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Leveraging Social Science Expertise in Immigration Policymaking

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Introduction

In *Northwestern University Law Review*'s 2017 Symposium—"A Fear of Too Much Justice"? Equal Protection and the Social Sciences 30 Years After *McCleskey v. Kemp*—social scientists and experts demonstrate racial disparities in criminal justice, marriage equality, civil rights, and many other areas of social life. Yet courts routinely overlook this evidence, instead pushing policy based on erroneous assumptions. The same is true in the administrative state. If anything, *McCleskey*'s legacy has gained momentum in a Trump Administration that mistrusts intellectualism and endorses policies without a sound evidentiary basis.

The rejection of expertise is particularly problematic when it comes to recent immigration policy. If correcting racial bias has been elusive under the Equal Protection clause and civil rights statutes, it has been even more elusive where immigrants are concerned. The most significant immigration policy changes have been announced by the President and his political advisors. The administrative agencies implementing these decisions accord significant weight to political considerations. They adopt their policies swiftly and with minimal justification or factual foundation. The courts evaluating agency decisions traditionally defer to these agencies and to Congress, precisely because they are steeped in political judgments.

Given that immigration policies involve hotly-contested values and high-stakes consequences for immigrants, from an institutional standpoint, immigration policy should involve more expertise and less politics. Adopting evidence-based policy requires opening up immigration policymaking to internal and external voices that operate on the basis of reliable, expert information. It also requires a measure of independence to counter excesses in political decisionmaking. These voices might be administrative agencies internal to the executive branch. They might come from political channels including Congress, citizen advisory groups, or interest groups. Or they might be judicial avenues of reviewing agency reasoning and records.

This Essay examines the deficient use of social science and expertise in the modern administrative state. More specifically, it highlights key immigration policies that dismiss social scientific findings and expertise as part of Presidential and agency decision-making. This dismissal undermines both substantive and procedural protections for immigrants. Part I presents background on the key principles and structures that have led agencies to reject considerations of social science and expertise in policymaking. It then explains how this rejection has been even more pronounced in immigration law and policymaking. Part II presents examples of three signature immigration policies that dismiss relevant social science expertise: border control,

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crime control, and extreme vetting of refugees to prevent terrorism.[1] Part III shows how applying traditional administrative law principles to the immigration context would encourage agencies to better leverage expertise in immigration policy.

Part I. Administrative State and Social Science Expertise

Administrative agencies have wrestled with the incorporation of expertise in their policymaking since their inception. This Part provides a brief look at this history, exploring how agencies first embraced social science evidence through the use of experts and procedures that promote reasoned decisionmaking. It then describes why these agency officials and procedures are missing in the realm of immigration policymaking.

A. Rise and Decline of Social Science Expertise in Administrative Law

The push and pull between expertise and democratic accountability animated agency decisionmaking during the New Deal and civil rights era. These eras saw the expansion of the administrative state built on the need for expertise in policymaking. Administrative law scholar James O. Freedman says that the origins of the administrative state reveal the "commitment to expertise as a principal justification for the administrative process."[2] He cites one of the founding figures in administrative law, James Landis, as saying of agencies in the New Deal era: "the rise of regulation, and the need for expertness became dominant; for the art of regulating in an industry requires knowledge of the details of its operation, ability to shift requirements as the conditions of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy."[3] The judicial opinions reviewing administrative power during this time of expanding federal power similarly recognized that modern life had become too complex for the president or Congress to regulate without assistance.[4] William O. Douglas said, "Administrative government . . . is democracy's way of dealing with the overcomplicated social and economic problems of today."[5]

An enduring concern for democratic accountability accompanied the expansion of expertise in agencies. The edifice of modern administrative law offered two main safeguards to prevent arbitrary decisionmaking and mitigate the absence of direct electoral accountability, both of which remain relevant to immigration policymaking today: experts and administrative procedure.

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[1] President Trump, Immigration Priorities (Oct 8, 2017), available here: https://www.whitehouse.gov/the-press-office/2017/10/08/president-donald-j-trumps-letter-house-and-senate-leaders-immigration.
[2] JAMES O. FREEDMAN, EXPERTISE AND ADMINISTRATIVE PROCESS (1976).
[3] JAMES LANDIS, THE ADMINISTRATIVE PROCESS 23–24 (1938).
[4] Foundational administrative law cases on nondelegation to agencies include *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), *Mistretta v. United States*, 488 U.S. 361 (1989), *Panama Refining v. Ryan*, 293 U.S. 388 (1935), and *Schechter Poultry v. United States*, 295 U.S. 495 (1935).
[5] William O. Douglas, DEMOCRACY AND FINANCE 246 (1940). See also William Douglas, *Foreword*, 28 GEO. WASH. L. REV. 1, 5 (1959). Jerome Frank, another important intellectual figure of the New Deal, held views similar to those of Douglas. JEROME FRANK, IF MEN WERE ANGELS 19–20 (1941).

1. *Civil Servants and Other Neutral Experts*

Chief among these safeguards was the creation of a professionalized civil service that would serve as neutral experts within a political system.[6] The rise of neutral experts during this time period promised both a substantive and structural check on politics.

Substantively, the civil servant class was expected to accumulate experience in the increasingly complex matters of policy and provide increased capacity to implement policies enacted by the President and Congress.[7] While not always social scientists by training, they offered learned expertise. Structurally, career civil servants provided an internal separation of powers that functioned as a check on political leadership within agencies and a counterbalance against Presidential interference.[8] Civil servants blunted the force of political goals due to their fidelity to statutes, organizational missions, and professional duties.[9] They drew upon learned expertise in administrative and policy substance and had access to a wider array of expert information and research as they conducted their jobs, especially if they fully engaged norms of consultation and deliberation while fashioning policy. They tended to serve for long periods of time across multiple administrations, giving them the long view and tempering the fluctuations of volatile changes. They also commissioned reports from external experts.

2. *Advisory Councils, Academics, and Researchers as Independent Experts*

A second type of expert came from outside the government. Policymakers in Congress and agencies supplemented the learned expertise of their career staff with expertise from a cadre of independent researchers. Lawmakers sought out these experts to staff advisory councils or confer with agency experts on an informal basis while maintaining their positions in universities and nonprofits. Councils of advisors offered a useful alternative to the singular voice within an

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[6] James Landis wrote that expertise "springs only from the continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem." JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938). Felix Frankfurter shared Landis' "faith in disinterested expertise as a mechanism of social regulation" and desire for "scientific expertness," "highly trained and disinterested permanent service, charged with the task of administering the broad policies formulated by Parliament and of putting at the disposal of government that ascertainable body of knowledge on which the choice of policies must be based" (Letter from Frankfurter to Learned Hand, Sept. 23, 1912 (cited in Freedman, *Expertise*, at 364 and *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973)).

[7] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 10–17 (1938); JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012) (describing expert agency overseeing steamboat safety).

[8] Reuel Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007) (quoting Frankfurter and Landis' views that expertise would counter demagoguery). Modern scholarship on the internal separation of powers (Jon Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 NYU L. REV. 227–91 (2016) and Neal Kunal Katyal, *Toward Internal Separation of Powers,* 116 YALE L.J. (2006) and presidential control (Gillian Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2014); Elena Kagan, *Presidential Administration,* 114 HARV. L. REV. 2245 (2000)) amplify these issues.

[9] MARISSA GOLDEN, WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS (2000); SHANNON GLEESON, CONFLICTING COMMITMENTS: THE POLITICS OF ENFORCING IMMIGRANT WORKER RIGHTS IN SAN JOSE AND HOUSTON (2013); Ming H. Chen, *Where You Stand Depends on Where You Sit: Immigrant Incorporation in Federal Workplace Agencies*, 33 BERK. J. EMPL. LAB. L. 359 (2012-2013).

agency that reported to a singular political figure. They were able to provide peer review of specific findings and offer an array of views when the social science did not lead inevitably to a single policy solution.[10] Ranging from scientists to economists to statisticians, these experts offered their professional norms around information-gathering and rigorous research in order to shape policymaking. While their findings in controversial policy areas were not without their own biases, they furnished a foundation for forging policy based on norms from their profession rather than norms from politics.

3. Procedures to Facilitate Reasoned-Decision Making in Agencies

In addition to the search for neutral experts, Congress and courts turned to administrative procedure to reinforce principles of reasoned decision-making and to avoid arbitrary and capricious decisionmaking. In *Beyond Accountability*,[11] Professor Lisa Bressman threads the concern for avoiding arbitrariness and abuse of discretion through several stages of U.S. history: first, early thought of administrative agencies as a "mere transmission belt" for legislative actions;[13] then, the rise of 1930s New Deal agencies engaged in social reform and economic regulation; [14] and finally, 1960s public-interest-minded agencies striving to advance a veritable rights revolution by curbing abuses of discretion.[15] Professor Wendy Wagner in *A Place for Agency Expertise* extends this history by recounting the rise and the fall of agencies, illuminating the growing distrust of the "geek squad" or agency-as-expert model: during the social regulation of the 1960–70s, some regulated groups began to worry about agency capture and politicized purpose.[16] Courts reviewing agency decisions responded by requiring agencies to identify their assumptions, methods, and evidence, as well as explain their reasoning. These concerns also led to the rise of decisionmaking procedures that promote transparency and enable public oversight.[17]

These procedural safeguards have solidified in the modern era. Rather than sorting out the bounds of substantive expertise or ruling on specific findings, the twenty-first century model of the agency-as-expert relies on a highly proceduralized approach to decisionmaking. Some of the

[10] Wendy Wagner, *A Place for Agency Expertise*, 115 COLUM. L. REV. 2019 (2015) (professionalized civil service typified by internal staff or external peer review of technical findings); JAMES O. FREEDMAN, EXPERTISE.
[11] Lisa Bressman, *Beyond Accountability*. See also Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 90 n.34 (1994); Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).
[13] Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).
[14] *See generally* Reuel Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007); JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012) (describing expert agency overseeing steamboat safety).
[15] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE (1969); HENRY FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES (1962); LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION (1990).
[16] Wagner cites especially scientific decisions from health/risk-management and environment giving rise to these attacks, at least some of the time from regulated entities with opposing interests. *Wagner, Agency Expertise*, at 2025–26.
[17] *See* Emily Hammond, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011) (discussing these issues in science policy context).

requirements are contained in the Administrative Procedure Act (APA), passed by Congress in 1946, and subsequent transsubstantive legislation intended to heighten political accountability. Many organic statutes include requirements as to what an agency must, can, or cannot consider in making its decisions. For example, the Endangered Species Act specifies that no agency can take any action with a potential effect on an endangered species without first consulting the Secretary of the Interior to render a biological opinion that the action does not threaten an endangered species.[18] The National Environmental Policy Act of 1969 requires federal agencies to conduct environmental impact analysis that can be weighed against economic motivations and technological feasibility when making decisions that could affect the quality of the human and natural environment.[19] Executive Order 12866 requires agencies to conduct cost-benefit analyses of significant regulatory actions and submit them to the Office of Information and Regulatory Affairs.[20] The APA and some of these other legislative requirements are not binding on the head of the administrative state, the President. However past presidents have been more open to the inclusion of science and other data in policymaking than President Trump.[21]

B. Consideration of Reason and Expertise in the Immigration Agencies

While the prototypical instances of agencies considering expertise arise in technical policy arenas such as the environment or economy,[22] important examples arise in civil rights, immigration policy, and elsewhere. This Essay focuses on immigration policymakers who routinely reject expertise in their policymaking.

In the modern immigration bureaucracy, expertise resides in the career civil servants who work alongside political appointees in the U.S. Department of Homeland Security (DHS) and U.S. Department of Justice, Executive Office of Immigration Review (EOIR). There is traditionally a bent toward promoting career staff into leadership positions within the agencies, but there is a regular infusion of political appointees at the top of the agency. Recognizing the political sensitivity of immigration, the post-9/11 structure of the immigration bureaucracy separates enforcement functions from policymaking functions by professionalizing the role of immigration

[18] Richard Pierce, *What Factors Can An Agency Consider in Making a Decision*, 2009 MICH. ST. L. REV. 67 (2009) (using ESA of 1973 as an example).
[19] National Environmental Policy Act of 1969. Public Law 91-190 as amended by Public Law 94-52 (1975), Public Law 94-83 (1975), and Public Law 97-258 (1982).
[20] Executive Order 12866 of September 30, 1993, Fed. Reg. Vol. 58. No. 190 (October 4, 1993).
[21] President Obama's Presidential Memorandum on Scientific Integrity, 74 Fed. Reg. 10671 (Mar. 11, 2009) ('To the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information.") Other reinforcing executive directives came from the Office of Information and Regulatory Affairs in the form of peer-review, cost-benefit, and risk-assessment guidelines. Compare this statement with President Trump questioning agency experts, dismissing fake news, and offering "alternative facts" in policymaking. Nicholas Fandos, *White House Pushes 'Alternative Facts."* N.Y. TIMES (Jan. 22, 2017).
[22] For examples of agency scientific expertise, see Sharon Jacobs, *Energy Deference*, HARV. ENVL. L. REV. 49 (2016); Thomas McGarity, *Judicial Review of Scientific Rulemaking,* SCI TECH HUMAN VALUES (1984); Emily Hammond, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011).

judges and by concentrating them in the immigration courts, rather than the more politicized Immigration and Customs Enforcement (ICE).[23] Learned expertise is supplemented by substantive expertise in areas related to immigration policy such as the Office of Immigration Statistics. But in spite of these efforts, immigration agencies still remain more susceptible to political pressures and less able to cultivate expertise than those in other policy areas.

The Trump administration has violated the traditional division of enforcement functions by initiating policies in the White House without consulting cabinet leaders in DHS and the State Department, by squelching dissent within his agencies, and by conflating the organizational missions of the DHS, DOJ, and State Department in their rush to push change. Consider the initially weak influence of then-DHS Secretary John Kelly on the travel ban and then the overly strong influence of Attorney General Jeff Sessions on areas of immigration policy typically administered by the DHS. The ability of civil servants to resist these high-level political changes has been compromised by the firing of interim-Attorney General Sally Yates for opposing travel ban, the intimidation of Statement Department officials, and threats to the independence of immigration judges and line officers through altered hiring standards and performance metrics.

As far as procedure, the Immigration and Nationality Act (INA) differs from legislation targeted at other administrative bodies, in that it does not require immigration agencies to conduct impact analysis or consult with experts in policymaking.[24] To the extent that immigration agencies voluntarily consider expert advice, they are not bound to follow the findings.[25] Agency heads can promulgate policies without developing any factual record. The factual record that immigration judge's decisions rest upon in immigration adjudication can be quite limited, even in cases where the facts rather than legal issues are crucial to the resolution of the case. In asylum cases, for example, establishing the credibility of an asylum-seeker's professed fear of persecution through expert testimony or reports on the safety of country conditions for return is exceedingly difficult due to precarious circumstances. Additionally, the BIA and reviewing courts are constrained in their ability to second-guess the record. Yet "no mechanism exists . . . to assure fundamental fairness in information is utilized in the decision-making process."[26] Consequently, a lot of immigration law and asylum is based on common sense impressions of migrant behavior, rather than on social science or learned expertise.[27]

Homeland Security Act of 2002, H.R. 5005, §§ 1-4, 101-103

[24] Indeed, earlier immigration laws limiting admissions from certain countries were based on dubious facts about immigrants based on eugenics. *See e.g.*, Johnson-Reed Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153 (May 26, 1924) (containing provisions prohibiting dysgenic Italians and Eastern European Jews). This example raises the important question of how to separate reliable social science from more dubious or politically-motivated claims, which should be examined more fully in future research.

[25] *See e.g.*, Mary Waters et al, *The Integration of Immigrants into American Society*, NATIONAL ACADEMY OF SCIENCES (2015) [hereinafter NAS Report].

[26] Susan Kerns, *Country Conditions Documentation in U.S. Asylum Cases*, 8 IND. J. GLOBAL LEGAL STUD. 197 (2000).

[27] *Id.*

Compounding the weakening of structural provisions that allow for expertise to influence policymaking, immigration policy rests on loose procedures. This is largely due to the traditionally deferential posture of courts to the President in matters impacting national sovereignty, the exceptional status for law enforcement and national security policymaking, immigration agencies are excused from many of the procedural requirements that apply in other contexts, such as compliance with the APA.

While more factors are certainly at play in immigration policymaking, this brief history illuminates structural features, such as the resistance to experts and the deficiency of procedure, that contribute to problematic tendencies of modern immigration policy to dismiss expertise.

Part II. Rejection of Expertise in Immigration Policymaking

The history of immigration policy shows a persistent rejection of expertise, across parties and across time. Government officials have ignored, misused, and even lied about social science expertise. They have also rejected civil servant expertise in favor of political leadership in the White House or agencies with political objectives. Part II discusses several notable departures from expertise in the signature immigration policies of recent presidential administrations. It focuses especially on rejections of a social science evidence in border control, crime control, and treatment of refugees.

A. Border Control and Policies of Self-Deportation

Federal immigration policy in both parties has made false assumptions about the factors driving unauthorized migration. The Obama administration and Trump administration's categorization of recent arrivals as high priorities for removal assumes that strong border enforcement will deter continued unauthorized crossings, especially for children and families. The Obama administration's categorization of recent arrivals as high priorities for removal assumed that strong enforcement would deter continued unauthorized crossings, especially for children and families.[28] These assumptions have resulted in calls for a border wall, family detention, and the speedy disposition of cases through "rocket dockets" in immigration courts as a means of deterring unauthorized crossings. They have also led to draconian public benefit laws that attempt to promote "self-deportation" by limiting access to basic necessities such as work, housing, and schooling and otherwise making the lives of undocumented immigrants more

[28] DHS Secretary Jeh Johnson Memo Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014).

difficult.[29] In addition, President Trump's executive orders punishing use of public benefits[30] or restricting employer-sponsored migration[31] assume that immigrants come to the United States to take jobs and public benefits, and that their willingness to come in contravention to immigration law reflects a desire to exploit and disrespect the rule of law.

These false and uncritically adopted presumptions in border policy overlook sociological evidence of the factors driving migration. Studies of migration offer several theories for why people migrate that contravene the notion that a border wall would stop immigration. Sociologist Douglas Massey has cast doubt on the neoclassical push-pull factor model, which presumes that individuals conduct a cost-benefit analysis in their decisions to migrate from less developed economies for job opportunities. Massey offers an alternative interpretation, that undocumented immigration is partly the result of perverse effects of U.S. border policy.[34] In Massey's account, border control produces the illegality it is meant to prevent by blocking circulation migration patterns that would otherwise be preferred by migrant families. Recent counts show that the number of border apprehensions is down,[35] but this is partly because of improving economic conditions in Mexican migration and not solely related to enforcement actions.[36] Relatedly, policymakers' assumptions that immigrants migrate to manipulate work benefits[37], public education and social benefits,[38] and family sponsorship[39] ignore evidence that these factors do

[29] For example, in *RILR v. Johnson*, Case 1:15-cv-00011 (D.D.C. 2015), DHS (on the basis of a report by political scientist Jonathan Hiskey, *Democracy, Governance, and Emigration Intentions in Latin America and the Caribbean*, 49 STUD. IN COMP. INTERNATL DVLP 89 (2014)) argued that family detention was necessary to halt chain migration. Hiskey said his report was used for contentions not supported by his research. The D.C. District Court said that the DHS evidence of a security threat was too weak to justify detention as deterrence.

[30] President Trump Executive Order: Enhancing Public Safety in the Interior of the United States (January 25, 2017) (Section 5 expands the list of noncitizens subject to deportation to include those who abused public benefit programs). https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/.

[31] Presidential Executive Order on Buy American. and Hire American (April 18, 2017), https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/.

[34] DOUGLAS MASSEY, BEYOND SMOKE AND MIRRORS (2003). See also Alejandro Portes & Jozsef Borocz, *Contemporary Immigration: Theoretical Perspectives on Its Determinants and Modes of Incorporation*, 23 INTL. MIGR. REV. 606 (1989).

[35] While border apprehensions have decreased, there is disagreement on the size of decrease and cause. *Compare Return to Rule of Law in Trump Administration Marked by Increase in Immigration Statistics*, U.S. DOJ, OFFICE OF PUBLIC AFFAIRS PRESS RELEASE (August 8, 2017) *with* independent fact checking in D'Angelo Gore and Eugene Kiely, *Trump's Border Boast,* THE WIRE (July 31, 2017).

[36] *More Mexicans Leaving than Coming to U.S.*, Pew Research Center (2015) (reporting net loss from 2009 to 2014); *Mexican Immigrants in the U.S.*, MPI (Mar. 2016) (reporting Mexican migration declined 2006–16).

[37] BERRY CHISWICK, HIGH-SKILLED IMMIGRATION IN GLOBAL LABOR MARKET (2011).

[38] Economists David Card and Giovanni Peri have clashed with George Borjas on the impacts of immigrant workers on native workers. George Borjas, *Immigration Economics* (2014); David Card & Giovanni Peri, *Immigration Economics: A Review* (2016) (describing George Borjas's Immigration Economics as a "one-sided view of immigration, with little or no attention to the growing body of work that offers a more nuanced picture of how immigrants fit into the host country market and affect native workers.")

[39] *See* 1996 IIRIRA and PRWORA. Attorney General Jeff Sessions' September 5, 2017, speech laid out reasons for rescinding DACA: "The effect of this unilateral executive amnesty, among other things, contributed to a surge of minors at the southern border that yielded terrible humanitarian consequences. It also denied jobs to hundreds of thousands of Americans by allowing those same illegal aliens to take those jobs." Sessions speech is available here: https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca. The Obama Administration

not by themselves drive migration decisions. Instead, migration entails more complex decisionmaking. Moreover, the initial reasons to migrate may evolve into a different decision about whether to remain and where to reside within the U.S.

These mistaken understandings of unauthorized migration are even more pronounced in the context of forced migration. The Central American border surge has been primarily the result of immigrants fleeing persecution, and therefore, has not been deterred by border crackdowns, priority docketing in immigration courts, and family detention policies. Copious expert testimony has demonstrated that country conditions in Central America propel migrants to take the risk of unauthorized migration; many of these migrants turn themselves over to ICE and file affirmative asylum applications in the belief that they have a legal right to remain in the U.S.[40] Ingrid Eagley's research on family detention shows that practices of detention do not deter forced migration and that increased staffing and expedited procedures to reduce immigration court delays do not overcome enticements for those seeking asylum to stay in U.S.[41]

Policies of self-deportation and "enforcement by attrition" make many of the same false assumptions about factors driving unauthorized migration to the United States. The most prominent of these is Arizona's SB 1070 "show me your papers" provision.[43] A coalition of civil rights groups settled a lawsuit and the ACLU filed a separate racial profiling lawsuit against Sheriff Joe Arpaio's alleged racially biased immigration enforcement practices. Litigants also challenged SB 1070 provisions intended to encourage self-deportation.[44] Social science evidence shows that it is more likely these draconian circumstances encourage immigrants to move from one state to another within the United States rather than discourage their initial migration to the United States. The experience of copycat laws in Utah and southern states Alabama, Georgia, and South Carolina further vindicate that these patterns of internal migration that channel, rather than eradicate, unauthorized migration.[45]

DHS Secretary Jeh Johnson believed a version of this claim for Central American children. DHS Secretary Jeh Johnson Memo Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014).

[40] *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection,* UNHCR Report (2015)*; Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico,* UNHCR (2015).

[41] Ingrid V. Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIFORNIA LAW REVIEW (forthcoming 2018). *Cf.* Doris Meissner, *Upfront Hearings a Must to Stem the Tide of Border-Crossing Children*, DALLAS NEWS (June 2014) (former INS Commissioner noting the theory of delay as a pull factor).

[43] Arizona S.B. 1070, https://www.azleg.gov/legtext/49leg/2r/summary/s.1070pshs.doc.htm.

[44] For background on racial profiling lawsuit against Joe Arpaio, *see* ACLU summary (Sept 13, 2017), https://www.aclu.org/cases/ortega-melendres-et-al-v-arpaio-et-al. The lawsuit against Arpaio continues even after President Trump pardoned Joe Arpaio. For reports on the effects of other "enforcement by attrition" and "self-deportation" policies, see https://www.americanimmigrationcouncil.org/research/myth-self-deportation.

[45] Huyen Pham and Van Pham, *Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 CARDOZO L. REV. 485 (2010) (reprinted 31 Immigr. & Nationality L. Rev. 687 (2010);

Some of these policies rest upon contestable facts about the causes of migration, where there is reasonable disagreement among experts. But others rest on disregard of social science, professional expertise, or misrepresentation of facts in the service of a political agenda.

B. Criminal Aliens and Sanctuary Cities

An equally strong belief in immigrant criminality has motivated recent federal immigration policies that prioritize enforcement against criminal aliens and more recently, punish sanctuary cities for resisting ICE requests to transfer these criminal aliens to detention. Examples include Congress' expansion of the criminal grounds for deportation and eradication of prosecutorial discretion,[46] the Obama Administration's ICE priorities for removals,[47] and the Trump Administration's targeting of criminal aliens as gang members and terrorists.[48] These policies are meant to exclude undesirable immigrants from the U.S. and prevent incidents of violent crimes within the U.S., as well as prioritize enforcement against the most dangerous immigrants.

But numerous studies show that the belief that immigrants commit more crime is false.[49] A 2015 American Immigration Council report showed that immigrants do not actually commit more crime.[50] Think tanks from across the political spectrum have reached consistent results.[51] An eminent task force of social scientists reported that immigrants commit more crime *after* spending time in the United States, mirroring trends in the general population, as opposed to *before* they enter the country.[52] These reports demonstrate how stereotypes and perceptions of

SB 1070 Lessons Learned Four Years Later, National Immigrant Law Center (2014): https://www.nilc.org/issues/immigration-enforcement/sb-1070-lessons-learned/ (describing SB 1070 copycat laws).

[46] The INA grounds for deportability were significantly expanded in The Anti-terrorism and Effective Death Penalty Act (1996) and The Illegal Immigration Reform and Immigrant Responsibility Act (1996).

[47] DHS Secretary Jeh Johnson Memo Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014).

[48] The DHS and DOJ trumpet Operation Raging Bull as an enforcement action targeting MS-13 gang members that has resulted in hundreds of arrests. https://www.ice.gov/features/raging-bull.

[49] ICE spokesperson James Schwab resigned on March 12, 2018 because he felt that he could no longer perpetuate misleading facts about immigrants and the effects of sanctuary policies on the dangers they posed to their community. Hameez Aleaziz, *San Francisco's ICE Spokesman Quits, Disputes Agency's Claim that 800 Eluded Arrest*, S.F. CHRON. (March 12, 2018). Mr. Schwab went on to say that "It's the job of a public affairs officer to offer transparency for the agency you work for. I've never been in a situation when I've been asked to ignore the facts because it was more convenient." *Id.* He later told CNN, "I just couldn't bear the burden — continuing on as a representative of the agency and charged with upholding integrity, knowing that information was false." Dan Simon, *ICE Spokesman in SF Resigns and Slams Trump Administration Officials*, CNN (March 13, 2018).

[50] Walter Ewing, Daniel Martinez, Ruben Rumbaut, *Criminalization of Immigration in the United States*, AIC (July 13, 2015), https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states.

[51] Similar reports by Sentencing Project, Cato Institute, NAS Commission on Immigrant Integration (finding that immigrants show more criminal activity after living in the US and become assimilated to native-born patterns of criminality). In addition, Emily Ryo has found that immigration judges are more likely to predict that Central Americans will be a danger to the public in bond hearings. Ryo, *Predicting Danger in Immigration Courts*, Unpublished Manuscript (December 2017) (on file with author).

[52] NAS Report.

immigrant crime are driven by the construction of immigrant criminality rather than facts.[53] These social science facts counter the Trump Administration's claims that Mexico is not sending us their best, that they are sending rapists and murderers, and that immigrants are "bad hombres."[54] They also counter the Obama Administration's assumptions about dangerous criminal aliens justifying priorities, expansion of statutory grounds for deportation, and widespread use of detention as measures to prevent crime or promote public safety.[55] In addition, social scientists have shown that street gangs made up of Central American immigrants, such as MS-13, were formed in Los Angeles and led to migrant criminality *after* immigrants returned from deportation, rather than criminality preceding migration to the U.S.[56]

False belief in immigrant criminality has also led to the Trump administration's public hostility towards city sanctuary policies, which seek to restrict local police communication with federal immigration officials, and his many attempts to penalize the jurisdictions that do not cooperate.[57] The high profile killing of Kate Steinle by an undocumented immigrant, who San Francisco police had previously released, fueled the public impression that sanctuary policies enable violence.[58] But underneath the impassioned politics and public scandals, it is an empirical issue whether sanctuary cities lead to more violent crime from immigrants. Tom Wong, a U.C. San Diego political scientist, conducted a study which concluded that "[c]rime is statistically significantly lower in sanctuary counties compared to nonsanctuary counties."[59] This study was misquoted by Attorney General Jeff Sessions in his statements that sanctuary cities facilitate more crime.[60] A similar misattribution happened with a study authored by Loren Collingwood

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[53] Juliet Stumpf, *The Crimmigration Crisis,* 56 AM. U. L. REV. (2012); Jennifer Chacon, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIM. (2012); Cesar Garcia Hernandez, *Creating Crimmigration*, 2013 BYU L. REV. 1457 (2013).

[54] *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015); Trump-Clinton Presidential Debate (Oct 19, 2016).

[55] DHS Secretary Jeh Johnson Memo Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014).

[56] Claire Ribando Seelke, *Gangs in Central America*, CONG. RESEARCH REPORT (Aug. 29, 2016). Sessions also conflates unaccompanied children from Central America with the gang members and with DACA youth migration in subsequent policy speeches. Jeff Sessions Remarks about Carrying out the President's Immigration Priorities (Oct. 20, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-about-carrying-out-presidents-immigration ("The open-borders lobby talks a lot about kids—those who are here unlawfully. . . After the previous administration announced [DACA] in 2012, the number of unaccompanied children coming here nearly doubled in one year. The next year, it doubled again. I doubt that was a coincidence. DACA encouraged potentially tens of thousands of vulnerable children to make the dangerous journey North.").

[57] Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (defining "sanctuary jurisdictions" as those that "willfully refuse to comply with 8 U.S.C. 1373"). The term "sanctuary" or "sanctuary city" is not defined by statute; United States v. California, Case No. 18-264 (Filed E.D. Ca. March 6, 2018).

[58] *See Julia Preston, San Francisco Murder Case Exposes Lapses in Immigration Enforcement, July 7, 2015, https://www.nytimes.com/2015/07/08/us/san-francisco-murder-case-exposes-lapses-in-immigration-enforcement.html.*

[59] Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CENTER FOR AMERICAN PROGRESS (2017).

[60] Attorney General Jeff Sessions said at a White House briefing (March 27, 2017), "When cities and states refuse to help enforce immigration laws, our nation is less safe. Failure to deport aliens who are convicted of criminal

and colleagues at U.C. Riverside, which has been misinterpreted to support the same conclusion that sanctuary jurisdictions are more dangerous.[61] Many law enforcement officials actually believe that sanctuary policies prevent crime, and that jurisdictions without such policies inadvertently promote crime by creating immigrant mistrust of the police force. For example, a blue ribbon task force consisting of law enforcement officials recommended abandoning the Secure Communities program, a program that required county jails to assist federal immigration agents by granting immigration detainers. The task force found the program was ineffective and perceived by the public as unfair, because minor offenses were conflated with violent crime.[62] Recent litigation in San Francisco and Chicago challenging President Trump's sanctuary city sanctions suggest that the policies are deficient due to their arbitrary adoption and other Constitutional concerns.[63]

What would it instead take to encourage local compliance with federal immigration enforcement against criminal aliens? Attorney General Sessions assumes sanctions and sticks work best, as with this threats to withhold federal public safety grants to noncooperating jurisdictions or his lawsuit challenging California's sanctuary policies. But social science evidence demonstrates these types of policies rest on a misunderstanding of what it takes to get sanctuary cities to comply. According to procedural justice research, threatening sanctuary jurisdictions with sanctions is not going to encourage voluntary cooperation or compliance. In work inspired by social psychologist Tom Tyler, legal scholars studying immigration detainers—or federal requests for local police to detain criminal aliens who would otherwise be eligible for release—have found that the primary motivator of local noncompliance is lack of legitimacy of these requests.[64] Although the timeframe of the study makes it difficult prove conclusively, President Obama's replacement Priorities Enforcement Program (PEP), which pulled back on Secure Communities by requesting notification of release rather than holding and reserving detainer requests for more serious crimes, would have led to greater compliance.[65] Additionally, my prior research, informed by the procedural justice studies of Tom Tyler, hypothesized an increase in the number of jurisdictions resisting cooperation after President Trump's subsequent reinstatement of Secure Communities.[66] And indeed, the Trump Executive Order restoring

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offenses puts whole communities at risk, especially immigrant communities in the very sanctuary jurisdictions that seek to protect the perpetrators."

[61] Loren Collingwood et al., *The Politics of Refuge: Sanctuary Cities, Crime, Undocumented Immigration* (August 2016), http://www.collingwoodresearch.com/uploads/8/3/6/0/8360930/shelter_nopols_blind.pdf.

[62] Homeland Security Advisory Council, *Task Force on Secure Communities: Findings and Recommendations* (2011).

[63] SF v. Trump, 3:17-cv-00485 (N.D. Ca. 2017) (preliminary injunction said challenges to the Trump sanctuary city sanctions were likely to succeed on the merits due to 'Separation of Powers, Arbitrariness, 10th amendment considerations, etc.").

[64] Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities after Secure Communities*, 91 CHI-KENT L. REV. 13 (2015).

[65] ICE Priorities Enforcement Program Description (Archived), https://www.ice.gov/pep.

[66] Chen, Trust in Immigration Enforcement. *See also* Memorandum from Jeh Charles Johnson, Sec'y, Dep't Homeland Sec., on Secure Communities to Thomas S. Winkowski, Acting Dir., U.S. Immigr. Customs & Enf't et al

Secure Communities and AG Sessions' threats to sanctuary cities and states should lead to continuing noncompliance. Indeed, recent litigation in San Francisco[67] and Chicago[68] challenging Trump's Executive Order shows that these policies have not encouraged greater cooperation with federal policies. Beyond the litigation in San Francisco and Chicago, more than 30 states or localities have adopted sanctuary policies following Trump's Executive Order, most strengthening rather than weakening sanctuary provisions.[73] In one of the most far-reaching sanctuary policies, California adopted a sanctuary law that is even bolder and broader in scope: California S.B. 54 goes a step further than not honoring detainers, and directs law enforcement agencies to ignore federal requests for release dates as well (with caveats for some crimes), in addition to not allowing local law enforcement to house detainees under contract.[74] California has additionally adopted state laws restricting private employers' cooperation with worksite enforcement.[76] Not every jurisdiction has moved in this direction, but the trends are notable.[77]

Policies that promote public safety or allocate resources to prioritize criminal behavior among immigrants over less serious offenses are not unreasonable. However, enacting such policies on the basis of false or exaggerated claims of immigrant criminality, rather than on the basis of legitimate social science research, damages immigrants and communities alike.

C. Exclusion of Refugees

Third, the Trump Administration's exclusion of refugees has exaggerated the national security threat presented by refugees from Muslim-majority countries and overlooked evidence of the rigor of vetting practices. As a result, in a move to reverse President Obama's increased refugee admissions, the Trump Administration's policies lowered the refugee cap by more than half, amounting to the lowest level since 1980. President Trump's 45,000 cap is even lower than the reduced level Congress recommended.[81]

(Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (eradicating Secure Communities and discrediting the tactic of using immigration detainers to boost deportation).

[67] SF v. Trump, 3:17-cv-00485 (N.D. Ca. 2017).

[68] City of Chicago v. Sessions, 1:2017cv05720 (N.D. Ill. 2017), 2017 WL 4081821 (F. Supp. 3d 9/15/2017).

[73] Chris Lasch et al, *Understanding Sanctuary Cities*, B.C. L. REV. (forthcoming 2018) (thirty-seven policies); MPI Report, *Despite Little Action on Sanctuary Cities, States and Localities Rush to Respond to Rhetoric* (April 2017) (thirty-three policies.) The list of policies is regularly updated here: http://libguides.law.du.edu/c.php?g=705342.

[74] California S.B. 54 (2017).

[76] California A.B. 450 (2018).

[77] Migration Policy Institute, National Conference of State Legislators, and Pew Charitable Trusts report that some counties are moving away from sanctuary policies under the threat of sanctions or as they get more assurances that they will not be held liable for criminal procedure abuses that may arise in the use of immigration detainers. MPI Report, *Despite Little Action on Sanctuary Cities, States and Localities Rush to Respond to Rhetoric* (April 20, 2017); Tim Henderson, *Sheriffs Still Looking for Clarify on Deportation*, Pew Charitable Trusts (Feb. 10, 2017). At the state level, see City of Austin v. Texas, Case 5:17-cv-00489 (W.D. Texas 2017) (Texas litigation challenging state law S.B. 4 that restricts sanctuary policies).

[81] U.S. Department of State Bureau of Population, Refugees, and Migration, Proposed Refugee Admissions for FY 2017, https://www.state.gov/j/prm/releases/docsforcongress/261956.htm; Refugees and Asylees in the U.S., Migration Policy Institute (June 7, 2017) (charts with State Department data, reprinted in

The premise of the lower levels of refugee admission is that the refugees from Muslim-majority countries pose a national security threat during a time of terrorist attacks and the corollary belief that vetting practices have been inadequate to stem this threat.[84] Then Acting Attorney General Sally Yates expressed reservations about the legality of the policy, leading to her abrupt firing.[85] State Department dissent from 1000 diplomats about the security threat was similarly squelched.[86] However, the Fourth and Ninth Circuit litigation subsequently blocking the travel ban as a whole contains specific statements of concern about insufficient evidence of the security threat[87] and possibly irrational and discriminatory anti-Muslim bias.[88] Refugee service providers and news outlets and past government officials have tried to describe the rigorous vetting of refugees overseas,[89] and news analysts have pointed out that those who flee a tyrant government share the U.S.' dislike of the regime, not a sympathy for the goals of the oppressor.[90] Nevertheless, under the veil of anti-Muslim suspicion long-present in the U.S., recent policies continue to conflate terrorists and their victims.[91] The false equivalence of refugees with terrorists has led to reductions and outright suspensions in refugee admissions, as well as calls for increased vetting prior to admission. It has also inspired more burdensome procedures for

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https://www.washingtonpost.com/news/wonk/wp/2017/09/26/the-incredible-shrinking-refugee-cap-in-one-chart/?utm_term=.4dd5685a736a).

[84] There have been many examples of President Trump and candidate Trump making statements labeling refugees as terrorists and security risks. These have been part of the grounds the Fourth and Ninth Circuit enjoining the travel ban as religious or national origin discrimination that violates the Equal Protection Clause, the Establishment Clause, and the INA. *In His Words, Trump and Muslims on the Muslim Ban,* https://cdn.knightlab.com/libs/timeline3/latest/embed/index.html (collecting official and unofficial statements from Trump as candidate and president).

[85] Ryan Lizza, *Why Sally Yates Stood Up to Trump*, THE NEW YORKER (May 29, 2017).

[86] Barbara Plett Ulsher, *Trump Travel Ban: Diplomats Register Dissent*, BBC (Jan. 30, 2017). The dismissal of State Department expertise has contributed to a troublesome mass exodus among senior diplomats.

[87] Courts enjoining the travel ban have commented on the inadequate evidence of national security threat and insufficient vetting accompanying E.O. Refugee Admissions (Oct. 24, 2017). The Fourth Circuit expressed skepticism that national security was the government's motivating issue, as opposed to racial animus. IRAP v. Trump, 857 F.3d 554 (4th Cir. 2017).

[88] On travel ban 2, for example, the Fourth Circuit said "EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the U.S. on the basis of their religious beliefs . . . drips with religious intolerance, animus and discrimination." IRAP v. Trump, 857 F.3d 554, 601 (4th Cir. 2017). The lower court decision from Judge Watson in Hawaii contains similar language in opposition to travel ban 2: "the EO "began life as a Muslim ban" and was "infected by the same legal problems as the first order" and the "latest ban plainly discriminates base on nationality in the manner that the Ninth Circuit previously found unconstitutional." State of Hawaii and Ismail Elshikh v. Trump, Case 1:17-cv-00050 (Mar. 8, 2017 and subsequent filings).

[89] State Department Description of Refugee Admissions, https://www.state.gov/j/prm/ra/admissions/; Refugees are Already Vigorously Vetted: I Know Because I Vetted Them, WASH. POST (Feb 1, 2017), https://www.washingtonpost.com/posteverything/wp/2017/02/01/refugees-are-already-vigorously-vetted-i-know-because-i-vetted-them/.

[90] Michael Mullen, *The Wrong Time to Cut Back on Refugees*, N.Y. TIMES (Sep. 29, 2017), https://www.nytimes.com/2017/09/29/opinion/refugee-resettlement-trump.html ("Refugees are victims of extremist groups and brutal governments. They become patriotic, hard-working Americans").

[91] For the longer perspective on anti-Muslim bias, *see* Shoba Wadhnia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669 (2017) (linking post-9/11 Muslim Registry with contemporary anti-Muslim policies)); Seema Sohi, *Race, Surveillance, and South Asian Exclusion*, Presentation at CU Citizenship and Equality Colloquium (Nov. 2, 2017); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

obtaining a green card and subsequently naturalizing from within the U.S. Finally, this misconception has created widespread hostility against refugees, especially from the Middle East.[92]

The social science evidence also disproves the claim that refugees receive more from society than they contribute. This view presumably stems from the relative costs of resettling refugees within the U.S. (including the affirmative assistance with integration in the form of job placement, language training, social workers) and from widespread beliefs in welfare abuse or fraud.[93] But the facts do not bear out this misperception. The *New York Times* reported in Fall 2017 that the U.S. government suppressed an analysis stating that refugees benefit the economy.[94] This finding complements evidence from many prior studies showing that refugees integrate and naturalize impressively, relative to other immigrant groups and predictors of success.[95] Still the narrative of the refugee welfare queen has been used to justify presidential policies that reduce refugee admissions and resist refugee resettlement.[96]

Stemming security threats is an unassailable goal in immigration policymaking. However, seeking to do so without understanding the motivations of both refugees and terrorists is costly. It can lead to unduly restrictive admissions, burdensome vetting, and barriers to integration for refugees. It can sow social division and alienation that give rise to domestic unrest and national security risks. It can lead the U.S. to violate obligations to international human rights and endanger the U.S.' relationships with other countries as well.

Part III. Leveraging Expertise in Immigration Law and Policy

[92] USCIS enhanced interview procedures for LPR application application to refugees (Aug 28, 2017) under travel ban: https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants.

[93] Randy Capps et al, *Integration Outcomes: U.S. Refugees Successes and Challenges*, MPI (June 2015) https://www.migrationpolicy.org/research/integration-outcomes-us-refugees-successes-and-challenges. Cf. critical reports and figures on settlement costs in http://thefederalist.com/2017/01/04/shut-americas-refugee-programs-turn-us-germany/ (on asylum fraud) and on security threat (https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/).

[94] *Draft report Fiscal Costs of USRAP at the Federal, State, Local Levels from 2005-14* (leaked report rejected by President Trump), https://www.nytimes.com/interactive/2017/09/19/us/politics/document-Refugee-Report.html; *Report to Congress on Proposed Refugee Levels for Fiscal Year 2018*; Stella Burch Elias, Presentation at CU Citizenship and Equality Colloquium (October 5, 2017).

[95] Randy Capps et al, *Integration Outcomes: U.S. Refugees Successes and Challenges*, MPI (June 2015) https://www.migrationpolicy.org/research/integration-outcomes-us-refugees-successes-and-challenges.; Colorado RISE Report (2016), https://cbsdenver.files.wordpress.com/2016/03/rise-year-5-report-feb-2016.pdf.

[96] Bernadette Ludwig, *Wiping the Refugee Dust from My Feet.' Advantages and Burdens of Refugee Status and the Refugee Label,"* 54 INTERNATIONAL MIGRATION 1 (2016). Compare successful legal challenges to the DACA rescission that acknowledge arbitrariness for mistakenly presuming the illegality of the program and for overlooking the contributions of DACA recipients to U.S. society. UC Regents v. DHS, No. C 17-05211 (N.D.Ca. Jan 9, 2018), https://assets.documentcloud.org/documents/4345906/1-9-18-DACA-Opinion.pdf.

Whether through legal avenues or nonlegal ones, policymakers need to be held accountable for the quality of their policies and decisions. This Part proposes measures to enhance the role of expertise and social science evidence in agency decisionmaking. In general, the recommendations focus on *how* decisions are made and strive to enhance norms of good governance and to bring immigration policy into alignment with ordinary administrative and Constitutional principles.

A. Bringing presidential policymaking into the administrative state.

Presidential policymaking and government statements might be outside conventional legal mechanisms of accountability. However, they can and should be supported by administrative involvement that is within the scope of accountability mechanisms. Generally, a president announcing a sweeping executive action ought to consult with the heads of the affected agencies and encourage promulgation of further regulations to carry out those executive orders. Thus, one way presidents can respect expertise is to involve civil servants. As explained in Part I, these professionals offer crucial longterm experience and some independence from politics. These qualities balance presidential influence during a time when Presidential action is dominating immigration policymaking.

Another benefit of involving agencies is that administrative procedure promotes fact-finding and transparency in decision-making. Bringing agency policies into the domain of the APA would lead to increased use of legislative rulemaking. The notice and comment period, in particular, requires that the DHS be more transparent about changes in policy and practice, creates opportunities for public engagement around those changes, and enables all parties to introduce facts into policy deliberations. If these basic administrative principles applied with equal force to immigration law as other areas of administrative law, they would prevent individual abuses of discretion, arbitrariness, and secrecy in immigration enforcement. However, they run counter to current practices of announcing immigration policies swiftly and abruptly, sometimes without even issuing guidance. Effective enforcement does requirement some latitude for discretion. However, discretion should not be wielded under a veil of secrecy whenever they involve law enforcement, national security, or other forms of immigration exceptionalism.

Normalizing these administrative principles in immigration adjudication at the U.S. Department of Justice is difficult, but vital. An alien has the statutory right to a full and fair hearing and a reasonable opportunity to present evidence on his or her own behalf.[108] Yet these principles are only partially and problematically enforced in immigration court. Policymaking through administration adjudication is vexing as a general matter. The immigration courts and the Board of Immigration Appeals (BIA) serve similar functions to administrative law judges and other administrative appeals units, but they operate with even less independence, less public oversight, and less procedure. Immigration adjudication is neither informal nor formal adjudication under the APA, meaning that its procedures are permitted to deviate from normal practice. The chief

[108] Section 240(b)(4)(B) of the Immigration and Nationality Act; 8 U.S.C. § 1229(b)(4)(B).

immigration judge has called on Congress and the President to safeguard the independence of immigration judges from political decisionmaking; one of her suggestions is to create an Article I immigration court, rather than housing immigration judges in the Department of Justice.[109] These recommendations run contrary to current proposals that seek to weaken rather than strengthen the independence and professionalism of the immigration courts. For instance, Attorney General Sessions' has suggested imposition of completion goals that would tilt EOIR decisionmaking toward removal.[110]

High stakes policymaking and adjudication should not be made on the basis of an administrative process that does not allow it to gather facts reliably. The normalization of principles of administrative procedure in immigration policymaking and adjudication could encourage greater availability of social science expertise and improve agency reliance on good information instead of political influence alone.[112]

B. Political mechanisms to improve the quality of evidence.

Political mechanisms can improve the quality of evidence in immigration policy. Congressional requests for information about immigration policies can push the DHS and the DOJ to describe the factual foundations of their policy decisions and hold them accountable to evidence-backed research about the effectiveness of policies. Congress could amend the APA or the INA to legislate a requirement that agency policies be supported by a factual record that facilitates subsequent review and that studies relied upon disclose the methods, assumptions, and data sources used in crafting their policies. Congress could modify requirements that significant rules already subject to notice and comment or regulatory impact analysis use the "best available evidence."[113]

More broadly, improving the quality and rationality of decisionmaking in immigration policies using nonlegal avenues of accountability would fill the lacuna of judicial review. Holding immigration policy accountable to expertise through legal means is not easy because not all statements and policies about immigration are correctable through legal recourse. Moreover, many of these enforcement policies are the product of discretion and cannot be challenged on substantive grounds. President Trump's twitter statements regarding the purpose of the travel ban or Attorney General Sessions' televised public statements on sanctuary cities are difficult to review, even if courts have taken notice.[114] Many garden variety immigration decisions are

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[109] *Dana Leigh Marks,* Immigrant Courts Should Be Independent – Not an Arm of the Administration, American Prospect (Apr. 24, 2017). These longstanding calls for greater independence in immigration adjudication are even more necessary in the face of the Trump Administration.

[110] Sessions Remarks to EOIR (Oct 12, 2017). *See also* White House Immigration Principles language intending to "establish performance metrics for immigration judges" (Oct. 8, 2017).

[112] A similar argument is made in Jill Family, *Is Immigration Law Administrative Law?* YALE J.REG. NOTICE & COMMENT ONLINE SYMPOSIUM (Feb. 8, 2016).

[113] Reeve Bull and Jerry Ellig, *Judicial Review of Regulatory Impact Analysis: Why Not the Best?* 69 ADMIN. L. REV. _ (2017) (seeking to improve regulatory impact analysis requirements with a "best evidence" standard).

[114] However, the DACA rescission is being challenged under APA. See e.g. *Regents of California* v. *DHS*, N.D. Ca. (update complaint and filing dates) ("failed to 'articulate a satisfactory explanation' for their action that would

rendered by Congress to be unreviewable in court by the terms of the Immigration and Nationality Act or subsequent jurisdiction-stripping statutes.[115] Consequently, misinformation or misleading practices that intrude on sound immigration policymaking need to be addressed through nonlegal avenues of accountability such as public discourse and political action. Increasing attention is being paid to the use of FOIA to obtain essential information about immigration enforcement practices and incriminating evidence related to individuals targeted for removal as well.[116] Improving the quality and rationality of decisionmaking under these constraints rests on an appeal to democratic and social norms more than courts.

That said, all of these evidence-bolstering mechanisms would benefit subsequent review as well. Courts, who are subject nonexperts, could use either the procedural standards or the substantive information generated from compliance with those standards to more effectively review the rationality of the policies. Academic researchers, citizen advisory councils, and public interest organizations who are familiar with social science research would have more opportunities to inform policymaking and correct misstatements under such requirements as well.

C. Strengthening judicial review of immigration policy.

When courts do review immigration policies, they have difficulty holding immigration decisionmakers accountable. Constitutional and statutory requirements for due process and other basic freedoms extend to immigrants. The First Amendment, Equal Protection Clause, and Due Process Clause apply to persons and not merely citizens, for example, and the INA includes its own procedural constraints. However, recent litigation activity notwithstanding,[117] longstanding precedent shows that these Constitutional and statutory provisions are often applied in a more relaxed fashion in the immigration context that disfavors immigrants. The INA is notoriously unclear and courts often prove unwilling to construe ambiguous provisions in favor of immigrants given that most decisions reside in the civil context, despite their high stakes.

Courts are typically more deferential to immigration agencies in their policymaking than hornbook Constitutional and administrative law doctrine would portend, whether due to background assumptions that immigration law is unique or due to the sheer complexity of

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enable a court to conclude that the decision was 'the product of reasoned decision-making'). https://universityofcalifornia.edu/sites/default/files/UC-DACA-Complaint.pdf. A 9th Circuit hearing included discussion of how the federal government's position squared with *State Farm* and agreed there must be a rational connection. https://www.courthousenews.com/fight-daca-decision-making-documents-hits-9th-circuit/.

[115] 1996 statutes such as AEDPA and IIRIRA stripped federal courts of review in many immigration matters. This has led to an insulations of BIA cases from scrutiny and widespread disparities.

[116] Margaret Kwoka, *First-Person FOIA*, 127 YALE LAW JOURNAL (forthcoming 2018).

[117] Federal courts have been actively reviewing recent immigration policies such as the travel ban, DACA rescission, and sanctuary city sanctions for both Constitutional and statutory compliance. Initial decisions suggest that some of these policies cannot withstood even the more relaxed judicial review that they currently face. For example, federal courts in the travel ban litigation have questioned the arbitrariness of banning refugees without more evidence of national security threat. Litigants challenging the rescission of DACA are asking for more explanation under the APA, after significant waffling and a bungled execution led to post office delays that jeopardized authorized renewals as untimely. However, the final result in these cases remains to be seen since many of the decisions involve preliminary stages of litigation and conflicting rulings across the nation may prompt Supreme Court review.

immigration law. This is not always appropriate. Courts tend to overlook immigration courts' inconsistent application of legal standards in their review of immigration court decisions and fail to consider that crimmigration cases involve interpretative matters under canons not well suited to the harsh consequences associated with detention and deportation. Factual findings routinely arise in immigration court even where the record is slim or where the fact-finding is not governed by federal rules of evidence. In asylum cases that require an asylum seekers' well-founded fear of persecution, for example, the BIA sometimes adopts State Department reports uncritically in an effort to challenge the petitioner's claimed persecution, rather than bringing in other social science evidence that would question the assertions of those reports, and sometimes rejects expert testimony unreasonably. Mass adjudication and priority docketing further truncate due process in immigration proceedings. The resulting opinions and administrative appeals are not always well-reasoned and sometimes not reasoned at all.

Requiring immigration agencies and immigration courts to engage in better data gathering and truthful reporting is critical to ensuring procedural fairness and substantive integrity in a policy area with such high stakes and such contested values. Courts should review immigration policy under normal standards of Constitutional and statutory review.[131] The Constitution should apply in force. Applicable standards for reviewing agency legislative actions would require courts to take a "hard look" at the rationality of agency decisionmaking, or at least be sure that the agency has taken a hard look and provide some kind of rational explanation for policy changes.[133] A more searching review of immigration policy would curb the current informality and irregularity of policymaking and adjudicatory decisionmaking in the high-stakes arena of immigration.

Conclusion

The rejection of expertise in immigration policy goes beyond the singular issue of immigration and the singular Trump Administration. But it is particularly consequential in the midst of a populist moment that rejects expertise in the service of a virulent anti-immigrant policy agenda. and that relies on missing or erroneous data to strip immigrants of their most basic rights. Immigration law is value-laden and subject to strong political pressure. It is not scientific law and may not lend itself to objective answers or singularly-agreed upon solutions. However, it is also not a policy domain bereft of reason, expertise, or evidence. Even if the neutral expert in immigration policymaking is a myth, there should be norms to separate irresponsible immigration policies from normal shifts in administrative policies, priorities, and procedures.[140]

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[131] This form of review would apply to agency decisions such as the DHS enforcement guidance accompanying the Trump Administration's interior enforcement executive order, the State Department's vetting guidelines for implementation of the travel ban, DHS Secretary Janet Napolitano's memo on DACA, and immigration court decisions from the Department of Justice and EOIR.

[133] Motor Veh. Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Corp., 463 U.S. 29 (1983).

[140] These principles echo sentiments from the move for evidence-based policymaking in other countries. *See generally* WHAT WORKS? EVIDENCE-BASED POLICY AND PRACTICE IN PUBLIC SERVICES (eds. Huw T.O. David, et al,

The institutional purpose of agencies is to advance norms of expertise and reasoned decisionmaking. Building standards for immigration policy based on rationality, expertise, and social science is part of the project of restoring the administrative state as well as improving immigration policy.

2000); Wayne Parsons, *From Muddling Through to Muddling Up: Evidence-Based Policy Making and the Modernisation of British Government*, 17 PUBLIC POL'Y & ADMIN. (2002); Michael Howlett, *Policy Analytical Capacity and Evidence-Based Policymaking: Lessons from Canada*, CANADIAN PUBL. ADMIN. 153 (2009); Gary Banks, *Evidence-Based Policy Making: What is It? How Do We Get It?* ANU Public Lecture Series, Productivity Commission, Australia (February 4, 2009), Available at SSRN: https://ssrn.com/abstract=1616460.