

RESPONSE

A NEW HOPE: BRINGING JUSTICE BACK INTO REMOVAL PROCEEDINGS

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

In his article, Return of the JRAD, Professor Jason Cade makes a strong and viable case that the Department of Homeland Security (DHS) can and should take into account nonstatutory Judicial Recommendations Against Deportation (JRADs) and other criminal justice signals of diminished criminal culpability when deciding whether or not to charge a noncitizen with deportability. Professor Cade's proposal is a good one. The overall effects of his proposal will be modest. It can neither eliminate racial disparities in the criminal justice system and deportations nor end capricious distinctions between similarly situated criminal defendants in removal proceedings. On the other hand, it has no notable downsides and some significant potential upsides. Part I explains why exercising discretion along the lines that Cade proposes is firmly within DHS's discretion and why such modest and rational exercises of discretion are unlikely to spark political backlash. Part II elaborates upon the potential benefits of Cade's proposal. First, by encouraging criminal sentencing judges to issue nonstatutory JRADs, the Cade proposal promises to provide DHS with useful information otherwise unavailable at the charging stage, thus increasing charging fairness. At the same time, his proposal would make a positive change in the way that at least some criminal sentencing judges think about immigration consequences in criminal sentencing. Ultimately, it might even change the way that we talk, think, and write about the nexus of immigration and criminal law—better exposing the common failings and the interconnections of these systems to scholars and practitioners other than those who routinely work at their intersection.

In his insightful article *Return of the JRAD*, Jason Cade makes a strong and viable case that the Department of Homeland Security (DHS) can and should take into account judicial recommendations against deportation and other criminal justice signals of diminished criminal culpability when deciding whether or not to charge a

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noncitizen with deportability. Although Congress long ago repealed the little-used statutory mechanism mandating that immigration officials give effect to Judicial Recommendations Against Deportation (JRADs), Cade argues that judges in criminal proceedings should, *sua sponte*, weigh in on the merits of deportation at sentencing, and that DHS ought to take this judicial counsel into account discretionarily when deciding whether or not to initiate removal proceedings.¹ Cade also suggests that DHS take into account other criminal justice signals, like pardons, expungements, and deferred adjudications in criminal cases, when deciding whether or not to initiate deportation proceedings.² He is absolutely right.

Legislative immigration reform is nowhere on the horizon. Congress has repeatedly refused to overhaul the nation's immigration laws and shows no sign of having any intention of doing so in the near future.³ At the same time, because the number of deportable noncitizens far exceeds the government's capacity to remove them, administrative enforcement discretion is an inevitable part of the enforcement of existing immigration law. Legal scholars should therefore help policy makers identify creative and lawful administrative measures that can mitigate the most unjust effects of a deportation system that targets tens of thousands of long-term residents for removal every year.⁴ For his efforts in this regard,

¹ Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36, 45–48 (2015).

² *Id.* at 48–50. Remarkably, sentences that are later pardoned or expunged, and even those that are entered but deferred pending completion of diversionary programs, all count as “convictions” for purposes of deportation. See 8 U.S.C. § 1101(a)(48) (2012) (defining conviction for INA purposes); see also Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 368–69 (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).

³ See, e.g., Dan Nowicki, *No Comprehensive Immigration Reform Until 2017?*, ARIZ. REP. BLOG (Feb. 9, 2015, 10:54 AM), <http://www.azcentral.com/story/azdc/2015/02/07/immigration-reform-2017-mccain-flake-gang-of-eight/22939173/> (“Though some Republicans last year argued that a GOP-run U.S. House and U.S. Senate might be inclined to tackle immigration reform early this year . . . most observers now say there appears to be little chance for far-reaching legislation . . .”). Prior to the 2014 congressional elections, the nation experienced a nearly twenty-year period in which comprehensive immigration reform bills were periodically introduced in Congress but were never enacted into law. See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act, S. 755, 113th Cong. (2013); Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong. § 601 (2007).

⁴ U.S. Department of Homeland Security Data reveals that between 1997 and 2007, the federal government deported 87,884 lawful permanent residents from the United States. JONATHAN BAUM ET AL., UNIV. OF BERKELEY SCH. OF L., INT’L HUM. RTS. CLINIC, IN THE CHILD’S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 4 (2010), https://www.law.berkeley.edu/files/Human_Rights_report.pdf. Many of the

Professor Cade is to be both commended and imitated.

Professor Cade is his own strongest critic. He is careful to note and to explain the fact that reliance on the criminal justice system is generally a poor form of *post hoc* immigration screening,⁵ but, unfortunately, one that we are unlikely to get away from any time soon. He knows that tweaking this system is not a fix, but a band-aid.

Professor Cade also acknowledges and addresses in detail the most significant problems with his band-aid proposal. First, he takes on the argument that his proposal might be seen as an unlawful usurpation of legislative authority.⁶ Second, he addresses the argument

unauthorized immigrants who have been removed in the same period also have been long-time residents of the country. As of 2014, the median length of residence of the unauthorized population was nearly thirteen years. Jeffrey S. Passel et al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled*, PEW RES. CTR. (Sept. 3, 2014), <http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/>.

Overall removal numbers have skyrocketed in recent years, increasing more than twentyfold in the thirty-year period from 1981 to 2011—from 17,379 to 391,953. DEP'T OF HOMELAND SEC., ALIENS REMOVED OR RETURNED: FISCAL YEARS 1892 TO 2011, YEARBOOK OF IMMIGRATION STATISTICS: 2011 ENFORCEMENT, <http://www.dhs.gov/yearbook-immigration-statistics-2011-3>. A recent study found that Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CPB) formally removed 3.7 million people between 2003 and 2013, not counting informal returns. MARC R. ROSENBLUM & KRISTEN MCCABE, MIGRATION POLICY INST., DEPORTATION AND DISCRETION: REVIEWING THE RECORD AND OPTIONS FOR CHANGE 1 (2014), <http://migrationpolicy.org/research/deportation-and-discretion-reviewing-record-and-options-change>; see also Bill Ong Hing, *Ethics, Morality, and Disruption of U.S. Immigration Laws*, 63 U. KAN. L. REV. 981, 1019 (2015) (documenting enforcement statistics and specific cases and describing and endorsing “disruption of immigration enforcement or unreasonable immigration policies”); DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 3–18 (2012) (documenting the extent and costs of recent immigration enforcement efforts).

⁵ See Cade, *supra* note 1, at 43. Eric Posner and Adam Cox have argued that the current system could be seen to reflect an evolution of administrative design choice, in which there is little front-end screening (i.e., high rates of unauthorized migration) but more systemic post hoc immigrant screening. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 835–39 (2007). The argument appears more theoretically than factually premised, insofar as even the authors would be unlikely to suggest that the current system operates as a well-designed screening system. Cade persuasively explains why contact with the criminal justice system is a poor proxy for immigrant desirability. See Cade, *supra* note 1, at 43–44, 57–58.

Unlike Professor Cade, I am uncertain that the criminal justice system can send reliable signals in the absence of additional information. Even in the case of most so-called “violent” offenders, those arrest, charging, and sentencing decisions are also likely to be infected with the same sorts of biases that occur with respect to minor offenses. Indeed, the very category of violent crime is itself malleable. See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 575 (2011) (“[T]he ‘violent’ character of certain criminal offenses is not entirely pre-legal. Across time and jurisdictions, the criminal law has constructed violence differently.”); cf. Cade, *supra* note 1, at 43, 58 (limiting his concerns about poor signaling to minor offenses).

⁶ Cade, *supra* note 1, at 53–58.

that his proposal will result in inconsistent applications of immigration law to noncitizens⁷ with similar criminal sanctions.⁸ Professor Cade takes very seriously the merits of both of these arguments and presents them fairly, but persuasively demonstrates that neither argument ultimately requires the rejection of his proposal.

With regard to the first argument concerning the limits of administrative discretion, Professor Cade argues that paying attention to the equities of individual cases is the essence of proper executive discretion.⁹ His proposal does not involve a “blanket—as opposed to individualized—application of prosecutorial discretion.”¹⁰ The sort of discretionary exercise that Cade proposes is precisely the sort of decision about whether or not to initiate deportation proceedings that the late Justice Scalia affirmed in his decision for the Court in *Reno v. AADC*.¹¹

With regard to the second argument—that the nonstatutory JRAD and related discretionary tools will be applied inconsistently—Professor Cade notes the undeniable fact that these inconsistencies are already the dominant feature of the criminal removal system. His proposal does nothing more than insert some leniency, albeit unpredictably and inconsistently, into this incredibly capricious system. Such a proposal can only ameliorate and will not worsen what is admittedly a very bad situation. While his view that defense

⁷ The term “noncitizen” can seem derogatory to some readers, but for legal reasons, it is problematic to use the terms “immigrant” and “foreign national” in discussing deportation. Millions of immigrants are citizens and are not (legally) deportable, and many foreign nationals also hold dual U.S. citizenship and are therefore citizens. Noncitizens who are also non-nationals are the only people who are deportable. “Noncitizens” is the shorthand term I will use for this group. In so doing, I do not attach any particular normative valence to U.S. citizenship.

⁸ Cade, *supra* note 1, at 58–60.

⁹ See Cade, *supra* note 1, at 56 (describing how the system only functions with certain amounts of executive discretion).

¹⁰ Cf. Kevin R. Johnson, *Back to the Future? Returning Discretion to Crime-Based Removal Decisions*, 91 N.Y.U. L. REV. ONLINE 129 (2016). Dean Johnson observes that programmatic exercises of administrative discretion have recently become political lightning rods in immigration law and policy. The litigation over the Obama Administration’s Department of Homeland Security’s announced program for deferred action for the parents of lawful permanent residents and U.S. citizens well illustrates this irrefutable point. For more on this point, see discussion *infra* notes 16–25. But Cade’s proposal is one that is structured around individual grants of discretion, not a top-down program governing agency-wide exercises of discretion.

¹¹ In *Reno v. American-Arab Antidiscrimination Committee*, 525 U.S. 471, 482–87 (1999), the Court upheld the thrust of 8 U.S.C. § 1252(g) (2012), which bars judicial review of DHS decisions about whether to “commence proceedings,” against an attempt to weaken the provision. Justice Scalia noted that the decision about whether or not to bring a proceeding in an individual case lies at the heart of executive discretion, both in general and as delegated to the executive branch by the relevant statutes.

attorneys will be well-positioned to argue effectively for nonstatutory JRADs may be sanguine,¹² at least his proposal stands a chance of improving matters in cases where defense attorneys are capable, judges are receptive, and DHS exercises discretion wisely.

Indeed, if Professor Cade can be criticized at all—and here, I really have to stretch for criticism—it is only because he does not defend his proposal strongly enough against charges that it will impede broader reform, nor does he fully extoll the potential benefits of his policy. This essay expands on Professor Cade’s defense of his own proposal in two key regards. First, I explain why I believe that any concerns about backlash from this proposal are overblown. Second, I discuss why his proposal would not only alleviate some of the harsh racial inequities of the criminal justice system, but might ultimately generate productive anti-racist law reform.

I.

ON BACKLASH

In addition to the two potential criticisms already discussed, Professor Cade briefly mentions in his essay a third possible criticism of his proposal, namely, that “some commentators might argue that the rise of administrative reliance on disproportionality rules of thumb would discourage more lasting reform measures.”¹³ He responds that “[a]ny such criticism is overly speculative,” and that Congress seems unlikely to engage in any reform any time soon, with or without his proposed reforms.¹⁴ This seems correct, but is also too modest. In fact, not only is Cade’s proposal unlikely to discourage lasting reform measures, it might actually promote them.

Both Professor Cade’s article and Dean Kevin Johnson commentary on it note the risk that Cade’s proposed measures could ignite political backlash.¹⁵ This argument finds support in recent events surrounding widescale deferred action programs announced by the Obama Administration. At first, the administration was able to implement these programs with little pushback. In June 2012, Janet

¹² See Cade, *supra* note 1, at 51 (arguing that defense counsel should have the necessary information to argue for immigration leniency). In fact, defense counsel may not always even understand the potential immigration consequences of particular criminal convictions, let alone the equities they would need to argue to avoid them. See, e.g., Lilia S. Stantcheva, *Padilla v. Kentucky: How Much Advice is Enough*, 89 N.Y.U. L. REV. 1836, 1849–56 (2014) (describing mixed lower court responses in cases in which defense counsel, notwithstanding their obligations under *Padilla v. Kentucky*, gave overly general and imprecise advice about the immigration consequences of potential convictions).

¹³ Cade, *supra* note 1, at 60.

¹⁴ *Id.*

¹⁵ Cade, *supra* note 1, at 60; Johnson, *supra* note 10.

Napolitano, then Secretary of the Department of Homeland Security, announced the Deferred Action for Childhood Arrivals (DACA) program.¹⁶ DACA deprioritized the removal of certain qualifying noncitizens unlawfully present in the United States since childhood. Their designation as recipients of “deferred action” also triggered the statutory and regulatory authorization of work permits¹⁷ and driver’s licenses.¹⁸ The program was successfully implemented in the years that followed. About 600,000 noncitizens have received a deferred action designation under the DACA program, and their economic and social outcomes have improved markedly as a result of the program.¹⁹ Legal challenges to the program met with little success as courts found that the federal employees and state governors who filed lawsuits in opposition to DACA lacked standing to bring these suits.²⁰

Hoping to build on the success of DACA, in November 2014, Secretary of Homeland Security Jeh Johnson announced a proposed expansion of the DACA program (DACA+) and the Deferred Action for Parents of U.S. Citizens and Lawful Permanent Residents (DAPA)²¹ programs. DACA+ would have expanded the age range of eligible DACA recipients and DAPA would have extended deferred action to qualifying parents of U.S. citizens and lawful permanent residents

¹⁶ See Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (setting forth the guidelines for receiving deferred action under the program) [hereinafter Napolitano, DACA Memorandum].

¹⁷ See 8 U.S.C. § 1324a(h)(3) (2012); 8 C.F.R. § 274a.12(c)(14) (2014) (authorizing work permits for noncitizens who are granted deferred action); Paul Wickham Schmidt, *Employment Authorization for Aliens: Part I*, 89 IMMIGR. BRIEFINGS 1 (May 1989). DACA applicants were required to submit simultaneous applications to DHS for work authorization, and indeed, the work authorization application constituted the bulk of the DACA fee, accounting for \$395 of the \$465 price tag. This must be paid with each application for renewal, currently required once every two years.

¹⁸ The availability of drivers’ licenses for individuals who receive deferred action is governed by the REAL ID Act of 2005. See Pub. L. No. 109–13, § 202(c)(1)(B)(viii), 119 Stat. 231, 312–13 (2005) (authorizing drivers’ licenses for those with approved deferred action status). Most states have structured their drivers’ license laws to track these federal categories of individuals eligible to receive a driver’s license.

¹⁹ See, e.g., ROBERTO G. GONZALES & ANGIE M. BAUTISTA-CHAVEZ, TWO YEARS AND COUNTING: ASSESSING THE GROWING POWER OF DACA 2–4 (2014), http://www.immigrationpolicy.org/sites/default/files/docs/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf (finding marked improvements in the economic and social status of immigrants benefitting from the DACA program).

²⁰ See *Crane v. Johnson*, 783 F.3d 244, 247 (2015) (affirming dismissal of a claim against DACA for lack of subject matter jurisdiction).

²¹ The program was originally known as “Deferred Action for Parental Accountability,” which is why it is abbreviated as DAPA. The abbreviation has survived even as the program name has morphed.

(LPRs).²² But that second announcement, which outlined programs that would have covered an estimated four million migrants in the United States, triggered a political backlash with legal consequences. The governors of twenty-six states filed suit in the Southern District of Texas against the Obama Administration, and in February 2015, U.S. District Court Judge Andrew Hanen ruled that the programs violated the Administrative Procedure Act.²³ He enjoined both DACA+ and DAPA (but not the original DACA program).²⁴ In May 2015, the Fifth Circuit denied the government's motion to stay that decision,²⁵ and in November 2015, went on to affirm District Court Judge Hanen's ruling on the merits.²⁶ On June 23, 2016, the Supreme Court failed to resolve the question, and issued a per curiam opinion that simply stated that the judgment of the Fifth Circuit was "affirmed by an equally divided court."²⁷ The injunction therefore stands and the matter is slated to return to Judge Hanen for a determination of the case on the merits.

The legal challenges to DACA+ and DAPA revealed that in the highly politicized world of immigration policy, even a policy allowing for the exercise of prosecutorial discretion through individualized, case-by-case evaluations can generate political opposition and legal challenges.²⁸ But that does not mean that such programs are

²² Memorandum from Jeh C. Johnson, Sec'y of Homeland Sec., to León Rodriguez et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter Johnson, DAPA Memorandum].

²³ *Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015) [hereinafter *Texas I*]; see also *Texas v. United States*, No. B-14-254, 2015 WL 1540022, at *8 (S.D. Tex. Apr. 7, 2015) [hereinafter *Texas II*] (denying motion for stay pending appeal). Judge Hanen also issued an unusual "supplemental order" without any request for such by the parties. See Supplemental Order, *Texas v. United States*, No. B-14-254 (S.D. Tex. May 8, 2015), <http://klhn.co/Texas-v-US-SDTex-ECF-248> [hereinafter *Texas III*] (adding additional facts to the previous order). For a critical analysis of these orders, see generally Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015). For a favorable assessment of Judge Hanen's decision, see Michael W. McConnell, *Why Obama's Immigration Order Was Blocked*, WALL ST. J. (Feb. 17, 2015), <http://www.wsj.com/articles/michael-mcconnell-why-obamas-immigration-order-was-blocked-1424219904>.

²⁴ See *Texas I*, *supra* note 23, at 606.

²⁵ See *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) [hereinafter *Texas IV*].

²⁶ See *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015) [hereinafter *Texas V*] (affirming the district court's preliminary injunction).

²⁷ *United States v. Texas*, No. 15-674, slip op. at 1 (June 23, 2016).

²⁸ The DAPA criteria would require DHS officials to make individualized determinations about each applicant before making a decision to defer removal proceedings. In addition to making the discretionary determination that an individual is not an "enforcement priority" as outlined in other departmental memos, the United States Citizenship and Immigration Services (USCIS) officials administering DAPA were specifically charged with broad

unlawful,²⁹ nor does it mean that they should not be pursued.

Most immigration law scholars have concluded that DACA and DAPA are (or would be, in the case of DAPA) lawful exercises of executive authority.³⁰ They would also likely agree on the lawfulness of Professor Cade's proposal, of course, but so would many of the opponents of DAPA. A relatively small number of discrete decisions based on highly individualized information seems like the essence of the discretionary judgments supported not just by DACA and DAPA's proponents,³¹ but even by their opponents.³² Indeed, Congress has expressly required DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime."³³ This proposal fits neatly within the scope of that mandate.

The real question is not one of law but of politics: Should DHS pursue Professor Cade's proposal, or does this run too great a risk of generating political backlash that will endanger both this and future

discretionary authority to make the determination that the migrant "present[s] no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." See Johnson, DAPA Memorandum, *supra* note 22, at 4.

²⁹ The Immigration and Nationality Act delegates broad discretion to the Secretary of the Department of Homeland Security to implement immigration law and the executive branch has a long history of creatively exercising executive authority within the bounds of congressional delegation through the immigration laws. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 151 (2015) ("[T]he modern structure of immigration law effectively delegates vast screening authority to the President. The interlocking statutory and political developments we describe have opened up a tremendous gap between law on the books and on the ground. . . . The keys to the immigrant screening system effectively belong to the Executive. . . .").

³⁰ See generally Brief of Immigration Law Professors as Amici Curiae in Support of Reversal, *United States v. Texas*, 136 S. Ct. 1535 (2016) (No. 15-40238) (signed by over 100 law professors who teach immigration law at AALS member schools); see also Kalhan, *supra* note 23, at 64–66 (2015) (outlining an argument in support of the legality of the DACA+ and DAPA programs); Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 1–2 (2015) (same). Both Professor Cade and I signed the law professors' brief.

³¹ See Dep't of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. 1, 2 (2014) [hereinafter OLC Memorandum], <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (concluding DACA and DAPA fall within established parameters of executive discretion).

³² See, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 842–43 (2012) (discussing equitable considerations in a positive manner when made in individual cases, but not when established ex ante for an entire class); cf. Brief in Opposition, *Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, United States v. Texas*, 136 S. Ct. 1535 (2016) (No. 15-674), (providing three reasons that DAPA violates the APA, none of which would apply to Professor Cade's proposal).

³³ Department of Homeland Security Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, 251.

immigration reform?

In my view, the policy is worth pursuing. First, it is hard to see why this policy would be a political lightning rod. Because the Cade proposal allows courts to suggest stays of removal in cases where such stays are merited by an individual's equities and the facts of their criminal case, the individuals most likely to benefit from such a policy are residents with substantial positive equities or relatively minor (albeit deportable) criminal convictions. Theoretically, Congress could respond to such exercises of discretion by enacting legislation expressly prohibiting DHS from considering the equitable findings of criminal court judges in removal proceedings, but it is unclear why a majority in Congress would support such an odd and counterproductive measure. Indeed, prior congressional guidance cuts in the opposite direction.³⁴ Alternatively, and in line with Professor Cade's own analysis, backlash could take the form of legislative inaction. But that is just a continuation of the status quo. Nothing suggests that Congress is about to act in the absence of further discretionary executive actions.

With regard to executive backlash, the argument against Professor Cade's proposal would look much like the policy arguments made by DAPA opponents. Many opponents of DAPA argue that turnaround will be fair play, and that DAPA supporters will not like what they see under a future president who declines to enforce their favorite laws.³⁵ But presidents have made these types of nonenforcement decisions before; DHS's exercise of discretion in certain immigration cases does not create this issue. Nor does it provide new legal tools in support of such measures in other areas of law. As Professor Cade and others have argued, the immigration statute is exceptionally broad in its delegation of enforcement discretion.³⁶ Where, as here, broad statutory grants of enforcement discretion exist, it would seem that the most significant limits on the executive branch's enforcement decisions are political, not legal.

But what if an anti-immigrant demagogue were the next president? Would Professor Cade's program open the doors for new

³⁴ See, e.g., *id.*

³⁵ See, e.g., McConnell, *supra* note 23 ("If this president can create a new legal status for aliens unlawfully present under the terms of the Immigration Act, future presidents will have the same authority to employ broad notions of 'prosecutorial discretion' to gut the enforcement of whichever laws they dislike . . .").

³⁶ See, e.g., Cade, *supra* note 1, at 53 ("With respect to domestic enforcement, Congress has explicitly delegated authority to DHS to establish enforcement policies and priorities in its administration of immigration law."); see also Kalhan, *supra* note 23, at 67 (noting the same historical delegation of discretionary authority in granting deferred status).

and dangerous exercises of executive discretion? If such a candidate swept to power after the initiation of a JRAD program, the new president could eliminate the program—as he could eliminate DACA—and he could deport to the maximum capacity permitted by the budget. Indeed, he could undo a number of other administrative relief measures put into place by the Obama Administration and deport those previously protected. He could choose to deport any of the tens of thousands of individuals granted deferred action status outside of the rubric of DACA and DAPA, or he could choose to reorder the enforcement priorities set by the current administration so long as this reordering was consistent with any applicable congressional specifications. But no one would have argued even before DACA and DAPA that an incoming president lacked the power to change administrative deportation priorities. And, in deporting to the full extent permitted by the budget, the new president would merely be aligning his practices with those of former President George W. Bush and, at least until recently, current President Obama.

A new, anti-immigrant president would presumably have his own priorities for deportation and we can assume he would pursue them as vigorously as congressional budget allocations would allow. That is not a happy prospect for those of us who would favor a far more constrained use of deportations, but it is hardly a new power or a new concern. At a minimum, express statutory and constitutional barriers provide procedural protections that would set some outer limits on any overly aggressive efforts to speed deportations.³⁷

In short, it is hard to conceive of any way that Professor Cade's proposal either would stymie immigration reform or generate novel forms of enforcement excesses. It seems more likely to improve administrative rationality in a relatively low-profile way. In fact, it seems more likely to spur than to thwart reform.

II.

ON REFORM

Professor Cade argues that his proposal is unlikely to prevent more expansive future reforms. I agree, but I would take the argument further. I believe that his proposal has the potential to spur reforms in

³⁷ For over 100 years, it has been a constitutional truism that individuals in deportation proceedings are entitled to certain basic due process protections. *See Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903) (granting due process rights to those noncitizens who have become “a part of [the] population”). Moreover, the Immigration and Nationality Act provides specific procedural protections for individuals in removal proceedings. *See* 8 U.S.C. § 1229a(b)(4) (2012) (outlining the procedural rights of noncitizens in section 240 removal proceedings).

both the criminal justice and the immigration removal systems. In his response to Professor Cade, Dean Johnson cites to the sentencing case of *Mistretta v. United States* as evidence that courts are limited in their power to make outcomes more equitable.³⁸ This is true and correct, but I would suggest that post-*Mistretta* developments in sentencing point to the role that courts *can* play in spurring systemic reform when they give voice to their critiques.

It was not too long ago that the mandatory minimum sentences dictated by the federal sentencing guidelines were taken as a given in the federal criminal justice system. The fact that they were harsh and overly punitive was seen as a political problem, not a legal one. But judges insistently critiqued the injustice generated by these guidelines and expressed their own (seemingly futile) opposition.³⁹ Included among these judges, and surely not coincidentally, was Judge Jack Weinstein, whose humane decision in *United States v. Aguilar* provides Professor Cade's leading example of how the nonstatutory JRAD might function.⁴⁰

³⁸ Johnson, *supra* note 10. The *Mistretta* Court upheld the Sentencing Reform Act of 1984 as a constitutional delegation of powers. 488 U.S. 361, 412 (1989).

³⁹ Criticisms came from across the political spectrum. President Clinton's appointees John Gleeson and Jed Rakoff and President George W. Bush's appointee Paul Cassell have all been vocal critics of the sentencing guidelines, including in their judicial opinions. *See, e.g., United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (Casell, J.) ("To correct what appears to be an unjust sentence, the court also calls on the President—in whom our Constitution reposes the power to correct unduly harsh sentences—to commute Mr. Angelos's sentence to something that is more in accord with just and rational punishment."); *United States v. Dossie*, 851 F. Supp. 2d 478, 478 (Gleeson, J.) (E.D.N.Y. 2012) ("This case illustrates how mandatory minimum sentences in drug cases distort the sentencing process and mandate unjust sentences."); Memorandum Explaining a Policy Disagreement with the Drug Trafficking Offense Guideline, *United States v. Diaz*, at 1, No. 11-CR-00821-2 (E.D.N.Y. 2013), 2013 WL 322243, at *1 (Gleeson, J.) ("[T]he Guidelines ranges for drug trafficking offenses are not based on empirical data, Commission expertise, or the actual culpability of defendants. If they were, they would be much less severe, and judges would respect them more."). *See also* Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. BOOKS (May 15, 2015), <http://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges/> ("On one issue—opposition to mandatory minimum laws—the federal judiciary has been consistent in its opposition and clear in its message. As stated in a September 2013 letter to Congress submitted by the Judicial Conference of the United States . . . 'For sixty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentences and has supported measures for their repeal or to ameliorate their effects.'").

⁴⁰ *Compare* Statement of Reasons for Sentence Pursuant to 18 U.S.C. § 3553(c)(2), *United States v. Aguilar*, 133 F. Supp. 3d 468 (E.D.N.Y. 2015) (No. 14-CR-0668), *with* Cade, *supra* note 1, at 36–37, 45–47 (discussing Judge Weinstein's decision in *Aguilar*). Judge Weinstein ceased to handle federal drug cases because of his concern that the guidelines required him to impose "cruel[]" sentences in those cases. *See* Joseph B. Treaster, *2 Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES (Apr. 17, 1993), <http://www.nytimes.com/1993/04/17/nyregion/2-judges-decline-drug-cases-protesting-sentencing-rules.html>. More recently, he has criticized the severity of sentences in cases

After years of apparently futile protests, some unexpected things happened: The Supreme Court found that the Sentencing Guideline's mandatory minimum sentences were unconstitutional.⁴¹ Some judges are now using their discretionary function to sentence below the Guideline minimums.⁴² Sustained judicial criticism helped to provide momentum for these changes.

Judicial criticism may now help to spur even broader sentencing reform. Federal judges as a group have not been particularly active in critiquing the racial injustices of the Guidelines,⁴³ but that may be changing.⁴⁴ After *Booker*, it is not impossible to imagine that sustained judicial criticisms of racial injustices wrought by sentencing laws could help spur further sentencing reform, particularly if such criticisms are

involving convictions for possession of child pornography. See Douglas A. Berman, *Judge Jack Weinstein Disregards Severe Federal Child Porn Guidelines Again*, SENT'G L. & POL'Y (Jan. 30, 2016, 2:25 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2016/01/judge-jack-weinstein-disregards-severe-federal-child-porn-guidelines-again.html.

⁴¹ See *United States v. Booker*, 543 U.S. 220, 232, 245–46 (2005) (striking down as violation of Sixth Amendment right to jury trial the Sentencing Reform Act provision that created mandatory guidelines sentencing scheme in which a defendant's maximum sentence could increase based on judicial fact finding and preponderance of the evidence standard); *Gall v. United States*, 552 U.S. 38, 51 (2007) (clarifying that sentences are not unreasonable simply because they fall outside the Guidelines); *Kimbrough v. United States*, 552 U.S. 85, 108–09 (2007) (confirming that sentencing judges can depart from the Guidelines for policy reasons). Since *Booker* and *Gall/Kimbrough*, questions have arisen as to whether the resulting increased sentencing discretion has also increased racial disparities in sentencing. A 2010 report from the U.S. Sentencing Commission suggested this was the case. U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER REPORT'S* MULTIVARIATE REGRESSION ANALYSIS 3, 15–16 fig. B (2010), http://www.albany.edu/scj/documents/USSC_Multivariate_Regression_Analysis_Report_001.pdf (estimating *Booker* increased the federal sentencing gap between blacks and whites from 5.5% to 23.3%). In contrast, a study by Sonja Starr and M. Marit Rehavi concludes the opposite, and attributes the increased racial disparity that correlates with *Booker's* wake to other causes—most prominently prosecutorial charging decisions. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 5 (2013) (“Far from finding evidence that judges’ use of expanded discretion worsens disparity, we fail to find an increase in disparity and find suggestive evidence cutting in the opposite direction.”).

⁴² As of 2015, more than twenty percent of sentences reflected nongovernment sponsored departures below Guideline range. U.S. SENTENCING COMM'N, ANNUAL REPORT tbl. N (2015) <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/TableN.pdf>.

⁴³ Rakoff, *supra* note 39 (arguing that “[f]or too long, too many judges have been too quiet about... mass incarceration” which he attributes to “laws that were passed in response to the substantial rise in crime rates that began in the 1960s and continued through the 1980s” and particularly “mandatory minimum terms of imprisonment”).

⁴⁴ *Id.* (listing several federal district court judges who have openly denounced mass incarceration and summarizing Justice Anthony Kennedy's March 23, 2015 comments to a House subcommittee that “this idea of total incarceration just isn't working,” and that “it would be wiser to assign offenders to probation or other supervised release programs”).

part of a broader social movement.

In addition to encouraging sentencing reform, judicial criticisms and interventions have also spurred decarceration efforts. The severe prison overcrowding generated by California's harsh mandatory criminal sentences resulted in deteriorating prison conditions. Ultimately, those conditions led to repeated judicial interventions into the operation of California's prison system, culminating with the Supreme Court's decision in *Brown v. Plata*.⁴⁵ That decision, in turn, contributed to the enactment of some of the most sweeping criminal justice reforms that California has seen in recent history.⁴⁶ The changes have at times been ineffective and even counterproductive; they are certainly not enough.⁴⁷ But in California, they have opened up a space for a real political conversation about criminal justice reform and for further political change.⁴⁸

This is not to argue that criminal justice is now either fair or post-racial. Far from it.⁴⁹ There is a long road ahead before individuals whose race, class, gender, and disability make them the

⁴⁵ 563 U.S. 493, 545 (2011) (holding overcrowded conditions in California's prisons violated Eighth Amendment prohibition on cruel and unusual punishment, and ordering remedies). For a history of court intervention that led to this decision, see generally JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* (2014).

⁴⁶ Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 327 (2014) ("California has embarked on a prison downsizing experiment of historical significance. Facing a U.S. Supreme Court decision, *Brown v. Plata*, which ordered the state to reduce its prison population by twenty-five percent within two years, Governor Jerry Brown signed the Public Safety Realignment Act (AB 109). . . . The hope is that Realignment, with its focus on locally designed rehabilitative services, will not only reduce prison overcrowding but also the state's 64% recidivism rate—meaning that six out of ten people who left a California prison returned to a California prison within three years of release."); see also SIMON, *supra* note 45, at 155–72 (describing the California reforms prompted by the courts).

⁴⁷ See, e.g., Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1105–07 (2015); Katherine Beckett et al., *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238 (2016).

⁴⁸ For example, in the post-Realignment era, Governor Jerry Brown of California is now hoping to push further criminal justice reforms through ballot initiative, including a prisoner early-release program. John Myers, *Gov. Brown to Seek November Ballot Initiative to Relax Mandatory Prison Sentences*, L.A. TIMES (Jan. 27, 2016), <http://www.latimes.com/politics/la-pol-sac-jerry-brown-sentencing-reform-ballot-20160127-story.html> ("Rather than change sentencing policy, the proposal would allow corrections officials to more easily award credits toward early release based on an inmate's good behavior, efforts to rehabilitate or participation in prison education programs.").

⁴⁹ See, e.g., James Forman, Jr., *Racial Critique of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 46 (2012) ("There is overwhelming evidence that discriminatory practices in drug law enforcement contribute to racial disparities in arrests and prosecutions, and even for violent offenses there remain unexplained disparities between arrest rates and incarceration rates.").

disproportionate targets of legal and extralegal violence in the criminal justice system will be free of these harms. But for the first time in decades, these issues are part of serious national political discussions.⁵⁰

Just as the laws that have resulted in mass incarceration are subject to critique, there are a number of serious and important arguments that the current deportation system violates the Fifth Amendment due process guarantee of proportionality.⁵¹ To date, these proportionality arguments—which actually fare quite well in many legal systems around the world⁵²—have failed to gain legal traction in the United States. But the failure of these arguments is not inevitable. Professor Cade’s proposal would give judges a reason to go on the record about the potential immigration consequences of the convictions they enter, and to weigh in when they think the likely result is too harsh. If judges around the country begin to voice their concerns about disproportionality in individual cases (even if it is only some judges in some cases) this could increase the political viability of

⁵⁰ Peter Baker, *2016 Candidates Are United in Their Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), http://www.nytimes.com/2015/04/28/us/politics/being-less-tough-on-crime-is-2016-consensus.html?_r=0 (“[D]eclared and presumed candidates for president are competing over how to reverse what they see as the policy excesses of the 1990s and the mass incarceration that has followed. Democrats and Republicans alike are putting forth ideas to reduce the prison population and rethink a system that has locked up a generation of young men, particularly African-Americans.”). It remains to be seen whether and how any of these reforms—all of which are generally vague in their contours at this point—will be implemented post-election. But it seems significant that calls for reducing incarceration rates are now seen as politically salable rather than politically toxic.

⁵¹ See, e.g., KANSTROOM, *supra* note 4, at 146, 156–57, 211, 219 (describing the failure of U.S. courts to apply Fifth Amendment substantive due process guarantees to deportees); Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1246 (2013) (arguing “[d]eportation should only be utilized when it is a proportionate response to criminal activity”); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 520 (2007) (noting some “crime-related deportations 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 law 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) (stating immigration law “has not previously been subject to judicial review for conformity to constitutional proportionality principles arising under the Eighth Amendment’s Cruel and Unusual Punishment Clause”).

⁵² The European Court of Human Rights has found deportation unlawfully disproportionate in cases involving long-term residents with family members in EU member states. See, e.g., *Boutif v. Switzerland*, 2001-IX Eur. Ct. H.R. 9–10; *Üner v. Netherlands*, 2006-XII Eur. Ct. H.R. 18. Similarly, the Inter-American Commission of Human Rights has found U.S. deportation of individuals with U.S. citizen family members to violate international legal norms. *Wayne Smith, Hugo Armendáriz, et al. v. United States*, Case 12.562, Inter-Am. Comm’n H.R. Report No. 81/10, ¶ 5 (2010).

restoring proportionality review to removal proceedings more generally. That practice could provide much-needed fuel for the excellent legal arguments against the constitutionality of the current deportation regime.

Greater judicial attention to the deportation consequences of criminal sanctions might also help build momentum against the racial inequities of the removal system. Equal protection arguments have long foundered in the criminal justice system because of the difficulty of demonstrating that similarly situated minority and nonminority defendants have been treated differently. But as Dean Johnson notes, “96 percent of the noncitizens removed annually from the United States originally came from Mexico and Central America.”⁵³ Approximately ninety-nine percent of individuals removed on criminal grounds were nationals of countries in the Americas.⁵⁴ Even without smoking gun proof of discriminatory intent, these are *Yick Wo*-type numbers.⁵⁵

Of course, mounting a successful equal protection challenge to the criminal removal system would be difficult—or impossible—given the state of contemporary equal protection jurisprudence. Still, judges could play a role in illuminating the work race does in the removal system. Because the deportation of Latinos, in particular, has become so normalized, observers of the removal system often fail to question its discriminatory nature. Focused discussion by judges in individual cases that takes note of particular instances of impermissibly discriminatory policing, charging, or immigration enforcement actions could help to make more visible the role race plays in the removal system.

Even if judges are not able to spur changes in the broader constitutional regime governing deportation, Professor Cade’s proposal would make it clear to all judges that they have an obligation—no less than a defense attorney⁵⁶ and some

⁵³ Johnson, *supra* note 10.

⁵⁴ See OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SECURITY, 2013 YEARBOOK OF IMMIGRATION STATISTICS 113–15 tbl. 41 (2014), https://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf.

⁵⁵ In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the U.S. Supreme Court struck down on equal protection grounds a San Francisco ordinance that made it illegal to operate a wooden laundry building without a permit from the Board of Supervisors. Although the law was neutral on its face, one permit was granted to the two hundred Chinese permit applicants whereas virtually all non-Chinese applicants were granted permits. The Court found this pattern evinced discriminatory purpose. 118 U.S. at 374. The criminal removal system, of course, is more complex. It relies on the combined effect of state and federal criminal convictions and immigration enforcement decisions.

⁵⁶ *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (requiring criminal defense counsel to

prosecutors⁵⁷—to ensure that justice is served in cases involving noncitizens. Too often, criminal judges have simply disavowed any role in immigration enforcement. The separation of criminal sentencing and deportation functions may well be formally desirable, but wishing does not make it so. A criminal court judge's decision about a crime automatically imposes an immigration consequence on many noncitizen defendants; judges should be aware of this reality.

The current system offers judges little incentive to understand the nuances of immigration law. In his decision in *United States v. Aguilar*, for example, Judge Weinstein misunderstood the likely effect of immigration law in the case before him,⁵⁸ even though he clearly cared about immigration consequences. A DHS policy that explicitly paid attention to criminal sentencing judges on questions of deportation could have the salubrious effect of incentivizing at least some judges (and their law clerks) to learn more about the immigration consequences of their sentencing decision.

It might also incentivize criminal justice scholars to treat this issue with greater seriousness. Thanks in no small part to Dean Johnson's own scholarship,⁵⁹ most contemporary scholars of immigration law acknowledge the animating role that race plays in structuring and generating political support for the sometimes symbiotic exclusionary regimes of criminal and immigration law.⁶⁰ On the other hand, criminal

advise clients about the clear immigration consequences of a criminal plea).

⁵⁷ California law, for example, now requires that prosecutors take immigration status into account in reaching a "just" case outcome. CAL. PENAL CODE § 1016.2 (West 2016). For a discussion of this provision, see Ingrid V. Eagly, *Immigration Enforcement in an Era of Criminal Justice Reform*, NEW CRIM. L. REV. (forthcoming 2016).

⁵⁸ See Cade, *supra* note 1, at 46–47 & n.52 (noting the sentence for a crime involving moral turpitude triggered deportation and a permanent bar, not a ten-year bar, as Weinstein thought).

⁵⁹ See, e.g., Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002) (describing the racial bias that drove application of immigration law in the post-9/11 era); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (discussing the central role of race in shaping immigration law and policy); 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. REFORM 967 (2015) (considering racially disproportionate policing as an important force shaping deportations).

⁶⁰ This includes scholars whose work is commonly situated under the "cimmigration" umbrella. See, e.g., Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1121–22 (2008) (noting racial profiling of Latinos in immigration enforcement); Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1131–33 & nn.132–59 (documenting specific cases involving allegations of racial profiling in immigration enforcement in support of arguments that Fourth Amendment violations by immigration enforcement officers have

justice scholars outside of the immigration field have been slower to acknowledge the work done by the immigration system in structuring contemporary criminal policing and punishment, even as they have been largely silent on the role race plays in this process and on the racial impact of immigration enforcement.⁶¹ Hopefully a policy that makes the racialized effects of immigration law more salient to criminal sentencing judges will also help to make it a focus of the scholars who purportedly write for and about them.

become widespread); Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 337–443 (2007) (discussing the racially discriminatory effects of anti-gang policing and immigration enforcement efforts); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1461 (2013) (arguing "crimmigration law" emerged when the federal government began to capitalize on criminal policing practices designed to contain communities of color, "in particular a reduction in judicial discretion and a newfound willingness to tap its authority to imprison"); Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 211 (2013) (characterizing the immigration detainer regime as a form of immigration rendition "akin to the Fugitive Slave Act of 1850" established to counter the free migration of laborers of color by delivering them back across borders); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 413 (2006) (identifying membership theory as the animating driver of immigration and criminal law exclusions, and noting "[t]he result of the application of membership theory has been to create a population, often identifiable by race and class, that is excluded physically, politically, and socially from the mainstream community"); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 608 (describing "crimmigration" as a system designed to subordinate Latinos).

⁶¹ Perhaps the "crimmigration" label unduly isolates the existing scholarship on this question from the broader conversations concerning both the role of race in the criminal justice system and criminal justice reform. See Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 763 (2015) ("[I]n focusing attention on the evolution of a new system, the crimmigration framework may skew attention away from the commonalities that the criminal-immigration law interactions have with other criminal-civil law interplay."). Some scholars have argued that acknowledgement of a "crimmigration system" is important for understanding how the interaction of criminal and immigration law systems generate a distinct system of racial oppression targeting Latinos. See, e.g., Vázquez, *supra* note 60, at 604–07 (contending the "prosecution and removal of [Latinos] is derived from political choices and cultural norms . . . that American society uses to enforce racial hierarchies"). But the critiques and reform proposals in the "crimmigration" scholarship are increasingly cut off from broader reform projects in criminal, constitutional, and international law—including current efforts to address racial bias in the criminal justice system and in international migration control regimes. Ultimately, this isolation may impede potentially synergistic law reform projects rather than foster them. Chacón, *supra*, at 763 ("Inside and outside the immigration sphere, the proliferation of liminal legal statuses function simultaneously as a means of effectuating administrative resource conservation through community-oriented risk management strategies and as a form of 'preservation through transformation,' allowing governmental actors to reassert and maintain shifting forms of control over racialized and otherwise marginalized populations identified as high risk in ways that do not trigger the rights-protective schemes that evolved in the post-War era in both domestic and international law. 'Crimmigration' serves as a shorthand explanation of how it occurs . . . but it is not always an accurate shorthand explanation." (footnotes omitted)).

CONCLUSION

Professor Cade's proposed disproportionality rule of thumb is a good idea. It would not solve the racial disparities in the criminal justice system or in the deportation system. It would not put an end to capricious distinctions between similarly situated criminal defendants in removal proceedings. Indeed, at the end of the day, it is likely to have a direct effect on only a small handful of removable noncitizens.

At the same time, it has no notable downsides and some significant potential upsides. It would help some noncitizens to avoid patently unjust deportations. It would provide DHS with some potentially useful information otherwise unavailable at the charging stage. It would make a positive change in the way that at least some judges think about immigration consequences in criminal sentencing. And it might even change the way that we talk, think, and write about the nexus of immigration and criminal law—better exposing the common failings and the interconnections of these systems to scholars and practitioners other than those who routinely work at their intersection.