power tends to rise as statutory codes become more severe and the space for judicial discretion narrows.[21] It follows that in our modern deportation scheme, considerations of fairness and proportionality can still play a role, but primarily through the exercise of enforcement discretion. Such discretion functions as a "flexible shock absorber," allowing for consideration of a noncitizen's individual equities in a system otherwise marked by the highest level of rigidity.[22]

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19 *See, e.g.*, Rodriguez v. State, 437 S.W.3d 450 (Tenn. 2014) (holding that petitioner was not entitled to post-conviction relief when his guilty plea was expunged after successful completion of judicial diversion, notwithstanding attorney's failure to advise him of the immigration consequences of the guilty plea). *See generally* Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1803-04 (2013) (examining the prevalence of guilty pleas in misdemeanor courts and the immigration consequences of misdemeanors for noncitizens).

20 *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 130–35 (2015) (examining the executive branch's extensive power over immigration enforcement); KANSTROOM, *supra* note 8, at 215–16 (considering various forms of discretion available in the immigration system, including prosecutorial, interpretive, and delegated discretion); Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 554–58 (2013) (analyzing the state criminal courts' power in determining immigration outcomes); SHOBA SIVAPRASAD WAHDIA, BEYOND DEPORTATION 4, 10–12, 146–47 (2015) (analyzing prosecutorial discretion at various levels of the immigration enforcement system).

21 *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1664–72 (2010) (explaining how overly expansive criminal codes increase the space for prosecutorial discretion); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1428–34 (2008) (explaining how mandatory federal sentencing guidelines transfer discretion over the severity of punishment from judges to prosecutors); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–23 (2001) (explaining how broad penal codes transfer "lawmaking" power from courts to enforcers).

22 KANSTROOM, *supra* note 8, at 215.

The Obama administration has taken steps to inject equity into immigration enforcement.[23] First, the current administration has generally focused its enforcement efforts on recent entrants to the United States and noncitizens who engage in crimes.[24] While the administration's overly coarse approach within these targeted groups is problematic, as will be explained shortly, focused enforcement choices decrease the probability of enforcement against individuals in non-targeted groups, whom the administration may believe are more likely to present significant equitable claims. Second, Department of Homeland Security (DHS) leaders have encouraged front-line government agents and attorneys in its enforcement sub-agencies to increase their use of prosecutorial discretion, including deferring removals in light of humanitarian or fairness concerns.[25] Third, the administration has developed categorical policy initiatives, such as Deferred Adjudication for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which allow some deportable noncitizens to gain a reprieve from removal based on particularly sympathetic equitable considerations (such as the well-being and diminished culpability of children).[26]

Despite these efforts, reliance on enforcement officials to inject necessary equity into the removal system has thus far fallen short. The agency's prosecutorial tunnel vision and crushing workloads have significantly hampered top-down efforts to elevate the use of prosecutorial discretion by front-line operatives.[27] As a result, inconsistency dominates, both within and across jurisdictions.[28] While the institutional design of DACA and DAPA offers gains in transparency and regularity over individual prosecutorial discretion, such programs do not reach the majority of deportable noncitizens and have been stymied by controversy and litigation.[29]

Most critically, the executive branch has largely failed to consider individual equities of any kind when it comes to noncitizens with a criminal history. Criminality, broadly conceptualized to include low-level offenses, has become an almost irrefutable signifier of undesirability in the

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23 For a more in-depth analysis of the present administration's actions with respect to immigration policy and enforcement, see Cade, *supra* note 6.

24 *Id.* at 687–91.

25 *Id.* at 691–94.

26 *Id.* at 694–98.

27 Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TULANE L. REV. 1, 46–54 (2014).

28 *Id.* at 31–34.

29 Cade, *supra* note 6, at 700, 709–11; Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58, 64–66 (2015).

modern deportation system.[30] The administration's prosecutorial discretion guidelines exclude persons with virtually any level of conviction. The agency aggressively pursues noncitizens with convictions—even longtime permanent residents convicted only of misdemeanors—consistently arguing for the broadest and most severe interpretations of the statutes governing removal on criminal grounds.[31] Even suspected criminal status operates as a sorting mechanism, as arrests are used to help identify which of the eleven million undocumented persons should be targeted, even when the noncitizen is never convicted or even prosecuted.[32]

Criminal history provides an attractive proxy for Congress and the executive for a number of reasons. In general, focusing on persons with convictions is politically advantageous.[33] Lawmakers and enforcement officials are seen as acting legitimately when they target persons who have committed (or who might commit) crimes or similar offenses.[34] And, to be sure, criminal history provides post-entry screening information about factors relevant to the nation's membership choices, such as respect for law, dangerousness, social adaptability, and economic productivity.[35] For this reason, prioritizing noncitizens who have had run-ins with law enforcement is seen as an efficient means of narrowing a very large pool of potential enforcement targets.[36]

The administration's blanket approach is problematic, however, because not all persons with convictions, let alone arrests, are similarly situated. Many noncitizens with serious criminal histories should be deported. But for others, such a severe penalty will be disproportionate in light of relatively minor criminal conduct and a range of mitigating factors, such as long-term residence in the United States, the passage of time since

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30 Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 827–29 (2015); McLeod, *supra* note 6, at 130–31.

31 *See, e.g.*, Moncrieffe v. Holder, 569 U.S. __, at 21, 133 S. Ct. 1678, 1693 (2013) ("This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as 'illicit trafficking in a controlled substance,' and thus an 'aggravated felony.' Once again we hold that the Government's approach defies 'the commonsense' . . . ." (internal citations omitted)); Cade, *supra* note 6, at 700; KANSTROOM, *supra* note 8, at 98.

32 Cade, *supra* note 6, at 704–05; Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Law Enforcement*, 88 N.Y.U. L. REV. 1126, 1139 (2013); Jain, *supra* note 30, at 829.

33 JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 76–77 (2007); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1460–61 (2013); Stuntz, *supra* note 21, at 570–71.

34 SIMON, *supra* note 33, 109–10.

35 Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 826–27 (2007); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510–14 (2009).

36 Cox & Posner, *supra* note 35, at 826–27; Cox & Rodríguez, *supra* note 35, at 520–21.

the offense, separation from family members, rehabilitation, or poor health. If the key goal is removing noncitizens who pose a true danger to society, it does not follow that every noncitizen with a conviction is justifiably deported and subject to the bars on future lawful return. The administration's wooden reliance on criminal history as an uncontestable trigger for deportation, without consideration of individualized circumstances, thus creates the likelihood of far-reaching injustice. And it does so precisely because little opportunity for adjudicative relief from removal is available once criminality is established.

Until Congress restores adjudicative discretion in immigration courts, it remains the responsibility of the executive branch enforcement officials to ensure proportionality in the implementation of deportation rules.[37] There are, however, grave practical problems with seeing to it that this responsibility is properly discharged. DHS has had difficulty supervising thousands of dispersed, numbers-driven front-line officials, most of whom contend with very heavy workloads—challenges that thus far overwhelm efforts to inject individualized assessments into enforcement decisions.[38] In light of these salient features of the deportation system, how can the agency better ensure that the criminal history proxy does not result in immigration consequences that are unjustly disproportionate? One starting point involves the identification of easily administered disproportionality rules of thumb.

II
DISPROPORTIONALITY RULES OF THUMB

The discussion now turns to the reasons why policy leaders in the executive branch should consider adopting a practice of generally deferring to judicial recommendations against deportation, along with certain other criminal law events, as tools for achieving equity in individual cases involving persons with criminal histories. Reliance on disproportionality rules of thumb would give rise to a cost-effective and efficient administrative reform that could be implemented without delay. Doing so would better align federal immigration and state (or federal) criminal

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37 Cade, *supra* note 6 at 668–69; KANSTROOM, *supra* note 8 at 214; WAHDIA, *supra* note 20, at 147–48; *see also* Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 203 (2013) (arguing that the executive branch bears responsibility for ensuring that constitutional rules are fully upheld in its implementation of immigration law).

38 Cade, *supra* note 27; Erin B. Corcoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law*, 48 LOY. L.A. L. REV. 119, 144–45 (2014); Kalhan, *supra* note 29, at 88–89; Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 213–25, 233–35 (2014).

justice interests and would help avoid at least some removals that would be out of proportion with the gravity of the underlying offense and the noncitizen's mitigating factors.

A. Nonstatutory JRADs

Judge Weinstein's order in *United States v. Aguilar* points the way toward an important, if distinctly second-best, reform in the immigration system. Despite the statutory JRAD's repeal, nothing prevents the agency from deferring on a discretionary basis to Judge Weinstein's recommendation that Mr. Aguilar not be deported, as it determines its own enforcement priorities. A criminal sentencing order is typically the product of a nuanced and holistic evaluation of the underlying criminal activity and any mitigating circumstances presented by the case. It thus offers the potential to serve as a valuable surrogate for the kind of balancing that previously would have taken place in immigration court, before Congress curtailed adjudicative discretionary authority. Indeed, the former statutory JRAD process was grounded in the understanding—no less accurate today than it was back then—that criminal court judges have access to distinctly valuable information about the facts of the crime and the defendant's circumstances.[39]

In *Aguilar*, for example, Judge Weinstein discussed in detail the nature of the noncitizen's criminal offense, his lack of any prior criminal history, and his difficult life circumstances, as well as the hardship his removal would visit upon his family, particularly his children. Judge Weinstein acknowledged the seriousness of the underlying criminal activity—helping a government confidential informant obtain fraudulent documents including a passport, social security card, and permanent resident card—although he also observed that the activity was "arguably induced by the informant."[40] The report indicated that the defendant made a full confession, pleading guilty to passport forgery in violation of 18 U.S.C. § 1543, and noted that there was no suggestion of additional criminal activity by the defendant.[41]

Judge Weinstein further found that Mr. Aguilar was raised in poverty

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[39] *See, e.g.*, Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 LA RAZA L.J. 31, 39–40 (2010) (arguing that criminal court judges were well suited to consider immigration consequences of defendant's conviction when the JRAD was in effect).

[40] United States v. Aguilar, Statement of Reasons for Sentence Pursuant to 18 U.S.C. § 3553(c)(2), No. 14-CR-0668, at 4 (Aug. 14, 2015, E.D.N.Y.).

[41] *Id.* at 2, 5; *see also id.* at 2 ("The crime charged appears to be a deviation from an otherwise legal way of life.").

and that both his parents died when he was very young.[42] He was repeatedly beaten by uncles and taken out of school in the seventh grade. Migrating to the United States, he started a family in his early twenties and found work in the construction industry for well over a decade. His employers informed the court that Mr. Aguilar has been a diligent and responsible worker throughout that time.[43]

During the sentencing hearing, the court took testimony from the defendant's spouse and two adolescent children, both United States citizens.[44] Judge Weinstein's report noted that the children were crying, dejected, and visibly depressed, and that both had been struggling academically and socially since their father's incarceration.[45] To support his conclusion that Aguilar's removal would cause significant hardship to his children, Judge Weinstein devoted seven pages of his report to compiling and explaining the relevance of studies finding correlations between the deportation of one or both parents and harmful impacts on their children, including anxiety, depression, behavioral problems, and academic failure in the immediate term, and increased likelihood of poverty and criminality as adults.[46]

The judge sentenced Mr. Aguilar to seven months incarceration (time-served), three years supervised release, and a $100 special assessment fee.[47] He also recommended to the immigration judge that Aguilar not be deported.[48] Technically, Judge Weinstein addressed his recommendation to the wrong immigration official. If Mr. Aguilar is found deportable, no immigration judge is likely to have authority to set aside removal as a discretionary matter. The forgery conviction would be classified as a CIMT, thus requiring his deportation.[49] Although he is also deportable on unlawful presence grounds,[50] Mr. Aguilar might have been able to secure discretionary relief based on his length of residence, hardship to his children, and other governing requirements.[51] However, as the statute has

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42 *Id.* at 20.

43 *Id.*

44 *Id.* at 5–6.

45 *Id.* at 6, 21.

46 *Id.* at 11–17.

47 *Id.* at 21.

48 *Id.*

49 *See* Cetik v. Gonzales, 181 Fed. Appx. 117, 119 (2d Cir. 2006) (citing cases establishing that fraud and forgery are CIMTs).

50 *See* Immigration and Nationality Act § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2012) (providing that persons residing in the United States without having been admitted by immigration officials are inadmissible (and therefore removable)).

51 *See* Immigration and Nationality Act § 240A(b), 8 U.S.C. § 1229(b) (2012) (non-LPRs are eligible to apply for cancellation of removal if they can show ten years of continuous physical presence in the United States immediately preceding the application, ten years of "good moral character" at the time of adjudication, and that removal would result in "exceptional and

been interpreted, his felony CIMT conviction negates his entitlement to petition for this remedy.[52]

Even so, Judge Weinstein's recommendation against removal was not an idle gesture. DHS could decide to forgo removal proceedings against Aguilar as a matter of discretion. More generally, the agency could establish an administrative policy of deferring to such recommendations by sentencing judges about pursuing removal in particular cases. In recent years, DHS has issued numerous memoranda guiding agency officials' use of prosecutorial discretion, setting forth non-exhaustive positive and negative factors to consider in individual cases, while also identifying specific categories of persons against whom enforcement is presumptively inappropriate.[53] DHS could designate beneficiaries of NJRADs as another factor typically warranting a favorable exercise of discretion for both lawfully present and undocumented noncitizens.[54]

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extremely unusual hardship" to a United States citizen or lawful permanent resident spouse, parent, or child).

52 *See* Matter of Cortez, 25 I. & N. Dec. 301, 311 (B.I.A. 2010) (holding that a conviction for a crime involving moral turpitude bars undocumented noncitizens from seeking cancellation of removal if the offense carries a potential sentence of one year or more); Matter of Pedroza, 25 I. & N. Dec. 312, 316 (B.I.A. 2010) (holding that because the underlying conviction was not for a crime involving moral turpitude, and the noncitizen had met all the statutory requirements, cancellation of removal relief was appropriate).

53 *See, e.g.*, Memorandum from Jeh Charles Johnson, *supra* note 1, at 2 (setting agency priorities, and the role prosecutorial discretion plays in all other cases); Memorandum from Gary Mead, Exec. Assoc. Dir., U.S. Immigration and Customs Enforcement et al., to All Field Office Dirs., Chief Counsel & Special Agents in Charge, Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships (Oct. 5, 2012), http://www.washingtonblade.com/content/files/2012/10/9-Oct-12-PD-and-Family-Reltionships.pdf (outlining prosecutorial discretion for cases involving same-sex couples and families); Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enforcement, to All Employees, on Secretary Napolitano's Memorandum Concerning the Exercise of Prosecutorial Discretion for Certain Removable Individuals Who Entered the United States as a Child (June 15, 2012), http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf (urging officers to exercise prosecutorial discretion in cases involving noncitizens who entered the United States as children and meet other characteristics); Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enforcement, to All Field Office Dirs. et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 4–5 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (detailing the relevant factors to consider for exercising prosecutorial discretion); Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigr. & Customs Enforcement, to All Office of the Principal Legal Advisor Chief Counsel, Prosecutorial Discretion (Oct. 24, 2005) (defining prosecutorial discretion and providing examples where it would be applicable).

54 With respect to the applicability of NJRADs to undocumented persons with criminal history, note that before the repeal of the statutory JRAD in 1990, courts were split with respect to its effectiveness in a situation involving adjustment of status or other discretionary relief. *See supra* note 11 (citing relevant cases). Importantly, however, the modern statutory scheme uses criminal history to trigger not only deportation, but also grounds of inadmissibility and bars to lawful return to the United States. *See, e.g.*, Immigration and Nationality Act § 212, 8 U.S.C.

If the agency were to do so, other criminal court judges would likely be willing to consider the appropriateness of removal as a component of the total package of sentencing sanctions.[55] As the Supreme Court recognized in *Padilla v. Kentucky*, in the modern immigration scheme deportation comprises an integral part of the penalty facing noncitizens in criminal court.[56] Accordingly, it is appropriate for criminal court judges to consider immigration consequences when assigning or recommending punishment. Notably, the issuance of such judicial pronouncements would impose few additional costs on the criminal justice system, because judges typically canvas the relevant circumstances as part of the underlying sentencing decision in any event.[57] And if agency enforcement decisionmakers were to regularly defer to well-explained judicial advice, they could then channel limited resources toward the deportation of far less deserving noncitizen lawbreakers.

B. Pardons, Expungements, and Diversionary Programs

DHS might make use of other signifying rules of thumb, in addition to judicial recommendations against deportation, as it assesses whether to deport a noncitizen on the basis of criminal history. These might include gubernatorial pardons, judicial expungements, and deferred adjudications pursuant to diversionary programs.[58] In many circumstances, these moves

§ 1182(a)(2)(A)(2)(A)(i) ("[A]ny alien convicted of . . . a crime involving moral turpitude . . . is inadmissible."); 8 U.S.C. § 1182(a)(9)(A)(ii) ("Any alien . . . who seeks admission . . . at any time in the case of an alien convicted of an aggravated felony [] is inadmissible."). Accordingly, proportionality concerns are present even if a noncitizen with a conviction is also removable solely on the basis of unlawful presence. *See* United States v. Castro, 26 F.3d 557, 558 n.2 (5th Cir. 1994) (collecting cases establishing that the JRADs were effective in overcoming conviction-based grounds of exclusion); Cade, *supra* note 19, at 1809–10 (arguing that proportionality concerns are also raised when petty convictions create inadmissibility bars, or foreclose the possibility of paths to lawful status or discretionary relief from removal that would otherwise have been available); Wishnie, *supra* note 8, at 428–31 (proposing that bars on reentry must be understood as penalties and therefore must comport with proportionality in light of the noncitizen's individual circumstances). In any event, nothing prevents the executive from adopting a policy of deferring to NJRADs in cases involving undocumented noncitizens with criminal history.

55 *Cf.* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (expressing the Court's hope that defense attorneys and prosecutors will explicitly consider immigration consequences in reaching appropriate plea bargains). *But see* Taylor & Wright, *supra* note 12, at 1148–49 (noting that JRADs were judiciously exercised even when authorized and were virtually unheard of in some jurisdictions).

56 559 U.S. at 364 ("These [statutory] changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (footnote omitted)).

57 For further discussion of the benefits and drawbacks of administrative reliance on criminal court judges' evaluations of the appropriateness of deportation, see *infra* Parts II.C. and III.

58 *See also* Cade, *supra* note 6, at 721–22 (arguing that immigration authorities should adopt

to clear the defendant's record fail to preclude deportation based on underlying criminal history.[59] This is because Congress defined "conviction" for immigration purposes to include any "formal judgment of guilt," or, if there was no adjudication of guilt, any situation in which (1) "the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt," and (2) "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[60] So long as this broad standard is met, noncitizens remain forever convicted for immigration purposes. As a result, many expunged convictions and deferred adjudications can still result in deportation. In particular, an expungement will preclude deportation only if the conviction has been vacated due to a procedural defect.

A separate provision of the Immigration and Nationality Act results in significant limitations on the preclusive effect of pardons for immigration purposes.[61] In the agency's interpretation of the statute, which has been upheld by the few courts to consider a challenge so far, even full and unconditional pardons by a governor or the President will preclude only some of the criminal grounds of deportation.[62] Pardons are deemed to have no effect, for example, on removal of noncitizens for any controlled substance offenses.[63]

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these mechanisms as disproportionality rules of thumb). Judicial "Certificates of Rehabilitation" are another, lesser-known criminal justice process intended to remove collateral consequences to criminal history and thus warrant consideration as a signal that removal should not be pursued. *See* Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715 (2012) (examining the use of Certificates of Rehabilitation in New York and arguing they should be more widely used to relieve barriers to reentry for deserving criminal defendants).

59 *See* Cade, *supra* note 18, at 373–84 (explaining the statutory provisions and circumstances in which pardons, expungements, and deferred adjudications will be ineffective in precluding removal); Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, 22 B.U. PUB. INT. L.J. 293 (2013) (arguing that governors should extend their use of pardons to ameliorate the harsh effects of deportation); Moore, *supra* note 18, at 679–83; Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253 (2010) (discussing constitutionality of restrictions on presidential pardons in the context of immigration consequences).

60 8 U.S.C. § 1101(a)(48)(A) (2012).

61 *See generally* Cade, *supra* note 18 (discussing the history and current role of pardons in immigration law).

62 The INA specifically provides that four deportation categories—crimes involving moral turpitude, multiple criminal convictions, aggravated felonies, and high-speed flight from an immigration checkpoint—will *not* apply "if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several states." 8 U.S.C. § 1227(a)(2)(A)(vi) (2012). The BIA, along with the few courts to have considered the issue, have therefore interpreted the current statute to give effect to pardons only for the specifically enumerated grounds. *See* Cade, *supra* note 18, at 374–76 (reviewing BIA's narrow interpretation of the pardon provision); Morison, *supra* note 59, at 257–58 (discussing the BIA's interpretation of § 1227).

63 *See, e.g.*, Matter of Garcia-Lopez, 2007 WL 2825112 at *1 (B.I.A. Aug. 30, 2007) (finding no statutory basis to conclude that a pardon waives a controlled substance ground of

As with NJRADs, noncitizens whose convictions have been pardoned, vacated, or otherwise set aside frequently will have had their individual positive and negative circumstances evaluated by criminal justice authorities.[64] In fact, pardons and expungements are even more powerful expressions than NJRADs of the criminal justice system's assessment that the noncitizen's criminal history would not warrant removal from the United States. A noncitizen who receives an NJRAD remains subject to incarceration and potentially a panoply of state-imposed collateral consequences. When states fully pardon or expunge a noncitizen's convictions, however, that person cannot be directly punished any further, and will no longer face most collateral consequences such as formal restrictions on employment, licenses, voting, receipt of benefits, et cetera.[65]

Such events thus could function as valuable signals to immigration officials that deporting a noncitizen on the basis of the predicate criminal history likely would be unfair or disproportional. In fact, deferring to the judgment of criminal justice actors in such cases would produce many benefits. I turn now to a closer study of the advantages of this reform.

C. Benefits

Much would be gained by injecting disproportionality-signaling rules of thumb into the processing of deportation cases sounded on past criminality. Three important benefits stand out.

First, relying on disproportionality rules of thumb would prove cost-neutral for screening out noncitizens whose removal should not be pursued in the interest of justice. This innovation would cost the agency virtually nothing and would add little to front-line officials' workloads. The actual evaluation and normative balancing in the noncitizen's case would in effect be delegated to law enforcement actors outside the immigration system.[66]

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removability).

64 To be sure, in some instances the operation of expungement laws or similar processes turns on statutorily defined factors rather than case-by-case discretion. But even in such cases there was a legislative evaluation that persons who meet specific criteria deserve relief from a conviction, and in many cases the prosecutor acts as an additional gatekeeper for the defendant's access to ameliorating programs.

65 *See generally* Cade, *supra* note 18, at 394–95, 398 (discussing how criminal convictions take away an individual's societal membership and how pardons can restore it); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1204–08 (2010) (arguing that presidential pardoning power should be more frequently utilized to overcome the collateral consequences of convictions that "operate as continuing punishment").

66 This kind of delegation already occurs in the modern deportation scheme, as police and prosecutors make the arrest, charging, and plea negotiation decisions that effectively determine immigration consequences. *See* Lee, *supra* note 20, at 553 (arguing that police and criminal prosecutors have significant influence on the operation of immigration law); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1826–27 (2011) (arguing that arrest discretion has

Specifically, criminal court judges, and, in the case of pardons, governors (or in some states, pardon boards) would do the actual work of considering whether the noncitizen's conviction should be stripped of its continuing punitive and collateral consequences. Of particular importance, unlike in immigration proceedings, all noncitizens facing significant criminal charges will have the right to appointed counsel, an important procedural measure for helping ensure the equities are aired before the decisionmaker.[67] In addition, pursuant to the Court's ruling in *Padilla*, defense attorneys must be attuned to the immigration consequences of a potential conviction.[68] As a result, defense attorneys will be in a good position to seek judicial recommendations against deportation during sentencing, or deferred adjudication of the conviction when a diversionary program is available. Indeed, when statutory JRADs were in place, some courts found the Sixth Amendment right to effective assistance of counsel to encompass JRAD requests.[69] Moreover, government attorneys generally will have motivation to challenge key claims for mitigation made on behalf of the defendant. In sum, the actions of judicial actors and other authorities with regard to expungements, diversion, pardons, and sentencing typically can be relied on as sound, precisely because they typically (though not always) are the products of the adversary system.

Second, the use of disproportionality rules of thumb would better align federal and state priorities. Pardons, expungements, and diversion programs reflect and implement the criminal system's justice-seeking, restorative, and expressive goals. The function of such processes is to eliminate, both directly and symbolically, the stigma and barriers to integration and participation that result from a conviction.[70] Seeking to deport the un-convicted (or never-convicted) creates a tension between federal immigration priorities and the state's criminal justice and membership goals. Post-conviction processes like pardons and expungements restore or

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an outsized influence on immigration priorities); *see also infra* note 93 and accompanying text (same).

67 *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that indigent defendants have a constitutional right to counsel in felony prosecutions); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (extending the right to counsel to misdemeanor prosecutions). *But see* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that states are not constitutionally required to appoint counsel where there is no possibility of incarceration).

68 Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

69 *Id.* at 363 (citing Janvier v. United States, 793 F.2d 449 (2d Cir. 1986) and United States v. Castro, 26 F.3d 557 (5th Cir. 1994)).

70 *See* Love, *supra* note 65, at 1204–08 (explaining how pardons remove collateral consequences and other barriers to reintegration following a conviction); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 19 (Marc Mauer & Leda Chesney-Lind eds., 2002) (arguing that the stigma attached to a criminal conviction demotes the individual's status in society).

preserve the membership status that the state previously took away through the criminal system. Thus, it is difficult to argue that noncitizens whose convictions have been removed (or never even entered) through these processes are out-of-step with the community's social mores. Rather, in such cases, the very criminal justice system that produced the predicate criminal history in the first place has formally determined that the countervailing factors—rehabilitation, remorse, hardship, health, et cetera—warrant formally withdrawing (or avoiding) the consequences of a conviction. Studies suggest declines in recidivism following these kinds of processes, further underscoring their importance as a tool of criminal justice.[71] Judge Weinstein likewise supported his recommendation against deportation in *Aguilar* with findings about the consequences of removal for the defendant's family, specifically discussing the children's elevated likelihood of criminality due to increased poverty and psychological harm resulting from Aguilar's deportation. By adopting a policy that defers to state (or federal) judgments in this respect, federal immigration authorities will reduce conflicts with the criminal justice system's goals.

Third, and most importantly, disproportionality rules of thumb allow the administration to take an important step towards implementing its responsibility to take account of individual circumstances in deportation cases involving persons with criminal history. A sentencing judge's recommendation against deportation offers the administration a powerful tool to avert unjust removals, precisely because such a recommendation is tailored to the particular would-be deportee.[72] And, as already discussed, the other criminal justice mechanisms discussed here may even be stronger signals that deportation is inappropriate. Notably, if federal agency officials begin to look with greater favor on expungements, diversions, and pardons, the consideration of such relief for noncitizens may well gain a new and welcome momentum. An agency-wide policy formally recognizing the value of disproportionality rules of thumb would help advance consistency (though probably not achieve uniformity) across jurisdictions, an outcome that may well be preferable to simply encouraging more use of the individual discretionary judgments of front-line agents.[73] The ultimate result of implementing this policy should be fewer unjustified removals of

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71 *See, e.g.*, JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 168–70 (2005) (citing a number of studies).

72 *See Padilla*, 559 U.S. at 361–63 (discussing history and potential impact of JRADs).

73 *See* Cox & Rodríguez, *supra* note 20, at 184–95 (arguing that President Obama's more categorical relief initiatives centralize and make more consistent the agency's exercise of discretion); Kalhan, *supra* note 29, at 88–90 (discussing the Obama administration's difficulties in guiding individual immigration officers' use of prosecutorial discretion); Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J (forthcoming 2015) (same).

noncitizens with criminal history.

III
OBJECTIONS

What objections to an executive branch policy to rely on disproportionality rules of thumb might a skeptic raise? Most critical is the question whether such a policy would exceed presidential authority. This inquiry raises two sub-questions. First, would the President violate his constitutional duty to "Take Care that the laws be faithfully executed" by declining to pursue the removal of persons whom Congress has made deportable on the basis of criminal history, regardless of extenuating circumstances?[74] Second, if DHS were to create an administrative policy of deferring to NJRADs, despite Congress's repeal of the preexisting JRAD statutory provision, would the executive be engaged in the making of law, in violation of the constitutional separation of powers?

The key to both questions lies in understanding the scope of delegation of authority to the executive in the field of immigration law. Through both explicit and implicit delegations, the President enjoys a sweeping policymaking role in the regulation of noncitizens.[75] Statutory provisions expressly delegate authority to the executive to manage the quantity and origin of foreign nationals fleeing persecution, upheaval, or natural disasters.[76] A related statutory "parole" authority gives the executive power to admit foreign nationals in other humanitarian situations.[77] With respect to domestic enforcement, Congress has explicitly delegated authority to DHS to establish enforcement policies and priorities in its administration of immigration law.[78]

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74 *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (evaluating agency prosecutorial discretion not to enforce the law in some cases in light of the President's constitutional duty to "take Care that the Laws be faithfully executed"); U.S. CONST., art. II, § 3.

75 Presidents have also claimed inherent authority to regulate immigration policy as an aspect of Article II foreign affairs powers. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 191–92 (7th ed. 2012) (reviewing case law on inherent presidential power in immigration matters); Cox & Rodríguez, *supra* note 35, at 465–66 (reviewing history of inherent power doctrine).

76 *See, e.g.*, 8 U.S.C. § 1254a(b)(1) (2012) (delegating the Attorney General authority to designate countries in which natural disasters, war, or other significant upheaval warrant granting "temporary protected status" to nationals of those countries who are residing in the United States); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 102–03 (1980) (giving the President authority to determine the countries from which refugees would be admitted and the total number of refugee admissions each year).

77 *See* 8 U.S.C. § 1182(d)(5)(A) (2012) (delegating authority to the Attorney General to "parole" inadmissible noncitizens into the country for "urgent humanitarian reasons or significant public benefit").

78 *See* 6 U.S.C. § 202(5) (2012) (charging the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities"); 8 U.S.C. § 1103(a) (2012) (conferring broad power to the Secretary of Homeland Security over "the administration

Additionally, substantial space for executive branch policy-making derives from the modern immigration law scheme. Congress's budgetary appropriations provide the immigration agencies with funding that is grossly insufficient to the task of removing all deportable noncitizens in the United States. The Obama administration has frequently noted that it has the resources only to remove about 400,000 persons each year, a number that must be divided between interior and border removals. Yet something on the order of 11 million unauthorized noncitizens live in the United States.[79] In addition, many hundreds of thousands of noncitizens who lawfully reside in this country are potentially deportable on the basis of criminal convictions.[80] The practical reality of massive underfunding leaves the executive no choice but to set priorities in choosing which tiny fraction of the removable population to target for enforcement—as Congress well knows.[81]

Furthermore, the INA's sweeping removal grounds, in combination with the curtailment of adjudicative discretion or accessible avenues for legalization, suggest that Congress meant to delegate primary discretion to the executive's enforcement officials to evaluate the appropriateness of individual removals, especially noncitizens caught up in the criminal justice system.[82] Modern immigration law thus tracks modern criminal law, in which legislatures create exceedingly broad penal codes, while limiting judicial sentencing options, thereby transferring considerable discretionary power to prosecutorial agencies to determine the code's real-world effects.[83] As Adam Cox and Cristina Rodríguez have explained, part of the executive's policymaking power stems from "a profound mismatch between the law on the books and reality on the ground, which has resulted from a series of legal, political, and demographic developments that have

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and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens").

79 *See Unauthorized Immigrants in the U.S., 2012*, PEW RESEARCH CENTER (Nov. 18, 2014), http://www.pewhispanic.org/interactives/unauthorized-immigrants-2012/.

80 *See* Cade, *supra* note 6, at 664 (citing sources).

81 Moreover, as Professor Kalhan and many others have noted, the Obama administration "not only has enforced the immigration laws to the maximum extent of these appropriated funds, but has removed more individuals than any other administration in U.S. history." Kalhan, *supra* note 29, at 74.

82 Cade, *supra* note 6; Cox & Rodríguez, *supra* note 35; Cox & Rodríguez, *supra* note 20; *see also* Elizabeth Keyes, *Deferred Action: Considering What is Lost*, 55 WASHBURN L.J. (forthcoming 2015) (discussing the importance of "residual discretion" in immigration law as a "tool of leniency" in situations where strict enforcement would lead to an inequitable result).

83 Cox & Rodríguez, *supra* note 35, at 517–19 (arguing that the categorical nature of the immigration code reallocates discretion from immigration judges to the enforcement officials who make charging decisions). *See generally* Stith, *supra* note 21, at 1428–34 (examining shifts in discretionary power between prosecutors and judges); Stuntz, *supra* note 21, at 565 (same).

accelerated over the last four decades."[84] These developments include not only the INA's blunderbuss removal provisions, but also the longstanding acquiescence by both political branches in the unauthorized migration and employment of noncitizens.[85]

In such an environment, even if the balance between agency resources and potential enforcement targets were not so lopsided, there would be good reason to believe the executive retains authority to "exercise[] its own value judgments about the scope of our immigration policy."[86] This prerogative—indeed, this inescapable responsibility—surely encompasses prosecutorial efforts to ensure that immigration laws are not enforced in an arbitrary, discriminatory, or disproportionate manner.[87] The Supreme Court has come a long way toward recognizing this point. Thus, in *Arizona v. United States* the Court deemed prosecutorial judgment in determining enforcement priorities to be so paramount that it insulated the federal government's discretion to choose among potential deportation targets from almost any interference by state law enforcement officials.[88]

To be sure, Congress has signaled the importance of apprehending and removing noncitizens with criminal histories.[89] Even so, nowhere has

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84 Cox & Rodríguez, *supra* note 20, at 131.

85 *Id.* at 49–50 (outlining how Congressional "choices over time . . . have created a parallel executive screening regime through which the executive exercises its own value judgments about the scope of our immigration policy"); HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 19–55 (2014) (explaining the political and historical factors that contributed to the size of the current unauthorized population and the connection with enforcement discretion).

86 Cox & Rodríguez, *supra* note 20, at 22.

87 I have developed this argument across a series of articles. *See* Cade, *Enforcing Immigration Equity*, *supra* note 6, at 668–69 (arguing that the executive branch must endeavor to avoid unfair deportations even in cases involving noncitizens with criminal history); Cade, *Policing the Immigration Police*, *supra* note 37, at 203 (arguing that the executive branch bears responsibility for ensuring that the Fourth Amendment is fully upheld in the administration of immigration law whether or not judicially enforceable remedies are available); Cade, *The Challenge of Seeing Justice Done*, *supra* note 27, at 61–62 (suggesting a range of administrative reforms to make deportation hearings more accurate and fair). *See generally* Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, *supra* note 19 (arguing that the executive should scale back measures targeting noncitizens facing only misdemeanors in light of (1) such convictions' general unreliability as evidence of wrong-doing and (2) corrosive feedback loops created by the federal immigration agency's integration in the misdemeanor system).

88 Arizona v. United States, 132 S. Ct. 2492, 2507–10 (2012) (upholding preliminary injunction against three of four provisions of state law providing for local police participation in enforcement of federal immigration law on grounds that such actions might unduly burden or interfere with the executive's federal deportation priorities). *See generally* Cade, *Enforcing Immigration Equity*, *supra* note 6; Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 54 (discussing the implications of the ruling in *Arizona v. United States*).

89 *See, e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 251 (containing proviso that DHS should prioritize removal of noncitizens in accordance with severity of their crimes); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574, 3659 (same); *Confirmation Hearing on the*

Congress ever mandated or even suggested that the executive *must* deport all persons who are removable on criminal grounds (or all members of any particular subgroup of deportable noncitizens). Moreover, to the extent there are clues in Congress's appropriations acts, they support recognition of broad executive branch discretion by acknowledging—in fact, *providing*—that DHS must prioritize among noncitizens convicted of a crime.[90]

For these reasons, an administrative policy of relying on disproportionality rules of thumb to help sort among deportable noncitizens would not amount to an abdication of statutory responsibilities, or otherwise run afoul of the executive's duty to enforce Congress's laws. Rather, such a policy would comport with legislative decisions that clearly envision executive branch attempts to rationalize immigration enforcement in the modern system.

Nor does the fact that Congress specifically repealed statutory JRADs transform administrative reliance on judicial recommendations such as the one Judge Weinstein issued in *Aguilar*, into an unconstitutional executive exercise of lawmaking power. Again, the President's vast discretionary space in the enforcement of immigration law makes it both appropriate and necessary for the agency to establish rational means of sorting through a massive number of potentially deportable noncitizens. Moreover, there is a crucial difference between the operation of the former statutorily-authorized JRADs and the administrative reliance policy recommended here. The statutory JRAD program in effect empowered state or federal judges to tie the executive branch's hands with respect to individual deportations. If federal officials wanted to deport a noncitizen on the basis of a conviction, they could not do so where a JRAD had been issued. In contrast, an administrative decision to defer to a judge's recommendation against removal simply treats that sentencing order as persuasive authority regarding the equities in a particular case. A rule of thumb is only a rule of thumb. Thus, in applying such a rule, immigration officials would retain a large measure of freedom. In certain cases, for example, the agency might take a different view of the seriousness of the underlying crime than the recommendation-issuing judge. In other cases, executive officials might

Nomination of Loretta Lynch as Attorney General of the United States Before the Senate Committee on the Judiciary, 114th Cong. (2015) (written statement of Stephen H. Legomsky, Professor, Washington University School of Law) (stating that many of the Congress's appropriations acts "mandate a specific priority on the removal of criminal offenders and, within that group of individuals, sub-priorities that depend on the severity of the crime.").

90 *See, e.g.*, Consolidated Appropriations Act, 2014, 128 Stat. at 251 (providing in part that "the Secretary of Homeland Security shall prioritize the identification and removal of aliens convicted of a crime by the severity of that crime"); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act 2009, 122 Stat. at 3659 (same).

possess other relevant information about the noncitizen's dangerousness or undesirability. Reliance on NJRADs thus would not amount to administrative reinstallation of a law that Congress has repealed.

The preceding discussion shows that disproportionality rules of thumb present no constitutional problems. But the executive's reliance on such rules might nonetheless be objectionable on policy grounds. For instance, one might claim that rules of thumb are not always accurate. Perhaps some pardons will be granted to persons who do not deserve to be pardoned. Perhaps not all judges who vacate a conviction or issue a recommendation against deportation will have assessed the positive and negative factors in a noncitizen defendant's case in as comprehensive a manner as an immigration judge would have in the era before Congress limited their authority. Indeed, it is likely that many state judges, with heavy dockets to manage, will have less time to issue carefully nuanced rationales explaining the basis for an NJRAD in every case. With these possible outcomes, how can immigration authorities be sure that actors in the criminal justice system are only employing such mechanisms when appropriate?

This objection, while not frivolous, must be considered in view of the fact that the underlying criminal history triggering deportation is itself only a proxy for undesirability. By and large the immigration system does not endeavor to make a factual determination about a noncitizen's dangerousness, likelihood to transgress society's norms, or even economic productivity.[91] Rather, the immigration system relies on convictions, generated by law enforcement actors outside the immigration system, as a second-order signal about those first-order concerns. Thus, the immigration system delegates to state authorities—police, prosecutors, and judges—a critical role with respect to the implementation of deportation policy. These non-federal actors make the arrest, charging, plea-bargaining, and sentencing decisions that effectively determine whether lawfully present and undocumented noncitizens alike will be prioritized for deportation, detained for that purpose, and perhaps subject to lengthy or permanent bars to lawful return. And the immigration system relies on this delegation despite the fact that convictions are often unreliable indicators of dangerousness, social disconnection, or even wrongdoing, especially in

[91] There some exceptions to this general rule. For example, immigration judges do make determinations with respect to allegations of fraudulent activity in seeking immigration benefits. *See* INA § 212(a)(6)(C)(i) ("Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."). Other examples include administrative determinations of drug abuse, human trafficking, or terrorist activities. *See* 8 U.S.C. § 1227(a)(2)(B)(ii) (2012) (providing for deportation of "drug abuser[s]"); *id*. § 1227(a)(2)(F) (incorporating 8 U.S.C. § 1182(a)(2)(H)) (human traffickers); *id.* §§ 1227(a)(4)(A)–(B) (persons convicted of espionage or terrorism).

cases involving minor offenses.[92]

Seen in that light, the subsequent tempering (or, even more so, the repudiation) of the underlying conviction that that very criminal justice system imposed in the first place has a telling significance. It signals that deportation might well be disproportionate. It merits reemphasis that the criminal history proxy for dangerousness and antisocial character is itself only a proxy. So when that criminal history is mitigated or negated, the proxy greatly weakens, and in many cases disappears. In the end, what is good for the goose should be good for the gander. And precisely because the criminal history proxy operates as a surrogate, the reworking of that history should serve as a marker, too. Again, the undoing of that history should not necessarily remove administrative power to proceed with deportation. But it should at least raise the presumption of nondeportability because, in such circumstances, the logic of the proxy for deportability is depleted of its force. Moreover, DHS could issue guidelines governing the appropriate timing and content of NJRADs in particular, ignoring or discounting those that are less thorough or too tardy. In any event, to the extent that NJRADs, expungements, and pardons influence downstream immigration consequences, they likely would do so more transparently than already occurs through the charging and plea-bargaining decisions of other criminal justice actors.[93]

A related concern focuses on inconsistency. The worry stems from the fact that it is easier to obtain pardons, judicial expungements, or similar relief in some states than in others.[94] Some criminal sentencing judges will

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92 *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012) (arguing that misdemeanor systems are overburdened and insufficiently attuned to questions of culpability); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 306–09 (2011) (describing the "serious institutional pressure from all quarters to quickly 'dispose of' misdemeanor cases, often before defense counsel can undertake any investigation or adequately review any discovery material").

93 *Cf.* Lee, *supra* note 20, at 598–99 (suggesting that transparency would be furthered by re-creation of JRADs). Furthermore, the professional role of judges facilitates more neutral and balanced assessments of noncitizen-defendants' equities than might occur in the hands of other players. Similarly, the political accountability of governors may operate to restrain less-than-thoughtful pardons. *See generally* Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1349 (2008) ("No governor or President wants to be viewed as soft on crime or to be blamed if a pardoned individual goes on to commit another crime."); Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 223–24 (2003) (attributing decline in grants of clemencies to political fears by governors).

94 *See* Margaret Colgate Love, *Chart # 3 - Characteristics of Pardon Authorities*, NACDL RESTORATION OF RIGHTS RESOURCE PROJECT (April 2015), https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Characteristics_of_Pardon_Authorities.pdf; Margaret Colgate Love, *Chart # 4 - Judicial Expungement, Sealing, and Set-Aside*, NACDL RESTORATION OF RIGHTS RESOURCE PROJECT (June 2015), http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Judicial_Expungement_Sealing_and_Set-Aside.pdf. Likewise, even within the same jurisdiction the availability of certain criminal justice processes will vary

be willing to make a determination about whether removal is an appropriate part of the defendant's sanction; others will not. To evaluate this objection, one must first recognize that inconsistency is already rampant in the criminal deportation system. Criminal offenses and punishments vary significantly across jurisdictions, leading to inconsistent immigration consequences.[95] A particular theft or drug offense in one state might be classified as an aggravated felony, triggering deportation without discretionary relief and a permanent bar to lawful reentry, but the same offense may not be an aggravated felony in another.[96] The same is true of criminal offenses that might trigger removal as a CIMT or controlled substance offense.[97] Moreover, even defendants engaging in similar conduct within the same jurisdiction can end up with different convictions through the mechanics of the plea-bargain process, leading to disparate immigration consequences.[98] In many cases, such differences across or within jurisdictions will have little or nothing to do with the noncitizen's stake in the United States, the gravity of his offense, or other factors relevant to the appropriateness of deportation.

Against this backdrop, a disproportionality-based red flag in some cases might operate to reduce problems of unequal treatment of persons

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depending on the statutory code or the attitudes of the prosecutor or judge.

95 *See, e.g.*, Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1735 (2011) ("Under a categorical analysis, two people who commit the same offense but are able to secure different plea deals or are prosecuted in jurisdictions that define the offense differently will face different immigration consequences."); Lee, *supra* note 20, at 565 (explaining how state prosecutors can influence downstream immigration consequences through charging and bargaining decisions).

96 *See* MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 461–62 (4th ed. 2009) (noting different approaches among jurisdictions to the same offense).

97 *See id.* at 204–06, 210, 300–03, 312–13 (reviewing case law concerning specific offenses). Furthermore, with respect to the consequence of pardons in particular, the current deportation system tolerates a particularly high level of inconsistency and arbitrariness. For example, the agency's interpretation of the statutory provisions allows the effectiveness of the same pardon for the same conviction to turn on front-line agents' charging decisions. *See* Matter of Suh, 23 I. & N. Dec. 626 (B.I.A. 2003) (holding that a noncitizen's full pardon for sexual battery conviction eliminated the aggravated felony basis for removal, but had no effect on the domestic violence deportability ground also charged by the Government).

98 *See* Cade, *supra* note 19, at 1772–74 (describing how the "range of charge, fact, and sentence bargaining options available under criminal law allows prosecutors and defense counsel wide room to structure pleas" in ways that avoid immigration consequences). Note that it is possible that administrative reliance on the NJRAD will increase the (less transparent) power of prosecutors in the plea bargain phase of criminal proceedings. For example, a prosecutor might offer a deal in which the defendant must plea to a deportable offense in exchange for the prosecutor's support when the noncitizen seeks an NJRAD in the sentencing phase. I am grateful to Professor Kevin Lapp for this observation, which warrants consideration. For now, my response is that criminal prosecutors already enjoy significant leverage in the plea bargaining process, and there is no reason to believe that the addition of NJRADs to the mix will significantly affect that power one way or the other.

caught up in the criminal justice systems of different jurisdictions. Moreover, it makes little sense to condemn on unequal-treatment grounds a rule of thumb that is designed to ensure that differently-situated persons are not arbitrarily and indiscriminately treated exactly the same. In any event, there is no escaping the fact that we live in a world of second-best solutions to overinclusive deportation grounds. In such a world, enforcement officials should take relevant mitigation information where they can find it.

Finally, some commentators might argue that the rise of administrative reliance on disproportionality rules of thumb would discourage more lasting reform measures. If NJRADs, pardons, or expungements become the operative means of forestalling deportation in individual cases, perhaps this reform would stall legislative restoration of adjudicative equity or a rollback of the now-overreaching criminal deportation grounds. Any such criticism is overly speculative. This is especially true because recent history suggests that Congress is not likely to enact reforms along these lines in the near future, regardless of the circumstances.[99] Immigration legislation of any sort is notoriously difficult to pass, and the bills that have advanced (but ultimately failed) in recent years have not contained measures significantly softening the criminal history grounds or returning discretionary authority to immigration judges.[100] In any event, given the political salience of immigration law, the adoption of a new administrative policy in this area is just as likely to motivate Congress to review (and perhaps ratify) such a reform as to breed a blind legislative passivity.[101]

CONCLUSION

In the modern deportation system, almost any level of criminal conviction can trigger deportation and other immigration consequences. At the same time, Congress has drastically restricted the discretionary authority of back-end adjudicators in immigration courts to avert

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99 *See generally* MARC R. ROSENBLUM, U.S. IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM (2011) (analyzing the political obstacles that stand in the way of immigration reform); Ryan Lizza, *Getting to Maybe: Inside the Gang of Eight's Immigration Deal*, NEW YORKER (June 24, 2013), http://www.newyorker.com/magazine/2013/06/24/getting-to-maybe (same); *Why Immigration Reform Died in Congress*, NBC NEWS (July 1, 2014, 9:09 AM), http://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276 (summarizing failed immigration bills from 2005 to 2014).

100 *See, e.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013); Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. (2011); Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong. (2007).

101 *See, e.g.*, Cox & Rodriguez, *supra* note 35, at 502–06 (discussing instances of congressional ratification of executive-generated immigration policies and procedures).

disproportionate deportations. The result is a system in which enforcement officials wield primary authority to pursue the goals of justice and fairness. While the current administration has taken important steps in this respect, it has failed to provide for adequate assessment of individual circumstances in cases involving persons with criminal histories. As a result, it is all but guaranteed that Ignacio Aguilar will soon be deported and barred from lawful return to the United States, without any administrative consideration of the life-altering impact this outcome will have on his family (particularly his children), his positive contributions in this country for more than a decade, and other mitigating factors, including the nonviolent and isolated nature of the underlying criminal activity.

Judge Weinstein's sentencing order in *Aguilar* points the way toward rational administrative reform in such situations. Immigration officials could cheaply and efficiently rely on judicial recommendations against deportation, pardons, expungements, and similar criminal justice actions as stand-ins for the equitable balancing that formerly took place in immigration courts. These processes could serve as signals that seeking the removal of that noncitizen presumptively would be disproportionate, allowing the agency to focus its limited resources on more important targets. Until Congress enacts more lasting measures, the executive branch's adoption of a disproportionality-based rule-of-thumb approach thus offers an important, if incomplete, step toward creating a more just deportation system.