

# ESSAY

## IMMIGRATION AND THE CIVIL RIGHTS AGENDA

Cristina M. Rodríguez†

|   |     |
|---|-----|
| I. INTRODUCTION .....                                     | 125 |
| II. THE CIVIL RIGHTS PARADIGM.....                        | 127 |
| A. Civil Rights as Incorporation .....                    | 128 |
| B. Incorporation as Out of Reach.....                     | 130 |
| III. THE MUTUAL BENEFIT AND RULE OF LAW ALTERNATIVES..... | 132 |
| A. Mutual Benefit and Pragmatism.....                     | 132 |
| B. The Rule of Law and Proportionality .....              | 135 |
| IV. CONCLUSION .....                                      | 145 |

### I. INTRODUCTION

During Congress's efforts to pass comprehensive immigration reform in 2006 and 2007, media and academic commentators characterized the activism that animated the immigrant community as the beginnings of a civil rights struggle<sup>1</sup>—one that would dovetail with the growing political power of the

---

† Professor of Law, NYU School of Law. I benefitted greatly in thinking through the ideas in this Essay from conversations with Jack Balkin and participants in the Conference in Honor of John Hope Franklin: From Slavery, to Freedom, to the White House, held at Duke Law School in April 2010.

1. A 2006 survey by the Pew Hispanic Center found that 62% of native-born Latinos and 64% of foreign-born Latinos believed the immigrants' rights marches of May 2006 signaled the start of a new civil rights movement that will go on for a long time. See ROBERTO SURO & GABRIEL ESCOBAR, PEW HISPANIC CTR., NATIONAL SURVEY OF LATINOS: THE IMMIGRATION DEBATE 8 (2006), available at <http://www.pewhispanic.org/files/reports/68.pdf>. For scholarly commentary on the subject, see, for example, Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007) (discussing prospects for multi-racial civil rights movement centered around immigrant concerns); David Bacon, *Time for a More Radical Immigrant-Rights Movement*, AM. PROSPECT, (July 24, 2007),

country's Latino population to produce a major new social movement. These predictions were stirring, and the large-scale immigration marches of 2006, which helped prevent the passage of a House bill that would have made unlawful status a felony rather than adopt a legalization program, illuminated the agency and power of immigrant communities.<sup>2</sup> But the intensity of organization reflected in those marches has been difficult to sustain. In addition, the interests of the Latino electorate and immigrants diverge and sometimes directly conflict, thus making a pan-Latino movement focused squarely on immigrants' rights a fraught proposition.<sup>3</sup>

In this Essay I reflect on whether the civil rights paradigm ought to be invoked to frame the movement for immigration reform. Do alternatives for framing the debate that more accurately capture the stakes involved exist? Even if the civil rights paradigm does not provide the best theoretical framework for debating immigration reform, in what ways do concerns that sound in civil rights nonetheless arise in relation to immigration regulation, and what can be done by political and administrative actors to address those concerns?

I argue that civil rights rhetoric and values historically have informed movements for immigrants' rights and ought to continue to suffuse reform debates, but that the overarching conceptual frame for the immigration debate should be built using two other paradigms: a more pragmatic concept of mutual benefit and a balanced appreciation for the rule of law that includes valuation of proportionality, accountability, and fairness. In Part II, I discuss the viability of a robust civil rights paradigm as a general matter. Though the broad theoretical question I pose has relevance to many aspects of the immigration debate, I focus my discussion on the question of how to address unauthorized immigration—in my view the most urgent issue on the reform agenda.<sup>4</sup> In Part III, I address the intersection of civil rights principles with the two alternative paradigms—mutual benefit and rule of law. With respect to the latter in

---

[http://www.prospect.org/cs/articles?article=time\\_for\\_a\\_more\\_radical\\_immigrantrights\\_movement](http://www.prospect.org/cs/articles?article=time_for_a_more_radical_immigrantrights_movement).

2. See, e.g., Ted Barrett et al., *Immigration Fight Looms After Vote*, CNN.COM (Mar. 27, 2006, 10:55 PM), <http://www.cnn.com/2006/POLITICS/03/27/immigration/index.html> (describing the protests and predicting their effect).

3. I have elaborated on this observation elsewhere. See Cristina M. Rodríguez, *Latinos and Immigrants*, 11 HARV. LATINO L. REV. 247 (2008) (exploring how the interests of Latinos and immigrants diverge and why the latter have an interest in differentiating themselves from the former).

4. The three issues I would identify as most pressing are: (1) reassessing the criminal law grounds for removal: potentially scaling back the number of minor offenses that make an alien removable, implementing some form of statute of limitations on the criminal law grounds for removal, and increasing opportunities for relief; (2) reforming the system of immigration adjudication to better ensure that immigration judges are sufficiently skilled, resourced, and independent to produce good-quality and fair decisions; (3) developing a coherent approach to immigrant integration that includes investment in language education, substantial aid to the states most affected by immigration, and coordination of best practices among states and localities who do the bulk of the work of integration.

particular, I focus on how early shifts in the Obama administration's enforcement agenda embody the rule of law properly conceived. But whether we frame the immigration issue as a movement that fits squarely within the national civil rights narrative—as heir to the struggles against Jim Crow and race discrimination of the 1950s and 60s—or as a more quotidian regulatory debate that also implicates anti-exploitation and fairness concerns, the challenge for policymakers will remain to shape a regime that simultaneously serves the national interest and advances the rule of law while respecting human dignity.

## II. THE CIVIL RIGHTS PARADIGM

Immigration law and policy evolved over the course of the twentieth century in deep relation to the civil rights movement. In a 1948 civil rights message to Congress, for example, President Truman called on the legislature to end the race-based restrictions on naturalization.<sup>5</sup> He vetoed the 1952 Immigration and Nationality Act, despite his belief that it made necessary improvements to the immigration regime as a whole, because Congress elected to maintain the racially discriminatory national origins quotas adopted in the 1920s to limit the admission of immigrants from Southern and Eastern Europe.<sup>6</sup> The 1965 reforms of the INA that finally abolished these quotas emerged from the political and cultural milieu that produced the Civil Rights Act of 1964 and the Voting Rights Act of 1965 and were defended by members of Congress as realizations of the anti-discrimination aspirations of the era.<sup>7</sup>

---

5. President Harry S. Truman to the U.S. House of Representatives, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality (June 25, 1952), available at the American Presidency Project (“I have long urged that racial or national barriers to naturalization be abolished. This was one of the recommendations in my civil rights message to the Congress on February 2, 1948.”).

6. *Id.* (“The idea behind this discriminatory policy was, to put it baldly, that Americans with English or Irish names were better people and better citizens than Americans with Italian or Greek or Polish names. It was thought that people of West European origin made better citizens than Rumanians or Yugoslavs or Ukrainians or Hungarians or Baits or Austrians. Such a concept is utterly unworthy of our traditions and our ideals. It violates the great political doctrine of the Declaration of Independence that “all men are created equal.” It denies the humanitarian creed inscribed beneath the Statue of Liberty proclaiming to all nations, “Give me your tired, your poor, your huddled masses yearning to breathe free.”).

7. A long list of these connections could be written. When Congress in 1964 finally put an end to the Mexican guest worker regime known as the Bracero program, begun at the close of World War II to address wartime labor shortages in the Southwest, it was in part due to the political pressure exerted by unions and other civil rights activists, who drew attention to the gross exploitation of the Bracero workers, as well as to the program's negative effects on the working conditions and wages of U.S. citizens—realities brought to the general public's attention through Edward R. Murrow's documentary *Harvest of Shame* (CBS television broadcast Nov. 25, 1960). For a discussion of the Bracero program's history, see Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 485-91 (2009). In 1986, when Congress adopted an employer sanctions regime as part of the Immigration Reform and Control Act, with a view to curbing illegal immigration, the

Consistent with this linkage between civil rights and immigration, courts in the late twentieth century grappled with whether and how to extend equal protection guarantees to non-citizens, addressing whether immigrants could be denied access to the social goods extended to citizens, such as public schooling, welfare benefits, and other entitlements.<sup>8</sup> The body of cases that emerged represented a meaningful, albeit incomplete, extension of the judicially crafted constitutional protections developed in the wake of *Brown v. Board of Education* to secure the rights of African Americans and other racial minorities. In *Plyler v. Doe*,<sup>9</sup> in particular, the Court advanced a strong anti-subordination, anti-caste justification for immigrants' rights by striking down a Texas law that would have denied unauthorized immigrant children access to public schools.

For advocates and social reformers, the appeal of the civil rights paradigm is obvious. It situates immigration reform in a central and perpetual national struggle for racial justice and equality. But despite the fact that immigration reform and the civil rights narrative have intersected throughout U.S. history, with the latter helping to shape the former, it remains unclear what it would mean for an immigrants' rights agenda to form a modern-day civil rights movement. I leave to the side the crucial question of what the movement would look like organizationally—how it would be structured, what coalitions it would entail, what tactics it should use, and how it might learn from the successes and failures of the civil rights movement itself. I focus instead on the substantive question: What would the civil rights claim be?

#### A. Civil Rights as Incorporation

Defining the core civil rights claim is substantially complicated by the fact that the central question in today's debate is how to make sense of the unauthorized immigrant—a figure to whose presence there has been no formal, legal consent.<sup>10</sup> Do unauthorized immigrants' claims to justice and recognition

---

formation of a political coalition to pass the bill depended on the inclusion of a civil rights provision in the statute, prohibiting employers from discriminating in hiring on the basis of race or national origin and delegating enforcement power to the Department of Justice.

8. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 646-47 (1973) (acknowledging that states could limit certain civil service positions within the traditional functions of state government to citizens but striking down a general prohibition on employment of aliens in the civil service as overbroad); *Graham v. Richardson*, 403 U.S. 365, 372, 376 (1971) (striking down state laws that denied non-citizens access to state welfare benefits, concluding that aliens constitute a suspect class and that preserving state resources for citizens did not constitute a compelling justification for the discrimination); cf. *Mathews v. Diaz*, 426 U.S. 67, 80-81 (1976) (upholding a federal law denying aliens welfare benefits on grounds that the federal government had legitimate interest in discriminating against non-citizens in light of its power to regulate immigration).

9. 457 U.S. 202 (1982).

10. Much of my work concerns how to make sense of the phenomenon of illegal immigration. The systemic and social dysfunctions represented by the presence of twelve million unauthorized immigrants in the United States consume the public debate on

constitute legitimate civil rights demands? Does today's population of unauthorized immigrants have a claim to social and political incorporation on the order of the claims made during the civil rights era by black and Latino citizens excluded from full membership by segregation and discrimination?

A civil rights agenda could elide the status problem by focusing on recognition of immigrant workers' dignity through respect for their rights under labor and employment laws—a call for the enforcement of certain elements of the legal regime that emerged from the New Deal and the civil rights movement to prevent exploitation in the workplace and protect basic economic interests. In this sense, even for the unauthorized worker, a civil rights claim would be easy to make, not only because unauthorized status ought never to justify conditions of servitude, but also because the integrity of the labor law regime depends on its enforcement regardless of the status of the workers in question.

But to be properly called a new civil rights movement, the claims made under the movement's umbrella would have to be more demanding than calls for basic humane treatment. Recognition of immigrants' interests would have to be justified by something more than the argument that social order depends on enforcement of labor and civil rights laws.<sup>11</sup> The civil rights demand is ultimately one for justice, equality, and incorporation—at the very least in social life, and ultimately in the political process.<sup>12</sup> On a philosophical level, a civil rights paradigm therefore requires arguing that unauthorized immigrants, rather than being treated as lawbreakers,<sup>13</sup> ought to be regarded as persons entitled to respect and membership. At the policy level, the civil rights claim

---

immigration. This focus admittedly distorts the debate on immigration law and policy writ large by drawing the bulk of attention and political capital to its resolution. But in the end, addressing the unauthorized phenomenon will be crucial to the achievement of broader systemic reforms, precisely because as long as an illegal immigration problem persists, other issues cannot attract the political attention they need to be pushed forward.

11. A human rights or humanitarian paradigm offers another possible framing for the immigration issue. But because it does not tap directly into a domestic history of struggle and social change, it lacks the symbolic or emotional heft a civil rights paradigm carries. And, because it does not offer tangible benefits in return to society, unlike the mutual benefit or rule of law paradigms, it may lack persuasive appeal.

12. These political rights could be immediate, either through the extension of the franchise, or through the more sociological mechanism of incorporation of immigrant communities into political institutions, such as parties and interest groups with a direct stake in the political process. Or, political incorporation could be established as a longer-term aspiration, by putting unauthorized immigrants on a path to permanent residency status and eventual naturalization. In either case, the claim would be for eventual recognition of their full and equal membership in the body politic.

13. The fact of their lawbreaking could even be characterized as a form of civil disobedience—the rejection of arbitrary limitations on freedom of movement. The moral case for incorporation might also be based on the complicity of the U.S. government and American consumers in illegal immigration—the former because of feckless or inadequate enforcement, and the latter because of demands for low-wage workers and the failure to support a robust labor law regime.

would revolve around a legalization platform that provides an ultimate path to citizenship. Whether that path turns out to be long or short depends on how the civil rights demand is delineated—whether the demand is based on immediacy and on strong claims of injustice, or gradualist and based on a more aspirational vision.

Justifications for this sort of incorporationist agenda certainly exist. The claim that unauthorized immigrants deserve a level of respect tantamount to incorporation would stem from the fact that they are already members of society, as a sociological matter. They are taxpayers, workers, and homeowners whose lives are intertwined with legal immigrants and U.S. citizens. They are persons on whose labor society depends.<sup>14</sup>

Legal reality does not, however, match this sociological reality. Unauthorized status correlates with subordination and marginalization. Unauthorized immigrants lack the capacity to be effective social actors, because their status erases them from the political conversation and makes it difficult for them to advocate their interests to others; the broader society feels justified in ignoring immigrants' interests because of illegal status. Unauthorized immigrants are subject to almost unrestrained state power by virtue of the limited constraints existing law places on the government's authority to remove them from the country. This power also facilitates exploitation by private actors, namely employers, and means that unauthorized immigrants risk arrest and deportation when they interact with legal and social institutions. Legal marginalization thus becomes social marginalization. The fact that unauthorized immigrants are overwhelmingly poor and non-white deepens the civil rights parallel. Given the sociological characteristics of unauthorized status, then, the desire to situate the debate on the civil rights trajectory makes sense.<sup>15</sup>

## B. Incorporation as Out of Reach

Despite the strong resemblance of the unauthorized phenomenon with the conditions that fueled the civil rights movement, the fit between the civil rights paradigm and the case of the unauthorized immigrant remains an uneasy one. The difficulty of locating the politics of legalization within a civil rights

---

14. For an extended argument that the passage of time, which transforms illegal immigrants into members of the polity, gives rise to a moral argument for legalization, see Joseph Carens, *The Case for Amnesty: Time Erodes the State's Right to Deport*, BOSTON REVIEW (May-June 2009), available at <http://bostonreview.net/BR34.3/carens.php>.

15. As I have observed elsewhere, “[c]oncern for economic exploitation of immigrants and growing nativism and racism are features of the immigration debate, and the civil rights movement provides us with our vocabulary for approaching these sorts of social dysfunctions.” See Cristina M. Rodríguez, *From Litigation, Legislation*, 117 YALE L.J. 1132, 1167 (2008) (book review) (noting also that “immigration-related measures adopted by state and local governments in recent years resemble the poor laws of the nineteenth century and the segregationist impulse of the twentieth”) (footnote omitted).

framework stems first from the fact that unauthorized immigrants have broken the law. It would be disingenuous to point to the agency that immigrants display in organizing to defend their interests through protest, or in transforming themselves through their work into de facto members of society, but to deny immigrants' complicity (at least adult immigrants) in their own status. To be sure, the fact that unauthorized status may be the product of choice does not change the undemocratic nature of the social condition described above. But one source of unauthorized immigrants' social disability—their legal status—is not morally irrelevant in the same way that race, or gender, or other characteristics that have defined successful civil rights movements are.<sup>16</sup> This fact alone will make it difficult to transform the movement for immigrants' rights into a broad social movement that appeals to the larger public's sense of moral obligation.<sup>17</sup> In fact, the expectation that immigrants' rights become the next great social movement may be overburdening advocates and immigrants themselves with a heavy historical narrative they may not be able to sustain.

Relatedly, the claim for immigrant incorporation cannot be justified along the same lines as the civil rights claims made by blacks and Latinos—as a demand for realization of the principle of equal citizenship enshrined in the Constitution. In other words, at the core of the civil rights movement was the existence of a constitutional commitment to equal citizenship regardless of race forged through Civil War and Reconstruction. As constitutional citizens whose entire lives and histories had been lived as part of the American polity, the protagonists of the civil rights movement demanded an equal treatment and respect that they already had been promised by the Constitution, whose breach throughout the Jim Crow era amounted to a repeated failure to honor commitments already made. As I have emphasized, “[t]he Latino access problem,” or the fact that millions of Latinos in the United States remain politically powerless because of their citizenship status,

arguably bears no resemblance to the access problem faced by [African Americans in the Jim Crow South]. Not only did the latter face race-based discrimination, violence, and intimidation, but also their exclusion was perpetrated despite the presence of a historically rooted national consensus, embodied in the Reconstruction Amendments, that they were members of the

---

16. The Supreme Court says as much in *Plyler v. Doe*, rejecting calls to apply strict scrutiny to unauthorized immigrants on the ground that the status is not morally irrelevant. 457 U.S. 202, 220 (1982) (considering the moral culpability of adults who take the conscious, unlawful action to illegally immigrate).

17. In this context, it is worth pointing out that the major civil rights statutes were enacted against a backdrop of social movement protest, but major immigration reforms have more closely fit the model of interest group-driven legislation. Even the Hart-Celler Act of 1965, which made its way through Congress the same year as the Voting Rights Act and was animated by civil rights principles of equal treatment, did not result from widespread popular mobilization, but rather from lobbying by discrete ethnic groups and the State Department. 1965 Immigration and Nationality Act, H.R. 2580, 89th Cong. (1965) (enacted).

political community.<sup>18</sup>

In the Court's equal protection jurisprudence, a lingering uncertainty about the propriety of extending the level of protection owed racial minorities to non-citizens is detectable. The Court recognizes that some forms of discrimination on the basis of citizenship status can be justified, because non-citizens have not yet been incorporated fully into the polity. This fact inheres in the existence of nation-states and citizenship as both a formal status and a participatory practice, and it is only more glaring when illegal immigration is at issue.

Given these tensions—that civil rights concerns are inescapably present in the immigration context but that key features of the civil rights framework are not—the question becomes whether the civil rights framing should be abandoned or downplayed. Efforts to protect immigrants' rights and secure immigration reform ultimately can be understood and described with reference to civil rights principles without being overburdened by the demand that it become the next great social movement. To that end, alternative framings ought to be elaborated to capture the full range of the interests at stake.

### III. THE MUTUAL BENEFIT AND RULE OF LAW ALTERNATIVES

In this Part, I suggest two alternatives to the civil rights paradigm: mutual benefit and the rule of law. Like the civil rights framework, each of these has been present historically in debates concerning how best to design a regime of immigrant admissions and immigrants' rights. At the moment, the mutual benefit framework operates primarily as a rhetorical framing device in public discourse. But a conception of the rule of law that incorporates principles of proportionality, accountability, and due process has substantially shaped the Obama administration's policy shifts in this arena since the President took office. I consider the promise of each framework in turn.

#### A. Mutual Benefit and Pragmatism

A framework of mutual benefit is fundamentally pragmatic and highlights

---

18. Rodríguez, *supra* note 15, at 1166. Even some commentators, who advocate robust judicial protection of immigrants' rights to prevent their subordination, in the civil rights tradition of court protection of discrete and insular minorities, recognize the limitations of a civil rights framework. Owen Fiss, for example, has observed that:

To some extent, this special attentiveness [to the rights of African Americans] can be seen as a measure of corrective justice, as an implicit atonement for the wrongs admittedly done to African-Americans in the past. Immigrants cannot easily appeal to considerations of corrective justice. As an abstract category, immigrants have long been subject to abuse, but as actual people they are mostly newcomers.

OWEN FISS, A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 20 (1999). And yet he argues that immigrants, because of their political powerlessness, ought to be regarded as entitled to the same sort of judicially driven rights protection as racial minorities. *Id.* at 21.

the social gains that would accrue from the adoption of particular immigration policies. The concept of mutual benefit revolves around the recognition that immigration in general and legalization in particular can enhance the welfare of immigrants and Americans alike. The gain to immigrants is evident—job opportunities, acquisition of a stable legal status and the opportunity for long-term incorporation, all of which likely translate into the opportunity to live a better life. The social gains also include family reunification, as well as the general economic gains and growth in productivity that attend an orderly regime of labor migration, increased tax revenues, and the augmentation of a future tax base to support an aging population.<sup>19</sup>

Making the case for legalization using a mutual benefit paradigm would begin with an articulation of the negative externalities created by illegal immigration. I have written elsewhere about the human and social costs of the current illegal immigration regime.<sup>20</sup> Above I have made note of the corrosive effects the regime has on the labor laws. The vulnerable position of the unauthorized worker, who has strong disincentives to report violations of the law for fear of deportation, makes employer abrogation of labor, health, and safety laws easier. The threat of enforcement places families and communities of mixed status under great economic and social stress, which strains social institutions, such as public schools. The presence of a large unauthorized population also undermines confidence in the government's law enforcement capacities, which contributes to a general distrust of government.

Illegal immigration also reduces support for future legal immigration and adds considerable and destructive friction to debates over immigration reform targeted at promoting economic growth or otherwise improving the system as a whole. Relatedly, illegal immigration diminishes tolerance of already-present immigrant populations, which imposes costs on lawful immigrants and Latinos,<sup>21</sup> whose interests and identities become conflated with unauthorized immigrants. The existence of a large unauthorized population ultimately sows social unrest by negatively affecting race relations<sup>22</sup> and heightening the

---

19. For a discussion of why, based on demographic trends, the United States is in need of greater immigration, as well as an argument for a new social contract between immigrants and Americans based on principles of mutual need, see DOWELL MYERS, *IMMIGRANTS AND BOOMERS: FORGING A NEW SOCIAL CONTRACT FOR THE FUTURE OF AMERICA* 36-40 (2007).

20. See Cox & Rodríguez, *supra* note 7; Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219.

21. A 2006 Pew Hispanic Center survey revealed that 54% of Latinos see an increase in discrimination as a result of the immigration policy debate. See SURO & ESCOBAR, *supra* note 1, at ii. In a 2008 survey, one in seven Latinos reported having difficulty finding a job because of their Latino status, and one in ten Latinos reported the same dynamic in the housing context. See MARK HUGO LOPEZ & SUSAN MINUSHKIN, PEW HISPANIC CTR., *NATIONAL SURVEY OF LATINOS: HISPANICS SEE THEIR SITUATION IN U.S. DETERIORATING; OPPOSE KEY IMMIGRATION ENFORCEMENT MEASURES* i (2008), available at <http://pewhispanic.org/files/reports/93.pdf>.

22. The premium on enforcement can lead to racial profiling in hiring by employers

culture of surveillance in the workplace and other sectors where technology and monitoring can be deployed to screen the identity of workers and other participants.

From the premise that it is not in society's interests to allow the persistence of an unauthorized population, a mutual benefit argument for legalization could be made on the ground that it represents the only solution to the problems just outlined.<sup>23</sup> That a legalization program represents a logical policy response to the mutual benefit claim, just as it would to a civil rights claim, does not make the two frameworks interchangeable. But the potential social salience of the mutual benefit paradigm comes from its linking of reform to broader social welfare.

In addition, the mutual benefit paradigm might be politically appealing, because it would not necessarily coincide with political inclusion, or paths to citizenship. The procedural details of a legalization regime justified by mutual benefit might differ substantially from the regime adduced through a civil rights lens.<sup>24</sup> Legalization, instead of being a matter of right or obligation that stems from U.S. complicity in the creation of the problem, would be a benefit, which in turn would provide justification for more demanding eligibility criteria. A mutual benefit paradigm is not inconsistent with a robust legalization platform, but the former does ultimately allow for a broader range of political trade-offs.

---

reluctant to run afoul of the immigration laws, for example.

23. T. Alexander Aleinikoff has articulated the pragmatic case for legalization using cost-benefit language, which is congenial to a mutual benefit narrative. See Alexander Aleinikoff, *Legalization Has Its Costs, But They Are Outweighed by the Benefits; Pragmatic Arguments May in the End, Be Most Persuasive*, BOSTON REVIEW (May-June 2009), available at <http://bostonreview.net/BR34.3/aleinikoff.php> ("Legalization has its costs in terms of providing incentives to enter illegally and expanding eligibility for social programs. But on balance these costs are likely to be outweighed by the benefits of protecting against exploitation and promoting integration into American society."). An alternative strategy advocated by critics of illegal immigration has been the promotion of attrition through measures that make life unlivable for unauthorized immigrants. The state and local laws that prohibit landlords from renting to unauthorized immigrants represent perhaps the extreme example of this strategy. Though this sort of approach might fit within a mutual benefit paradigm, in the end it would impose many of the same externalities of the status quo and deny the U.S. the benefit of immigrant workers, or at least that is how a mutual benefit defense of legalization would proceed.

24. For a discussion of the decisions that must be made at the implementation phase of legalization, see *infra* note 48. The success of a legalization program rises and falls on the details of its design and on whether Congress can reform the system to prevent similar circumstances of high levels of unauthorized immigration from arising in the future. The policy questions that will arise, assuming that political will for legalization can be found, include: What will be the cut-off date of entry for eligibility? What will be the length of the path to permanent residency and then citizenship? Will the legislation simultaneously deal with backlogs in the system to restore a sense of fairness and reduce incentives for illegal immigration? Will states be given sufficient aid to manage the implementation process, and how should aid be disbursed and distributed?

## B. The Rule of Law and Proportionality

Holistically conceived, a rule of law paradigm would emphasize not just law and order, but also protection of individuals from arbitrary government action and overweening state power. A rule of law framing thus promises less a civil rights movement for our time than a balancing of different values. Importantly, these values include not just enforcement and policing, but also norms of proportionality, government accountability, and fairness. A rule of law agenda in relation to illegal immigration, in particular, would entail greater proceduralization of enforcement and the channeling of prosecutorial discretion through the lens of proportionality to focus on high-value targets. The principles of due process and proportionality would encourage, for example, skepticism of intrusive enforcement techniques, such as workplace surveillance, and the development of highly effective but expensive identification-tracking technology whose costs must be born by all people, not just unauthorized immigrants.<sup>25</sup>

Understood in this way, a rule of law agenda would advance core interests of the two paradigms already discussed, simultaneously furthering the social (and immigrant) interest in reducing the costs of illegal immigration and promoting the civil rights and liberties interests of non-citizens and citizens alike. But because it dovetails with law enforcement matters, it has two potential advantages over the other frameworks as a device for framing immigration debates in a way that advances civil rights principles. First, an agenda prioritizing enforcement of the law has potentially significant political appeal. In this sense, the rule of law framework need not be seen as a substitute for the civil rights or mutual benefit frameworks, but rather as a complement to be mobilized in the face of political obstacles to more ambitious agendas designed to promote immigrant incorporation.

Second, whereas the paradigms discussed above fit best within legislative

---

25. Another example of the ways in which civil liberties concerns operate within a rule of law agenda is the controversy over the social security no-match regulation. The Bush Department of Homeland Security issued a regulation establishing that when employers received social security no-match letters—meaning that an employee’s name and number did not match—the employer would be put on notice that he might have hired an unauthorized worker and was therefore required to take steps to investigate and cure the potential violation. Because no-match letters issue in cases of mistaken identity or clerical error, a public uproar and litigation ensued, and the Obama administration eventually decided to rescind the rule. The concern that animated the opposition stemmed from a fear of excessive surveillance in the workplace, or disproportionate use of government authority to address the hiring of unauthorized workers. The debate over the border fence—its commercial and environmental implications, its effects on the rights of property owners, and the absence of procedural guarantees to challenge the use of executive authority to build the fence in particular places—also elucidates the civil liberties counterweight to enforcement that fits within a rule of law framework. These sorts of claims also can be incorporated into a mutual benefit framework, but importantly, they represent claims about the limits of law and the government’s coercive power—claims central to understanding the full scope of the rule of law.

decision-making frameworks, a rule of law strategy could help guide not only reform efforts in Congress, but also (and primarily) the work of the executive branch, whose primary responsibility vis-à-vis immigration is to enforce the law. The challenge of infusing immigration law with civil rights principles is thus not for the legislature alone.<sup>26</sup> Congress enacts major overhauls of the immigration regime infrequently,<sup>27</sup> but the various arms of the executive branch that administer the immigration laws manage the system on a day-to-day basis. As a result, as a co-author and I have noted elsewhere, “[t]he inauguration of a new President can bring with it remarkable changes in immigration policy.”<sup>28</sup> Alterations in enforcement policy that emphasize proportionality and due process can thus help shape the normative framework that governs the immigration regime as a whole.

Critics of immigration enforcement policy would contend that, over the last decade and a half, Congress<sup>29</sup> and the President in tandem have moved very far from the sort of rule of law agenda I describe, with the rule of law becoming synonymous with state coercion.<sup>30</sup> Indeed, members of both political branches

---

26. As in any area of the law, the courts play an important role in setting the parameters of what the legislature and the executive may do by applying constitutional principles and doctrines of administrative law, and through the interpretation of statutes. But courts treat many aspects of immigration law, like the foreign affairs arena, as political questions. I have explored these dynamics extensively elsewhere. See Cox & Rodríguez, *supra* note 7.

27. For an astute discussion of the politics of immigration reform, see Daniel J. Tichenor, *Navigating an American Minefield: The Politics of Illegal Immigration*, 7 THE FORUM, Issue 3, 1 (2009), <http://www.bepress.com/cgi/viewcontent.cgi?article=1325&context=forum> (noting that the obstacles to immigration reform, which in and of itself is treacherous for presidents and congressional leaders, are heightened when focused on illegal immigration).

28. Cox & Rodríguez, *supra* note 7, at 464. We emphasize that, through a shift in enforcement priorities, the President has considerable power to affect the numbers and types of immigrants permitted to remain inside the United States. In this sense, the President might choose to extend a form of temporary amnesty to certain classes of unauthorized immigrants, say those whose only violation of the law is a civil immigration violation, by shifting enforcement policy to focus largely, if not exclusively, on the removal of aliens with criminal convictions. See Cox & Rodríguez, *supra* note 7, at 464. (“[D]e facto delegation makes it possible for him, without having to resort to the legislative process . . . to permit immigrants with minor criminal convictions to stay rather than removing them.”); cf. Tichenor, *supra* note 27, at 20 (arguing in light of experiences of Clinton and Bush administrations with immigration reform that “the Obama administration is almost certain to have far fewer degrees of freedom on immigration than its recent predecessors”).

29. See, e.g., Spencer S. Hsu, *Delay in Immigration Raids May Signal Policy Change*, WASH. POST, Mar. 29, 2009, at A2 (noting that, led by Senator Byrd, “Congress this year ordered ICE to spend \$127 million on workplace operations, \$34 million more than President George W. Bush had requested” and noting that senior aides indicated that “reducing those amounts” in the budget “would provoke a fight.”).

30. See *id.* A growing scholarly literature assesses the ways in which the immigration enforcement regime and the criminal law interact, identifying numerous due process problems that arise as the result of increased reliance on civil immigration enforcement to accomplish criminal law ends and increased criminalization of immigration violations. For

have allocated considerable financial and personnel resources to law enforcement operations, both at the border and in the interior, across several administrations. Secretary of Homeland Security Janet Napolitano has made clear that the Department of Homeland Security (DHS) will build on and expand the enforcement regime maintained by the Bush administration, pursuing an aggressive strategy targeting illegal immigration.<sup>31</sup> The rate of removal indeed went up in fiscal year 2009,<sup>32</sup> and the very fact that the administration's approach to illegal immigration has been to re-double enforcement efforts underscores that the civil rights paradigm as described in Part II is far from the government's purview.

That said, early initiatives of the Obama administration reflect a willingness to incorporate proportionality, accountability, and due process into the enforcement regime and provide a template for a genuine rule of law agenda, making it worthwhile to consider some of what has been accomplished to date. As often happens with new administrations and in most regulatory arenas, the Obama administration has reviewed the immigration policies of its predecessors and very publicly revised certain positions within the enforcement regime to advance the President's own substantive agenda. In 2009, Secretary Napolitano announced various new policies that suggest significant shifts in the underlying priorities of U.S. immigration policy, even as those policies reinforce the emphasis on law enforcement. She unveiled important changes with respect to employer sanctions, detention policy, and state and local

---

excellent examples of this literature, see Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) (discussing how the criminal law and immigration law systems overlap); Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007) (discussing the use of immigration law as a criminal enforcement strategy); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (arguing that immigration law has been incorporating the theories and practices of the criminal for the last twenty years while simultaneously rejecting the procedural protections of the criminal justice system); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (describing criminal law and immigration law as systems that are merely "nominally separate").

31. See, e.g., James C. McKinley, Jr., *Napolitano Focuses on Immigration Enforcement, Not Overhaul*, N.Y. TIMES, Aug. 12, 2009, at A12 (noting Napolitano's tough stand on enforcing existing law and simultaneous emphasis on shifting priorities to deport criminals and crack down on employers who hire illegal workers, rather than simply arresting the workers themselves); Julia Preston, *Firm Stance on Illegal Immigrants Remains Policy Under Obama*, N.Y. TIMES, Aug. 4, 2009, at A14 ("After early pledges by President Obama that he would moderate the Bush administration's tough policy on immigration enforcement, his administration is pursuing an aggressive strategy for an illegal-immigration crackdown that relies significantly on programs started by his predecessor.").

32. N.C. Aizenman, *Latinos Skeptical of Obama Immigration Efforts*, WASH. POST, Mar. 20, 2010, at A3 (noting that in fiscal year 2009, the rate of removal increased 5% to 387,790 removals, and that the removal of immigrants who have committed crimes increased by 19%).

immigration participation in immigration enforcement.<sup>33</sup>

The adjustment perhaps most reflective of a concern for proportionality has been the administration's increased emphasis on identifying and removing dangerous and higher-value targets, rather than ordinary status violators, accomplished through several means.<sup>34</sup> First, Secretary Napolitano has indicated that, in the enforcement of the employer sanctions regime, the U.S. Immigration and Customs Enforcement (ICE) will target employers, rather than unlawful workers, through greater use of criminal sanctions.<sup>35</sup> According to an ICE official, "of the more than 6,000 arrests related to worksite enforcement in

---

33. Hsu, *supra* note 29 (noting that Napolitano asked "agents in her department to apply more scrutiny to the selection and investigation of targets as well as the timing of raids").

34. ICE enforcement strategies animated by clear priorities will not necessarily result in advancement of those priorities. The National Fugitive Operations Program (NFOP), for example, has come under criticism for diverting resources intended to target dangerous fugitive aliens to the arrest of ordinary immigration status violators, or aliens who have never been brought before an immigration judge but who ICE determines are in the U.S. unlawfully. The NFOP has been gifted with dramatic increases in funding since 2003—from \$9 million in FY 2003, its first year of operation, to \$218 million in FY 2008—and was ostensibly designed to identify and remove fugitive aliens with criminal histories through the use of Fugitive Operations Teams sent around the country. From 2003 to 2005, however, ordinary status violators represented 22% of annual FOT apprehensions, and apprehensions of fugitive aliens with criminal convictions have dropped over time and represented only 9% of arrests in FY 2007. MARGOT MENDELSON ET AL., *MIGRATION POLICY INSTITUTE, COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM* 1-3 (2009). In other words, the articulation of enforcement priorities will not secure a reorientation of immigration policy unless oversight within DHS and by congressional subcommittees and the public continues.

35. Another means of implementing a sense of proportionality in enforcement is suggested by the Obama administration's abandonment of reliance on home raids to apprehend so-called criminal aliens, or otherwise removable aliens, and a return to focus on worksite enforcement—a move that also has humanitarian justifications. The focus on worksite raids at least approaches the targets of enforcement actions in less compromised circumstances and may be less likely to result in the application of enforcement authority in the sanctuary of the home and to minors and other more vulnerable targets; additionally, worksite enforcement is less likely to result in the violation of the Fourth Amendment. For discussion of the effects of home raids launched by the Bush administration, see BESS CHIU ET AL., *CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS* 1 (2009), available at [http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC\\_ICE-Home-Raid-Report%20Updated.pdf](http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf) (documenting practices such as entering homes illegally by pushing in doors; illegal seizure of "non-target" individuals during operations; and illegally seizing individuals based on race, ethnicity, or limited English proficiency); Katherine Evans, *The ICE Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561 (2009) (chronicling alleged abuses committed by ICE agents during home raids, including entering homes without true consent, mistaking citizens for deportable immigrants, and humiliating arrestees, such as taking them into custody in night clothes and releasing them after processing far from home and without means of return); see also 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 (noting increased Fourth Amendment violations in immigration raids, including during recent home raids).

2008, only 135 were of employers. [But] [e]nforcement efforts focused on employers better target the root causes of illegal immigration,”<sup>36</sup> and so an enforcement strategy according to which ICE prioritizes the criminal prosecution of actual employers who knowingly hire illegal workers is required. Noting that “[t]he prospect for employment in the United States continues to be one of the leading causes of illegal immigration[,] creating a market for criminal smuggling organizations who exploit people willing to pay high fees[ ] and take great risks to enter the United States without detection,” Napolitano has underscored that the shift in emphasis is designed to curb the criminality that surrounds illegal immigration more generally, but not by denominating the immigrant as a criminal.<sup>37</sup> This move arguably provides a means of systemically addressing the immigration problem by shifting the burden or costs more equally across all parties involved. Employers and consumers create the magnet that draws illegal immigration, and so enforcement resources ought to be targeted in ways that address them as root causes, thus improving law enforcement performance and better distributing culpability at the same time.

Questions remain as to whether this shift to a focus on employers will prove lasting or meaningful, either in the sense that the shift improves the efficacy of employer sanctions or reduces the channeling of immigrants into the system of detention and removal. It seems unlikely that ICE can or will target employers through criminal sanctions without conducting worksite raids that lead to the apprehension and detention of workers themselves. Indeed, in internal documents, ICE has indicated that it “will continue to fulfill its responsibility to arrest and process for removal illegal workers encountered during worksite enforcement operations.”<sup>38</sup>

That said, ICE does maintain a set of humanitarian guidelines to govern arrests at worksites,<sup>39</sup> and the Napolitano DHS has extended those guidelines

---

36. Memorandum from Marcy M. Forman, Director, Office of Investigation, to Assistant Director, Deputy Assistant Directors, Special Agents in Charge, U.S. Immigration and Customs Enforcement 1 (Apr. 30, 2009), *available* at <http://www.millerlawoffices.com/publications/Employers/Forman%20memo%20Best.pdf> [hereinafter Forman Memorandum].

37. *Id.*

38. *Id.* Of course, rounding up workers continues to be unproblematic from an enforcement perspective—they are in violation of the law, and this policy simply cures the imbalance in culpability by targeting the employers who are complicit.

39. In a related vein, a 2007 Government Accountability Office (GAO) report delineated recommendations for improving controls that govern ICE’s decision-making related to alien removal, particularly with respect to initial phases of the process that include apprehension and detention of aliens. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-67, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING (2007). The recommendations represent means of controlling the discretion possessed by ICE officers through guidelines designed to prevent improper decision-making. The suggested controls include promotion of effective communication in a form and within a time frame that enables officers to carry out duties. *See id.* at 25. The report as a whole evinces concern with establishing adequate mechanisms of supervision and

to actions that involve twenty-five or more illegal workers, rather than the standard of 150.<sup>40</sup> Perhaps more importantly, in its first year, the Obama administration did in fact move away from the worksite enforcement actions of the Bush administration toward employer audits.<sup>41</sup> These reorientations of enforcement priorities arguably reflect a concern for proportionality by having law enforcement police employers without dispatching ICE officials to workplaces with a show of armed force. Whatever its long-term plans, the administration appears to be attempting to burnish public confidence in the efficacy and integrity of the regime by balancing concerns for proportionality, accountability, and fair and humane treatment with identifying and prosecuting violations of immigration law.

The emphasis on proportionality also has informed the administration's approach to the controversial 287(g) program, pursuant to which state and local police enter into agreements with ICE to participate in the enforcement of federal immigration law, after receiving training and under ICE supervision. In July 2009, ICE announced that all 287(g) agreements would be governed by a new standard-form memorandum of agreement. The new template departs from the agreements signed by the Bush administration in various ways, the most significant of which is that the template articulates a set of clear enforcement priorities.<sup>42</sup> The template agreement identifies three levels of offenders and encourages participants to target level one "criminal aliens," or persons convicted of dangerous or violent crimes, as opposed to level three offenders, who are mere immigration status violators. This move, in fact, reflects ICE's stated policy of shifting federal enforcement efforts generally toward the apprehension and removal of so-called criminal aliens through the expansion of programs that target serious offenders.<sup>43</sup>

By articulating enforcement priorities that reflect principles of proportionality, the DHS appears to be shifting its resources to acknowledge that not all unauthorized immigrants should be regarded as equally in violation of the trust or sovereignty of the United States, thus combining a rule of law agenda with an implicit form of humanitarian relief. To be sure, developments in the spring of 2010 suggest that this shift may be more rhetorical than real. A March 2010 report by the Office of the Inspector General within the

---

monitoring during the course of normal operations to ensure that the exercise of officer discretion is consistent with established policies and procedures. *Id.* at 27.

40. See Forman Memorandum, *supra* note 36, at 4.

41. See Aizenman, *supra* note 32 (noting that the number of audits nearly doubled in 2009).

42. For a discussion of the evolution of the 287(g) program and other programs involving federal-state collaboration in enforcement that contain similar priorities, see CRISTINA M. RODRIGUEZ ET AL., MIGRATION POLICY INST., A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) (2010), available at <http://www.migrationpolicy.org/pubs/287g-March2010.pdf>.

43. See Aizenman, *supra* note 32 (noting that removals of criminal aliens went up 19% in fiscal year 2009).

Department of Homeland Security found that some local jurisdictions have not been operating in compliance with the terms of the agreements that authorize their enforcement activity, and that ICE supervision has been ineffective.<sup>44</sup> A memorandum from an ICE official to field directors, leaked in April of 2010, suggested agency intent to increase the number of non-criminal removals through a “surge” in efforts to apprehend status violators.<sup>45</sup> But the OIG report studied the 287(g) program before the Obama administration reformulated it, and the head of ICE has disavowed the contents of the leaked memo, noting that “we are strongly committed to carrying out our priorities to remove serious criminal offenders first.”<sup>46</sup> At the very least, enforcement policy is in a state of flux, and officials are at least grappling with proportionality concerns.

Several of the early Obama administration initiatives also advance the accountability component of the rule of law, according to which the use of force, to be justified, must be done by agents accountable for their actions, or subject to supervision to ensure that officials respect limits on the use of government power, including individual civil liberties. This accountability is also essential to secure the reliability of the outcomes of enforcement actions—that officers hit the intended targets rather than indiscriminately use force. Changes in the 287(g) program reflect an intent to promote these values, with ICE promising greater oversight of state and local officials in the program and engaging in more rigorous screening of entrants into the program by requiring that they adhere to the parameters of the new program template. In addition to issuing new formal guidelines for reporting and monitoring, the administration also appears to be willing to mete out consequences for failure to conform. In October 2009, several months after the Department of Justice launched an investigation of the use of 287(g) authority by Sheriff Joseph Arpaio in Maricopa County, Arizona based on accusations that he and his officers engaged in racial profiling, ICE terminated the authority of the Sheriff and his deputies to arrest suspected unauthorized immigrants during the ordinary course of policing.<sup>47</sup> This decision, coupled with the more formal references to

---

44. DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., OIG-10-63, THE PERFORMANCE OF 287(G) AGREEMENTS 1 (2010), available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_10-63\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf).

45. See Spencer S. Hsu & Andrew Becker, *Immigration Officials Set Quotas to Boost Deportation Numbers*, WASH. POST, Mar. 27, 2010, at A4; Memorandum from James M. Chaparro, Dir., ICE Detention & Removal Operations, to ICE Field Office Directors and Deputy Field Office Directors regarding “Removal Goals” (Feb. 22, 2010), available at <http://media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf>.

46. Assistant Secretary John Morton, U.S. Immigration and Customs Enforcement, News Releases, ICE Statement in Response to March 27 *Washington Post* Article (Mar. 27, 2010), <http://www.ice.gov/pi/nr/1003/100327washingtondc.htm>.

47. See Miriam Jordan, *Arizona Sheriff's Powers Cut*, WALL ST. J., Oct. 7, 2009, at A4 (noting that “activists have said Mr. Arpaio’s officers engaged in racial profiling and found pretexts, such as broken tail lights, to arrest undocumented residents of the Phoenix area”). For further presentation of evidence of Arpaio’s tactics, see for example, AARTI SHAHANI & JUDITH GREENE, JUSTICE STRATEGIES, LOCAL DEMOCRACY ON ICE: WHY STATE AND LOCAL

supervision, may well ensure that Sheriff Arpaio remains an aberrational abuser of the authority granted under the program, rather than a representative example of the consequences of 287(g) programming. That said, the extent to which consequences follow from monitoring, and the extent to which monitoring and supervision create incentives for actors within the 287(g) program to adhere to federal enforcement priorities or protocols, remains ripe for empirical investigation. The extent to which accountability in form turns into accountability in practice depends on the administration's ongoing implementation of its stated objectives. At the very least, however, the creation of mechanisms of accountability represents an effort to advance an enforcement agenda that also comports with a theory of limited government designed to protect basic civil liberties.<sup>48</sup>

---

GOVERNMENTS HAVE NO BUSINESS IN FEDERAL IMMIGRATION LAW ENFORCEMENT 37-39 (2009) (describing 287(g) authority given to Sheriff Joseph Arpaio in Maricopa County, Arizona, which included the authority to patrol the streets for immigration violators, as leading to large numbers of arrests for driving or traffic violations, such as burned-out license plate lights and failure to use proper turn signals). The 287(g) program has given rise to serious criticism by immigrants' rights advocates, academic researchers, and some law enforcement associations, for a variety of reasons, including that it undermines trust in the police in immigrant communities and therefore compromises public safety, and that it encourages racial profiling and heightened policing in immigrant communities. In March of 2010, the Office of the Inspector General in the Department of Homeland Security released its audit of the program, which focused on seven jurisdictions, and concluded that it lacked meaningful oversight and targeted low-priority immigration status violators. *See* DEP'T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., *supra* note 44. The studies of the 287(g) program conducted to date, including the OIG audit, have been of the program before the Obama administration reformulated it. Whether that reformulation along the lines discussed above will address the program's due process and proportionality defects remains to be seen. For a discussion of the questions that must be answered to determine whether the new structure of the program conforms to sound regulatory principles, see RODRÍGUEZ ET AL., *supra* note 42.

48. The experience with the implementation of the legalization program adopted in 1986 as part of the Immigration Reform and Control Act underscores how adherence to a proceduralist rule of law vision can advance substantive rights. The practices and regulations adopted by the agency in charge of administering any future legalization program will determine whether the program is administered fairly, efficiently, and transparently. "Absent faithful implementation, a program can be eviscerated in practice by restrictive rules, unfair adjudication practices, impermissible eligibility criteria or broad interpretations of grounds for denial." *See* LUCAS GUTTENTAGE, A BRIEF INTRODUCTION TO THE IRCA LEGALIZATION EXPERIENCE AND THE ROLE OF JUDICIAL REVIEW 2 (on file with author). After IRCA, judicial review and class action lawsuits proved essential to ensuring proper implementation. Judicial review "was both the tool of last resort and the essential mechanism for compelling the agency to implement the statute as Congress intended." *Id.* at 2-3; *see, e.g.,* Zambrano v. INS, 972 F.2d 1122, 1124 (9th Cir. 1992) (challenging INS regulation establishing that any past receipt of public cash assistance would bar eligibility for legalization and defining receipt to include receipt by family members, despite the fact that the statute enacted a special rule regarding the public charge admissibility requirement to allow such aliens to be eligible if they could "demonstrate an employment history in the United States evidencing self support without public assistance"); *Catholic Soc. Servs. v. Meese*, 685 F. Supp. 1149, 1151 (E.D. Cal. 1988) (challenging INS rule that restricted statutory exception to continuous physical presence requirement in the U.S. for "brief, casual, and innocent" absences to

Some of the recent changes targeted at keeping government officials in check are also infused with concerns for due process, fairness, and even the protection of human dignity. The most important advance along these lines could turn out to be the renewed attention to the system of civil immigration detention.<sup>49</sup> The head of ICE, John Morton, announced a major overhaul of the detention system in early 2009, with the goal of improving detention center management to “prioritize health, safety and uniformity among our facilities while ensuring security, efficiency and fiscal responsibility.”<sup>50</sup> Perhaps the most important long-term commitment made by ICE to this agenda has been the creation of an Office of Detention Policy and Planning, whose responsibilities include to “design and plan a civil detention system tailored to address” ICE’s needs.<sup>51</sup> The administration thus has committed resources to developing a detention regime that better promotes the humanitarian interests of detainees<sup>52</sup> and brings the system as a whole into line with the ostensibly

---

absences authorized by the agency through grants of advance parole).

49. Another important procedural shift initiated by executive officials in 2009 was Attorney General Holder’s decision to vacate the opinion issued by former Attorney General Mukasey denying that ineffective assistance of counsel could be a basis for a motion to reopen, overturning twenty years of precedent and essentially establishing that, because immigrants do not have a constitutional right to counsel, they cannot claim relief based on their lawyers’ mistakes. AG Holder ordered the BIA to continue applying past precedent on ineffective assistance of counsel pending a rulemaking on the subject. In an interim decision, the Attorney General said,

*Compean* set forth, as an exercise of the Attorney General’s administrative discretion, a new substantive and procedural framework for reviewing all such claims and a formulation of the prejudice showing different from that followed by many courts, despite the limited discussion of the *Lozada* framework in the briefs . . . .

Establishing an appropriate framework for reviewing motions to reopen immigration proceedings based on claims of ineffective assistance of counsel is a matter of great importance. I do not believe that the process used in *Compean* resulted in a thorough consideration of the issues involved . . . . The preferable administrative process for reforming the *Lozada* framework is one that affords all interested parties a full and fair opportunity to participate and ensures that the relevant facts and analysis are collected and evaluated.

*Compean*, 25 I&N Dec. 1 (A.G. 2009). Interim Decision #3643. This move simultaneously acknowledges the importance of counsel to the immigrant’s ability to defend his interests in removal proceedings and the value of procedural protections, such as the right to counsel, to the integrity of the regime of immigration adjudication, because of the role that counsel plays both in checking the government’s power and helping to approximate the correct outcome in adjudications.

50. U.S. Immigration and Customs Enforcement, News Releases, ICE Announces Major Reforms to Immigration Detention System (Aug. 6, 2009), <http://www.ice.gov/pi/nr/0908/090806washington.htm>.

51. *Id.*

52. Based on a review of twenty-five detention facilities, the first head of the new detention office within ICE has made several recommendations and identified important distinctions between the administrative purposes of immigration detention and the punitive purposes of the criminal incarceration system. See DORA SCHRIRO, ICE, DEP’T OF HOMELAND SECURITY, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009). “The majority of the population is characterized as low custody, or having a low propensity for violence. With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons.” *Id.* at 2. ICE relies

civil character of immigration enforcement by eliminating the trappings of criminal confinement. These reforms not only reflect a concern for proportionality, but also reflect a concern for recognition of the greater freedom to which civil immigration detainees ought to be entitled.

To be sure, these reforms are susceptible to the critique that they simply normalize immigration detention as a policy by streamlining and systematizing it.<sup>53</sup> The effect of the bureaucratization and sanitization of the detention regime may be to entrench it, or render it more acceptable because the conditions it imposes are less severe than in the past.<sup>54</sup> Of course, this normalization may simply be a natural outgrowth of a dynamic that predates the Obama administration—the government’s increased reliance, as a component of removal policy, on detention, which has grown dramatically since 1996,<sup>55</sup> particularly given the mandatory detention requirements enacted by Congress.<sup>56</sup> The fact that the agency now seeks to tailor the system to civil needs and to provide centralized oversight thus curbs already unfolding trends

---

on correctional incarceration standards designed for pre-trial felons, which “impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.” *Id.* at 2-3. The report recommends that ICE establish a system of immigration detention with requisite management tools and informational systems to detain and supervise aliens in settings consistent with assessed risk—signs of proportionality. The report also recommends that ICE expand access to legal materials, counsel, visitation, and religious practices and develop unique provisions for special populations such as women. *Id.* at 3.

53. For a critique of the detention regime and an expression of skepticism regarding the possibility of new directions, see Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1556867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1556867) (discussing “possibilities and limits” of a “truly civil detention system” and contending that “large-scale incarceration is here to stay”).

54. At the same time, the Department of Homeland Security has indicated that it does not intend to initiate a rulemaking to set out standards for immigration detainees. ICE instead has concluded that implementation of the forty-one Performance Based National Detention Standards issued by ICE in September of 2008 will be adequate to improve detention facility management. ICE’s refusal to open a public notice and comment process and to put in place a set of rules that guarantee certain substantive standards in detention may reflect reluctance to make substantive promises or impose substantive restraints on the detention system. See Letter from Jane Holl Lute, Deputy Sec’y, ICE, to Michael J. Wishnie, Clinical Professor of Law, Yale Law School, & Paromita Shah, Assoc. Dir., Nat’l Immigration Project of the Nat’l Lawyer’s Guild, 3, 5 (July 24, 2009) (on file with author).

55. “A total of 378,582 aliens from 221 countries were in custody or supervised by ICE in FY 2008; activities in 2009 remain at a similar level.” Of those in detention, “66 percent were subject to mandatory detention and 51 percent were felons, 11 percent had committed violent crimes.” SCHIRRO, *supra* note 52, at 2.

56. For a discussion of detention policy, see *DeMore v. Kim*, 538 U.S. 510 (2003) and Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 INTERPRETER RELEASES 209 (Feb. 3, 1997), revised and reprinted in UNDERSTANDING THE 1996 IMMIGRATION ACT (Juan P. Osuna ed., 1997). For a comprehensive review of the theories supporting detention, see Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531 (1999).

and provides an antidote to legislative excesses.<sup>57</sup>

Taken together, each of these examples of early alterations of enforcement policy reflects a paradigm that places respect for law at the center of immigration policy. Importantly, it is a respect for law informed by principles of proportionality, accountability, and fairness designed to prevent government over-reaching and protect the civil liberties of immigrants and the public alike. Though this rule of law agenda cannot by its own force eliminate or even substantially curb illegal immigration, this rule of law framing can perform a crucial political function that will help make such transformation possible. If the rule of law framework succeeds in restoring public confidence in the government's wherewithal to enforce the law, but in a manner that is humane and advances the interests of society as a whole, this enforcement policy may clear the ground for future reform. The rule of law agenda, in this formulation, represents the trade-off necessary to secure legalization and other more incorporationist agenda items in the future. But even if such aspirations are not part of the current rule of law agenda, the very public shift in priorities announced by Obama's Department of Homeland Security underscores how a rule of law vision that seeks to use government power in a responsible manner might contribute to a culture of respect for immigrants' rights.

#### IV. CONCLUSION

Despite promising to tackle immigration reform during his campaign, President Obama has not yet made the issue a serious priority, nor has it risen to the top of the legislative agenda. Whatever the timing of reform turns out to be, the shape that reform takes and whether and *how* it becomes law, will depend in part on how lawmakers and other interested parties frame the issues at stake. In this Essay, I have articulated three frameworks for understanding and addressing the phenomenon of illegal immigration in particular: a civil rights paradigm, a mutual benefit framework, and a rule of law agenda. These framing devices are not mutually exclusive, nor would a legalization program be wholly incompatible with any of them. But they each appeal to distinct audiences and have proven salient at different political moments in time.

The civil rights paradigm, invoked during the dramatic marches organized by immigrants and their allies in the spring of 2006, seeks to frame legalization

---

57. ICE also has announced that it will discontinue detaining families at the T. Don Hutto Family Residential facility in Texas, which had come under widespread criticism, including through a lawsuit in federal court, for housing children and families in prison-like conditions. See Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 5, 2009, at A1. The facility now will be used solely as a female detention center. See also SCHRIRO, *supra* note 52, at 2-3 (noting that, with few exceptions, the facilities used by ICE to house immigration detainees were constructed as jails and prisons and that management of detainees carries more costs than necessary to oversee detained population, and recommending that ICE develop a new set of standards for managing detainees and provide better access to medical care and other services).

as a means of fulfilling the promise of the civil rights movement by providing a path out of second-class status for millions of immigrant workers and families. The paradigm demands incorporation in order to bring the legal reality of status in line with the sociological reality of membership. But the limitations of the civil rights paradigm discussed in Part II will make it difficult to advance a reform agenda using only the momentum that the paradigm affords—a momentum based on demands that we live up to our ideals as a nation. The general public will demand a justification for immigration reform that links it to their own interests and the “good” of the country—a factor that makes the development of a mutual benefit framework vital. That framework would emphasize that the gains from legalization to immigrants and the broader public would outweigh the costs. All of that said, even if the momentum behind immigration reform and immigrants’ rights cannot be built into a morally tinged social movement, important civil rights goals can nonetheless be advanced through a rule of law agenda focused on enforcement cabined by principles of proportionality, accountability, and fairness.

In reality, a complete answer to the civil rights dilemmas that illegal immigration presents will come only by figuring out how to prevent illegal immigration from arising in the first place, or how to reduce it from large-scale social phenomenon to nuisance. The focus on legalization, though urgent, is therefore incomplete. In broaching the future, each of the paradigms I have articulated may have a role to play, but the relative weight of each paradigm is different when talking about the future versus the current debate over legalization. The civil rights strategy, for example, fits even less well when the concern is no longer non-citizens who are present and integrated, but rather a future class of people whose identities and characteristics are unknown and who cannot be said to have the serious claims on the U.S. and its citizens described above. A strict rule of law strategy focused on prevention might be appealing, but the trends discussed in Part III suggest that enforcement alone cannot prevent illegal immigration, and that the costs of an unrestrained enforcement approach are high. For a future-oriented debate, then, a strategy of mutual benefit will likely prove essential.

But as with legalization, no matter the moral arguments made or the framework mobilized, compromise will be required among the myriad interested parties. Elements of each of the frameworks I have articulated can be used to broker that compromise. The concepts of civil rights, mutual benefit, and rule of law always have and should continue to shape public deliberation over the nature of our immigrant future.