

RESPONSE

BACK TO THE FUTURE? RETURNING DISCRETION TO CRIME-BASED REMOVAL DECISIONS

KEVIN R. JOHNSON*

In response to
Jason A. Cade, *Return of the JRAD*
90 N.Y.U. L. REV. ONLINE 36 (2015)

Jason A. Cade has powerfully advocated for returning greater discretion to the courts and agencies in making and reviewing Executive Branch decisions to remove noncitizens from the United States. His latest Article, Return of the JRAD, calls for a revival of a now-discarded procedural device of allowing courts sentencing noncitizen criminal defendants to make a "Judicial Recommendation Against Deportation" (JRAD) that would bar the Executive Branch from removing a noncitizen from the United States. Congress eliminated the JRAD from the immigration laws in 1990. In calling for its comeback, Cade points to a ruling by revered federal district court judge Jack Weinstein. In United States v. Aguilar, Judge Weinstein issued a sentencing order that, despite the fact that Congress abolished the JRAD a quarter century ago, resembled the old recommendations against deportation. The court thus went beyond the law on the books to advocate against the removal from the United States of a one-time, non-violent criminal offender with U.S. citizen children. One might dismiss Judge Weinstein's recommendation as dicta. However, Jason Cade views the order as a much-needed sign of judicial resistance to the harsh criminal removal provisions of the modern U.S. immigration laws. He advocates the return of discretionary authority to the courts to ensure greater proportionality and reasonableness to contemporary removal decisions.

INTRODUCTION	116
I. TARGETING "CRIMINAL ALIENS" IN U.S. IMMIGRATION ENFORCEMENT	119
II. THE RACIALLY DISPARATE IMPACTS OF CONTEMPORARY CRIME- BASED REMOVALS.....	124
III. SEPARATION OF POWERS IN THE ENFORCEMENT OF THE IMMIGRATION LAWS.....	126
CONCLUSION.....	130

* Copyright © 2016 by Kevin R. Johnson, Dean and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies, University of California at Davis School of Law. Thanks to Jason Cade for his provocative paper as well as for comments on a draft of this response. U.C. Davis law students Sadie Weller, Nicole Zanardi, Gina Verraster, and Katie Kelly provided valuable research and editorial assistance.

INTRODUCTION

Jason A. Cade has powerfully advocated for returning greater discretion to the courts and agencies in making and reviewing Executive Branch decisions to remove noncitizens from the United States.¹ His latest Article, *Return of the JRAD*,² calls for a revival of a now-discarded procedural device of allowing courts sentencing noncitizen criminal defendants to make a “Judicial Recommendation Against Deportation” (JRAD) that would bar the Executive Branch from removing a noncitizen from the United States.

Congress eliminated the JRAD from the immigration laws in 1990.³ In calling for its comeback, Cade points to a ruling by revered federal district court judge Jack Weinstein. In *United States v. Aguilar*,⁴ Judge Weinstein issued a sentencing order that, despite the fact that Congress abolished the JRAD a quarter century ago, resembled the old recommendations against deportation. The court thus went beyond the law on the books to advocate against the removal from the United States of a one-time, non-violent criminal offender with U.S. citizen children.

One might dismiss Judge Weinstein’s recommendation as dicta. However, Jason Cade views the order as a much-needed sign of judicial resistance to the harsh criminal removal provisions of the immigration laws. He advocates for the return of discretionary authority to the courts to ensure greater proportionality and reasonableness to contemporary removal decisions.⁵

For decades, Congress has consistently toughened the provisions of the U.S. immigration laws that govern the removal of noncitizens who have encountered the criminal justice system. As a result, virtually all drug convictions today—even those for possession of small amounts of controlled substances for personal use—can subject a long-term lawful permanent resident with deep ties to the community to removal from the United States.⁶

¹ See, e.g., Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661 (2015).

² Jason A. Cade, *Return of the JRAD*, 90 *N.Y.U. L. REV. ONLINE* 36 (2015).

³ For background on the Judicial Recommendation Against Deportation (JRAD), see Elizabeth Keyes, *Deferred Action: Considering What Is Lost*, 55 *WASHBURN L.J.* 129, 139–41 (2015) and Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 *EMORY L.J.* 1131, 1143–48 (2002).

⁴ 133 F. Supp. 3d 468 (E.D.N.Y. 2015).

⁵ See Cade, *supra* note 2, at 39.

⁶ See, e.g., Wilber A. Barillas, *Collateral Damage: Drug Enforcement and Its Impact on the Deportation of Legal Permanent Residents*, 34 *B.C. J.L. & SOC. JUST.* 1, 8–19 (2014) (analyzing adverse impacts of enforcement of drug laws on immigrants); Gabriel J. Chin,

The Executive Branch has consciously targeted the removal of “criminal aliens” who, along with “terrorists,” are among the most politically unpopular groups of all immigrants.⁷ In setting a series of records for annual removals,⁸ President Barack Obama has sought to remove noncitizens who have had *any*—minor as well as major—run-in with the criminal justice system. Developed through numerous pieces of legislation, the contemporary American removal system has emphasized enforcement, detention, and removals. In enthusiastically pursuing removal, 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 modern deportation system.”⁹

As exemplified by Republican presidential candidate Donald Trump,¹⁰ some political leaders have capitalized on the unpopularity of criminal aliens by proclaiming that the nation is suffering from an immigrant crime wave, broadly (and inaccurately) painting the entire Mexican immigrant community as engaging in widespread criminal activity. Building on racial stereotypes that Mexican immigrants are dangerous criminals,¹¹ those leaders have called for massive

Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 J. GENDER, RACE & JUST. 253, 261 (2002) (same); see also Jordan Cunnings, Comment, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 531–33 (2015) (analyzing negative immigration impacts on noncitizens resulting from nonserious marijuana convictions). Moreover, in the name of immigration enforcement, Congress has mandated the detention of many categories of noncitizens with criminal convictions pending their removal from the United States. See, e.g., *Demore v. Kim*, 538 U.S. 510 (2003) (upholding provision of immigration laws mandating detention of noncitizens convicted of crimes pending their removal). See generally César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449 (2015) (analyzing impacts of expanded use of detention as a form of immigration enforcement).

⁷ See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1128 (2013) (“The deportation of ‘criminal aliens’ is now the driving force in American immigration enforcement.... In effect, federal immigration enforcement has become a criminal removal system.”) (footnotes omitted).

⁸ See JOHN F. SIMANSKI, DEP’T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 5–6 (Sept. 2014), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf (presenting data showing that removals of noncitizens from the United States reached an all-time high of more than 438,000 in 2013).

⁹ Cade, *supra* note 2, at 42–43 (footnote omitted).

¹⁰ See Raf Sanchez, *Donald Trump Uses Killing of U.S. Woman by Illegal Immigrant to Justify Mexican ‘Rapists and Criminals’ Claim*, TELEGRAPH (July 6, 2015, 12:21 PM), <http://www.telegraph.co.uk/news/worldnews/us-election/11721409/Donald-Trump-uses-killing-of-us-woman-by-illegal-immigrant-to-justify-mexican-rapists-and-criminals-claim.html>.

¹¹ See Deborah Weissman, *The Politics of Narrative: Law and the Representation of*

enforcement campaigns to remove Mexican immigrants from the United States. Political pressure has contributed substantially to greatly enhanced enforcement.

In recent years, a number of state and local governments have pushed back on the federal government's zealous efforts to remove immigrants convicted of any and all crimes,¹² like Judge Weinstein did in *Aguilar*. Along similar lines, commentators, such as Jason Cade, criticize the mandatory deportation of immigrants convicted of relatively minor crimes. In short, a growing number of governments and commentators acknowledge that the enhanced and aggressive federal removal efforts have gone too far.

Part I expresses full agreement with Jason Cade's conclusion in *Return of the JRAD* that the modern criminal removal system fails to protect against unfair removals of immigrants. By removing noncitizens from the country who pose virtually no risk to public safety, hundreds of thousands of removals each year needlessly tear apart families and entire communities. The lack of discretion in the law makes it extremely difficult for the courts and the immigration bureaucracy to prevent arbitrary and widespread human misery. Nevertheless, Congress is unlikely to enact any proposed reforms to the criminal removal status quo. Indeed, Congress has demonstrated time and time again remarkably little sympathy for immigrants convicted of crimes.

Part II adds a powerful justification to the call for the reform of the modern criminal removal system—namely, the serious concerns with the overwhelming modern racial disparities in removals, which flow directly from racial disparities in the operation of the modern criminal justice system in the United States. The contemporary criminal removal regime has disparate impacts on Latina/o immigrants, who today comprise the overwhelming majority of the persons deported from the United States. In fact, the modern removal system might accurately be characterized as a Latina/o removal system. Severely undermining the perceived legitimacy of immigration enforcement,¹³

Mexican Criminality, 38 *FORDHAM INT'L L.J.* 141, 145 (2015) (analyzing the influence of stereotypes of Mexican criminality on American law and policy).

¹² See Christopher N. Lasch, *Rendition Resistance*, 92 *N.C. L. REV.* 149, 203–32 (2013) (analyzing state and local resistance to federal immigration enforcement efforts); see also Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 *U.C. IRVINE L. REV.* 247, 248–49, 297–308 (2012) (analyzing sanctuary policies, their benefits, and the increasing number of sanctuary cities); Rose Cuisson Villazor, *What Is a "Sanctuary"?*, 61 *SMU L. REV.* 133, 142–43 (2008) (examining history of "sanctuary cities").

¹³ For a discussion of the importance of perceived legitimacy to the exercise of discretion in the enforcement of the law, see Tom R. Tyler & Gregory Mitchell, *Legitimacy*

the racialized nature of removals constitutes a pressing Latina/o civil rights concern. The racial impacts of contemporary criminal removals alone warrant a wholesale reconsideration of the entire criminal removal system in place under current American immigration law.

Part III considers separation of powers concerns in the administration of U.S. immigration laws. Jason Cade indirectly raises a critically important question concerning the branch of the federal government that is best equipped—constitutionally and politically—to curb the excesses of the modern criminal removal system: the legislative branch. Fundamental separation of powers principles strongly favor Congress, not the Executive Branch or the Judiciary, as the institution making these reforms. The overbreadth of the current system of criminal removals is founded in the immigration laws—laws of which Congress has been the primary architect.

The challenging political question posed to reformers is how to convince Congress to dismantle the mandatory criminal removal regime that it has built. As politicians frequently employ anti-immigrant rhetoric for political gain, noncitizens with criminal convictions continue to be among the most reviled of all immigrants in American politics. Only through a dramatic political change of heart can Congress begin to restore discretion to removal decisions and better ensure that proper respect is afforded to the weighty human interests of immigrants, their families, and their communities.

I

TARGETING “CRIMINAL ALIENS” IN U.S. IMMIGRATION ENFORCEMENT

Jason Cade accurately summarizes and criticizes recent trends in U.S. immigration enforcement:

The late twentieth century ushered in an era of far-reaching 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. It also took a meat cleaver to the longstanding statutory mechanisms that offered opportunities for obtaining relief from removal. The authority of immigration judges to set aside removals based on the equities of particular cases was drastically curtailed.¹⁴

and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights, 43 DUKE L.J. 703 (1994) (examining perception of legitimacy of discretion in law enforcement generally).

¹⁴ Cade, *supra* note 2, at 39–40 (footnotes omitted). Importantly, noncitizens who are merely arrested, but not convicted of criminal offenses, may also be subject to removal. See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826–33 (2015) (analyzing adverse

To summarize, “under current law many noncitizens are detained, deported, and often permanently banished [from the United States], 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.”¹⁵

Congress has taken a consistent series of steps to crack down on a broadly-defined, and constantly expanding, group of “criminal aliens.”¹⁶ These reforms have resulted in mass deportations of hundreds of thousands of noncitizens annually.¹⁷ Celebrating the mass removals, President Obama has characterized the noncitizens removed from the United States as “gang bangers,” a phrase that taps into deep racial anxieties in American society.¹⁸

With the hope of convincing Congress to pass long-debated comprehensive immigration reform,¹⁹ the Obama administration has pursued an aggressive removal strategy. The political calculus has been that, by demonstrating a firm commitment to immigration enforcement, Congress may be persuaded to enact immigration reform—including a path to legal status for undocumented immigrants, a central goal of many immigrant activists. Despite record numbers of removals, Congress has thus far failed to enact meaningful reform.

Immigrants with criminal convictions have precious few defenders in the political process and the law encourages—and, in many cases, mandates—their removal. However, as the *New York Times* editorial board stated a few years ago: “Immigration and Customs Enforcement records show that a vast majority, 79 percent, of people deported under Secure Communities [a federal criminal removal program] had *no criminal records or had been picked up for*

immigration consequences of criminal arrests).

¹⁵ Cade, *supra* note 2, at 41.

¹⁶ For criticism of the focus of modern removal efforts on “criminal aliens,” see Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 598–600 (2016); see also Rebecca Sharpless, *“Immigrants Are Not Criminals”: Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 693–701 (2016) (questioning willingness to sacrifice rights of immigrants with criminal convictions in efforts to secure reform of the immigration laws).

¹⁷ See *supra* note 8 and accompanying text (noting all-time high record of removals in 2013).

¹⁸ See Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=0.

¹⁹ See Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1789–1802 (2009) (analyzing political complexities of immigration reform).

*low-level offenses, like traffic violations and juvenile mischief.*²⁰ Consequently, removals of many of the immigrants have done little to promote public safety. Only political expediency, not mere safety concerns, can justify the mass deportations.²¹

With little discretion left in the hands of judicial and administrative decisionmakers to ensure that the removal of criminal offenders is proportional to their specific criminal acts, virtually all noncitizens who have brushes with the criminal justice system today face possible removal from the United States. The noncitizens removed include long-term lawful permanent residents, as well as undocumented immigrants, with deep ties to the community, including U.S. citizen children. A vibrant body of “cimmigration” scholarship documents the increasing use of the criminal justice system as a tool for immigration enforcement and criticizes the significant human costs on immigrants resulting from the hyper-aggressive enforcement of the unforgiving immigration laws.²²

Before 1990, the Immigration and Nationality Act allowed sentencing judges in criminal cases to issue a JRAD that was binding on the Executive Branch and ensured that a specific criminal conviction could not serve as the basis for the removal of an immigrant.²³ A JRAD allowed the judge most familiar with the criminal activity of the noncitizen to prevent removal and to ensure a degree of fairness in an individual removal decision. Put simply, the sentencing judge could ensure that the total punishment fit the crime. In 1990, Congress eliminated the JRAD as part of reform legislation that penalized criminal noncitizens while at the same time generally expanding the

²⁰ Editorial, *Immigration Bait and Switch*, N.Y. TIMES (Aug. 17, 2010) (emphasis added), <http://www.nytimes.com/2010/08/18/opinion/18wed3.html>; see also Thompson & Cohen, *supra* note 18 (reviewing statistical data).

²¹ For an analysis of the politics surrounding the emergence of crimmigration law, see César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457, 1513–15 (analyzing politics surrounding the emergence of crimmigration law). JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) and William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) critically analyze the adoption of ever-tougher criminal laws.

²² See, e.g., Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012) (analyzing the adverse impacts of the criminalization of U.S. immigration law); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012) (same); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) (same); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (same).

²³ See Immigration & Nationality Act § 241(b)(2), 8 U.S.C. § 1251(b)(2) (repealed 1990); see also Cade, *supra* note 2, at 38–39 (discussing the repeal of the JRAD).

opportunities for legal immigration to the United States.²⁴

The legislative history to the 1990 Act offers few specific hints about why Congress repealed the JRAD.²⁵ Nonetheless, the general intent of Congress can reasonably be inferred from contemporaneous legislation. For instance, legislation passed by Congress around this time period restricted the extent to which pardons and expungements of criminal convictions could prevent removals.²⁶ Those changes in combination toughened the immigration consequences of criminal convictions and facilitated the deportation of criminal immigrants. The amendments, as well as other pieces of legislation passed over many years, strongly suggest that Congress sought to make it easier to remove noncitizens convicted of crimes from the United States and to decrease and, in many instances, eliminate, judicial and administrative discretion from removal decisions.

In *Padilla v. Kentucky*,²⁷ the Supreme Court recognized the practical significance of the elimination of the JRAD and other reforms.²⁸ The Court observed that, through a series of amendments to the immigration laws, Congress “*dramatically raised the stakes of a noncitizen’s criminal conviction. . . . [D]eportation 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.*”²⁹ Because of the increased adverse immigration consequences of criminal convictions, the Court found that ineffective assistance of counsel claims under the Sixth Amendment may be based on the failure of defense counsel to advise a noncitizen defendant about the possible adverse immigration consequences—namely removal from the United States—of a criminal conviction under a plea agreement.³⁰

As the starting point for his Article, Jason Cade analyzes a sentencing order of influential federal district court judge Jack Weinstein that resembles a JRAD.³¹ In a detailed and nothing less than extraordinary sentencing order, the court summarized the essence of the case:

Defendant [Ignacio] Diaz Aguilar entered this country from Mexico when he was twenty years old. He met his wife *here* two years later.

²⁴ See Immigration Act of 1990, Pub. L. No. 101-649, § 505(a), 104 Stat. 4978, 5050 (1990).

²⁵ See Cade, *supra* note 2, at 40 n.17.

²⁶ See *id.* at 40 (discussing the statutory changes during this time period).

²⁷ 559 U.S. 356 (2010).

²⁸ See *id.* at 360.

²⁹ *Id.* at 364 (emphasis added) (footnote omitted).

³⁰ See *id.* at 366.

³¹ See *United States v. Aguilar*, 133 F. Supp. 3d 468 (E.D.N.Y. 2015).

Neither has papers. They had children *here*. The children are United States citizens. He was consistently employed *here* for fifteen years up until his arrest. He paid his income taxes *here* regularly. No criminal conduct other than this cause of conviction has been suggested. The crime charged appears to be a deviation from an otherwise legal way of life.³²

Over years of living in the United States, Ignacio Diaz Aguilar had developed deep ties to, and had been a contributing member of, the American community. The sentencing order emphasized the adverse impacts on Diaz Aguilar's family that would result from his removal from the United States.³³ Considering those impacts and the defendant's lack of any other criminal convictions, Judge Weinstein recommended "that the general practice of deportation *not* be followed."³⁴ He did so despite the lack of statutory authority for issuance of the recommendation.

For better or worse, it seems unlikely that many judges, especially absent congressional authorization, will frequently take the approach that Judge Weinstein did in *Aguilar*. Moreover, because the recommendation unquestionably does not legally bind the Executive Branch, it is not clear what impact, if any, the court's recommendation will have on Diaz Aguilar's possible removal from the United States. Despite Judge Weinstein's recommendation, the U.S. government ultimately could lawfully seek Diaz Aguilar's removal. In any event, some of the problems identified by Jason Cade would most effectively be addressed by a congressional re-authorization of the JRAD.

Unfortunately, congressional elimination of the JRAD is the tip of the proverbial iceberg. Through repeated reforms to the immigration laws, Congress, right or wrong as a policy matter, has made its intent clear—to facilitate the removal of criminal immigrants from the United States, to eliminate judicial and agency discretion in making removal decisions, and to make the immigration laws especially tough on immigrants convicted of crimes. To systematically reduce the harshness of the laws passed by Congress, wholesale reform of the immigration laws by Congress—not executive or judicial action at the margins of the removal process—would be preferable. Part III of this commentary returns to this topic.

³² *Id.* at 470.

³³ *See id.* at 479.

³⁴ *Id.* at 470.

II

THE RACIALLY DISPARATE IMPACTS OF CONTEMPORARY CRIME-BASED REMOVALS

One critically important characteristic of the modern criminal removal system—its racially disparate impacts—is not analyzed in much of the extant scholarship critically assessing the immigration consequences of criminal convictions. However, it alone justifies fundamental changes to the modern criminal removal system.

Even if race tends to be submerged in the public debate over immigration reform, it is front and center of the modern removal system. Nor is it mere coincidence that Ignacio Diaz Aguilar was a noncitizen from Mexico. Ninety-six percent of the noncitizens removed annually from the United States originally came from Mexico and Central America.³⁵ Latina/o immigrants are vastly overrepresented in removals in comparison to their percentage of the overall immigrant population.³⁶

The operation of the criminal justice system in the United States is the key to understanding the racial disparities in removals. Tragic events regularly make the national news and demonstrate that race and racism, unfortunately, are deeply embedded in the enforcement of the criminal laws.³⁷ Today, Latina/os and African Americans without question are disproportionately represented in the criminal justice system.

Few informed observers would dispute that the United States as a nation has considerable work to do to eliminate the undue influence of race on the American criminal justice system and restore the legitimacy of that system in the eyes of the general public.³⁸ Through practices such as racial profiling in traffic stops that is part and parcel of the “war on drugs,”³⁹ state and local police agencies systematically

³⁵ See SIMANSKI, *supra* note 8, at 6 (“Mexican nationals accounted for 72 percent of all aliens removed The next leading countries were Guatemala (11 percent), Honduras (8.3 percent), and El Salvador (4.7 percent). *These four countries accounted for 96 percent of all removals*”) (emphasis added).

³⁶ See Kevin R. Johnson, *Racial Profiling in the “War on Drugs” Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REF. 967, 976–77 (2015) (discussing the overrepresentation of Latinas/os among the noncitizens removed from the United States).

³⁷ See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 C. W. RES. L. REV. 993, 1020–21 (2016) (summarizing facts about the much-publicized 2015 tragedy in San Francisco involving killing of young woman, allegedly by an undocumented immigration with a long history of criminal problems).

³⁸ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (documenting the re-emergence of a caste-like system in the United States resulting from the incarceration of millions of African Americans).

³⁹ See generally Kevin R. Johnson, *How Racial Profiling in America Became the Law of the*

target Latina/os and African Americans in criminal law enforcement. Such targeting contributes significantly to the racial disparities in criminal arrests and convictions.

Few commentators have thoroughly analyzed the racial impacts of directly tying immigration removals to the racially-suspect criminal justice system.⁴⁰ However, by linking the removals to that system, the Executive Branch locks in the racially disparate impacts in removals. The inexorable result is that Latina/os are overwhelmingly represented in the nation's removals.

Two relatively recent decisions in which the Supreme Court rejected orders of removal of lawful permanent residents from Mexico provide insights into how the contemporary removal system has racially disparate impacts. In *Lopez v. Gonzales*,⁴¹ the Court rejected the Justice Department's contention that a lawful permanent resident from Mexico convicted under a state law for aiding and abetting another person's possession of cocaine constituted an "aggravated felony" under the federal immigration laws, requiring mandatory removal.⁴² Similarly, in *Carachuri-Rosendo v. Holder*,⁴³ the Supreme Court set aside a removal order of a lawful permanent resident from Mexico who had two minor drug possession convictions.⁴⁴ In both cases, the Executive Branch unsuccessfully sought to remove from the United States immigrants from Mexico who were what can be reasonably characterized as small-time drug offenders caught in the dragnet known as the "war on drugs."

The taint of race in criminal law enforcement has immigration removal consequences. It is not self-evident that, despite the weight of public opinion to the contrary, immigrants are a primary source of the nation's crime problems. Indeed, despite the exaggerated claims that the nation is being overrun by criminals from foreign lands, social

Land: United States v. Brignoni-Ponce and *Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (analyzing the prevalence of racial profiling in modern criminal and immigration enforcement in the United States).

⁴⁰ For exceptions, see Johnson, *supra* note 36 (analyzing the disparate racial impacts of the modern criminal removal system); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015) (same). See generally David B. Oppenheimer et al., *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1 (2016) (examining the history of racism and its enduring legacy in American immigration law and its enforcement). Jason Cade has previously acknowledged the racial disparities in the enforcement of the criminal laws on noncitizens of color. See Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1806-07 (2013).

⁴¹ 549 U.S. 47 (2006).

⁴² See *id.* at 52.

⁴³ 560 U.S. 563 (2010).

⁴⁴ See *id.* at 566.

science research has consistently found that immigrants—including those from Mexico and the rest of Latin America—are on average *more*, not *less*, law-abiding than U.S. citizens.⁴⁵

III

SEPARATION OF POWERS IN THE ENFORCEMENT OF THE IMMIGRATION LAWS

The lack of discretion under the criminal removal provisions of the U.S. immigration laws is a product of the laws passed by Congress. Congress, for example, bears responsibility for eliminating the procedural device known as the JRAD, the focal point of Jason Cade's Article. Congress also has consistently and dramatically expanded the criminal removal provisions and eliminated judicial and agency discretion from many removal decisions. In the end, Congress would seem to be the natural branch of government expected to most effectively reform the criminal removal provisions of the immigration laws.⁴⁶

Jason Cade has conceded that "Congress bears primary responsibility for the shift in equitable discretion from adjudicators to enforcers in the modern immigration scheme. *The most direct possibilities for redress also lie with Congress.*"⁴⁷ Cade undoubtedly is correct in that assessment. He and other commentators have outlined practical legislative reforms that would restore greater discretion and proportionality to individual removal decisions based on criminal convictions.⁴⁸ Those reform proposals unfortunately have not gained much traction in Congress. There is little reason to expect any change in the near future.

Return of the JRAD also suggests actions by branches of the U.S. government other than Congress to address the current overbreadth of the criminal removal provisions. This argument moves toward a more

⁴⁵ See, e.g., Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 625–26 (2015) (comparing data on criminality among immigrants and U.S. citizens).

⁴⁶ See, e.g., Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 81–83 (2013) (advocating for the reform of the criminal removal provisions of the U.S. immigration laws).

⁴⁷ Cade, *supra* note 1, at 714 (emphasis added).

⁴⁸ See, e.g., *id.* at 714–19; Bill Ong Hing, *Re-Examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools*, 8 HARV. L. & POL'Y REV. 141, 163–74 (2014) (proposing reforms to the criminal removal provisions of U.S. immigration laws); 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, 209–13 (2012) (same); Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 689–97 (2012) (same).

controversial approach to addressing the harsh impacts of the immigration laws on criminal removals: “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.”⁴⁹ One is left uncertain why, despite congressional mandates to the contrary, the Executive Branch should assume the responsibility to “ensure proportionality” in removal decisions.

Congress has enacted the law governing criminal removals. That law, generally speaking, should be enforced by the Executive Branch.⁵⁰ This is the heart of the separation of powers argument at the core of the claims recently before the Supreme Court in *United States v. Texas*,⁵¹ the challenge by twenty-six states to President Obama’s controversial deferred action program that would provide limited protection from removal to undocumented immigrant parents of U.S. citizens and lawful permanent residents.⁵² Commentators who challenged the lawfulness of the proposed program emphasized the limits on executive discretion in granting relief from removal and contended that the deferred action program exceeded those limits.⁵³ In contrast, in calling for the executive to protect noncitizens whose removal is required by law, Cade relies on the “vast” discretion afforded to the Executive Branch by Congress in the enforcement of the immigration laws.⁵⁴ His approach lends support to the Obama administration’s use of enforcement discretion in the deferred action program.

To avoid the political controversy that would be generated by claims that the Executive Branch is usurping congressional authority, it is preferable for Congress to narrow the criminal removal grounds; in addition, Congress should ensure greater discretion in the courts and the immigration bureaucracy, including the immigration courts. In

⁴⁹ Cade, *supra* note 2, at 44.

⁵⁰ See generally Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (analyzing the constitutional distribution of power between the President and Congress in the enforcement of the U.S. immigration laws).

⁵¹ 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016).

⁵² See *id.* at 146 (affirming a preliminary injunction barring the implementation of President Obama’s expanded deferred action program).

⁵³ See, e.g., Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1185 (2015) (questioning the lawfulness of President Obama’s deferred action programs).

⁵⁴ See Cade, *supra* note 2, at 56 (“[T]he 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.”).

making decisions to remove noncitizens convicted of crimes. Congressional reauthorization of the JRAD would seem to be an appropriate reform in that general direction. Such a step, along with others, by Congress would tend to ensure that the Executive Branch and the courts possess the discretion necessary to more fairly apply the criminal removal provisions in individual cases. With such discretion, the courts and the Executive Branch could ensure that the removal of an immigrant fits the crime.

The central problem with relying on congressional action to reduce the contemporary overbreadth of the criminal removal provisions of the immigration laws is that Congress can hardly be expected as a political matter to pass ameliorative reforms. As discussed in Part I, Congress has responded to the political unpopularity of noncitizens with criminal convictions by consistently imposing increasingly greater, and mandatory, penalties on them. There unquestionably is little political sympathy—and considerable antipathy—for this subset of the immigrant population.

In endorsing executive action to moderate congressional intent with respect to criminal removals, Jason Cade suggests that the Executive Branch should exercise a more fine-tuned approach to targeting immigrants for removal instead of aggressively enforcing the law with respect to all noncitizens who have encountered the criminal law.⁵⁵ He specifically notes that the Department of Homeland Security “could decide to forgo removal proceedings against Aguilar as a matter of discretion.”⁵⁶ The Executive Branch through the issuance of guidelines governing the exercise of prosecutorial discretion has attempted to narrow enforcement of the criminal removal provisions to the most serious criminal offenders.⁵⁷ However, to this point, such guidelines have enjoyed little success in reducing the over-enforcement of the criminal removal provisions, resulting in devastating impacts on Latina/o immigrants and the greater Latina/o community.

Consistent with Cade’s critique of the criminal removal status quo, the Executive Branch could expand the use of prosecutorial discretion in an effort to ensure that removal efforts target serious criminal offenders who pose a danger to the community. Indeed, the Obama administration, to its credit, has already attempted to do so. In 2014, it abolished a much-criticized criminal removal program known as Secure Communities and simultaneously announced the creation of the

⁵⁵ See *id.* at 45–49 (calling for a more calibrated approach to crime-based removals).

⁵⁶ *Id.* at 47 (advocating increased agency discretion in crime-based removal decisions).

⁵⁷ See *id.* at 36 n.1 (suggesting a more fine-tuned approach to crime-based removals).

Priority Enforcement Program (PEP).⁵⁸ The stated intent of the new program is to abandon the overbroad efforts to remove criminal offenders required by Secure Communities. The new program purportedly aims to restrict removal efforts to immigrants convicted of the most serious crimes. To that end, PEP limits requests for immigration “holds” by state and local law enforcement to noncitizens actually convicted of serious crimes rather than noncitizens merely arrested for any crime.

Unlike the deferred action program challenged in *United States v. Texas*, PEP failed to attract much public attention. However, any broader announcement of a blanket—as opposed to individualized—determination of prosecutorial discretion, would likely result in a political backlash from proponents of aggressive immigration enforcement. Such a response followed the announcement of the Obama administration’s deferred action program and resulted in litigation.

Besides calling for executive action, Cade has suggested that the federal courts should strive to bring greater equity to the decisions to remove criminal immigrants.⁵⁹ How that might be accomplished is far from certain. The courts generally are limited to applying, not reforming, the law. Concerns, for example, arose when the courts resisted the federal sentencing guidelines passed by Congress for criminal offenses.⁶⁰

The courts, including the Supreme Court, have shaped the criminal removal regime within conventional constitutional constraints. The courts have been unwilling to sanction the removal of criminal immigrants when doing so would contravene the language of the statute.⁶¹ In a similar vein, the Court has refused to foreclose judicial

⁵⁸ See Memorandum from Jeh Charles Johnson, Secretary, U.S. Department of Homeland Security to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, Megan Mack, Office of Civil Rights and Civil Liberties, Philip A. McNamara, Assistant Secretary for Intergovernmental Affairs 2–3 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

⁵⁹ See Cade, *supra* note 1, at 723 (“If Congress or the Executive do not take further steps to make the deportation system proportional, the responsibility to promote the value of individualized equity-based decision making in regard to life-defining legal choices about deportation will fall to federal courts.”).

⁶⁰ See *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (upholding congressional sentencing guidelines in the face of a constitutional challenge).

⁶¹ See, e.g., *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990–91 (2015) (setting aside a removal order based on a drug paraphernalia conviction); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1693–94 (2013) (setting aside a removal order based on a conviction for simple possession of a small amount of marijuana); see also *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 573–75 (2010) (prescription drug possession conviction); *Lopez v. Gonzales*, 549 U.S. 47, 53–55

review of immigration orders when such action would raise serious constitutional questions.⁶²

CONCLUSION

By focusing on Judge Weinstein's sentencing order in the case of Ignacio Diaz Aguilar, Jason Cade's *Return of the JRAD* sheds much-needed light on the serious problems that exist in the modern system of criminal removals of noncitizens from the United States. Cade and other commentators view the most pressing problem of contemporary immigration enforcement policy as the adverse human consequences of punitive immigration laws that subject virtually all noncitizen criminals to mandatory removal. The problematic nature of the criminal removal system is exacerbated by the fact that the removal process relies heavily, if not primarily, on a criminal justice system that is criticized for its deep and enduring racial bias. In contrast, the public and many policy-makers generally seem to understand the primary pressing public policy problem as the failure to remove immigrants who have committed crimes from the United States.

Ill-advised as they may be, Congress has passed many tough-on-criminal-alien reforms. They have been aggressively—at times, over-aggressively—enforced by the Executive Branch, including the Obama administration. The federal courts, in turn, have generally enforced the tough criminal removal laws. They, however, have stepped in when the Executive Branch went beyond the language of the immigration statute.

At the margins, the Executive Branch and the courts can soften some of the harsher edges of the enforcement of the criminal removal provisions of the immigration laws. More lasting solutions, however, would appear to be more conventionally and constitutionally accomplished through acts of Congress that make the immigration laws more sensitive to the human interests at stake in removal decisions. Congressional reforms also are much less likely than broad exercises of discretion by the Executive Branch to generate political resistance and litigation challenges.

How to persuade Congress to pass ameliorative laws that temper the modern criminal removal system is the daunting political task. The difficulty of bringing about reasonable reform is one of the reasons why Jason Cade and others, including President Obama, have explored

(2006) (conviction for aiding and abetting possession of drugs).

⁶² See *INS v. St. Cyr*, 533 U.S. 289, 300-05 (2001) (interpreting a congressional limitation on judicial review of a removal order of a noncitizen with a criminal conviction to not preclude habeas corpus review in order to avoid "serious constitutional questions").

alternatives to legislation, such as the exercise of prosecutorial discretion and deferred action, even though those approaches are less permanent in scope than reforms accomplished by congressional action. Such efforts, even if well-intentioned, are likely to be politically controversial.