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A NEW CONSERVATIVE APPROACH TO IMMIGRATION ENFORCEMENT

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INTRODUCTION

After the Trump administration implemented its “zero tolerance” immigration policy in early 2018, stories of children being ripped from their mother’s arms and extended family separations emerged.¹ Initially, administration officials denied the existence of any policy aimed at separating families at the border.² Others later claimed the separations were unintentional.³ However, a recent review of a leaked report from the Office of the Inspector General reveals both claims were false.⁴ This report revealed staff members from the White House and the

1. Krish O'Mara Vignarajah, “Children are still being ripped from their parents at the border,” *The Baltimore Sun*, April 4, 2019. <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0405-family-separation-20190403-story.html>.

2. “DHS Sec. Kirstjen Nielsen denies family separation policy exists, blames media,” *CBS News*, June 18, 2018. <https://www.cbsnews.com/news/dhs-sec-kirstjen-nielsen-denies-family-separation-policy-exists-blames-media>.

3. Morgan Gstalter, “Sessions: ‘We never really intended’ to separate families,” *The Hill*, June 21, 2018. <https://thehill.com/homenews/administration/393541-sessions-we-never-really-intended-to-separate-families>.

4. Michael D. Shear et al., “‘We Need to Take Away Children,’ No Matter How Young, Justice Dept. Officials Said,” *The New York Times*, Oct. 6, 2020. <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rostenstein.html>.

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Departments of Justice and Homeland Security met on multiple occasions to craft a plan, which they knew would separate migrant children from their parents, with the explicit goal of deterring illegal border crossings.

The resulting outrage eventually prompted President Trump to partially rescind the “zero tolerance” policy and fueled the political left’s opposition to the Trump administration’s handling of immigration laws.⁵ As a new administration takes office, immigration advocates have produced an exhaustive list of border policies for the Biden White House to repeal, but this administration will have to prioritize which of the Trump-era immigration regulations to address first.⁶

And, while the political left undoubtedly presents a strong case against the “zero tolerance” prosecutions undertaken by its predecessor, a robust set of conservative arguments against this policy offers the Biden administration ample, cross-ideological support for a new approach.

CONSERVATISM AND “ZERO TOLERANCE” IMMIGRATION POLICY

American conservatism is difficult to define or place amidst the current battle between a more classically liberal establishment and a surging nationalist and illiberal movement.⁷ But the luminaries of conservative thought—Edmund Burke,

5. Jonathan Haggerty and Arthur Rizer, “One Year Later, Trump’s ‘Zero Tolerance’ Border Policy is Threatening Public Safety,” *RealClear Policy*, April 12, 2019. https://www.realclearpolicy.com/articles/2019/04/12/one_year_later_trumps_zero_tolerance_border_policy_is_threatening_public_safety_111160.html.

6. Ted Hesson, “Legal hurdles, pandemic would bedevil Biden efforts to undo Trump immigration overhaul,” *Reuters*, Aug. 28, 2020. <https://www.reuters.com/article/us-usa-election-immigration-insight/legal-hurdles-pandemic-would-bedeil-biden-efforts-to-undo-trump-immigration-overhaul-idUSKBN2501IQ>.

7. Benjamin Wallace-Wells, “David French, Sohrab Ahmari, and the Battle for the Future of Conservatism,” *The New Yorker*, Sept. 12, 2019. <https://www.newyorker.com/news/the-political-scene/david-french-sohrab-ahmari-and-the-battle-for-the-future-of-conservatism>.

Russell Kirk, Barry Goldwater and Bill Buckley, to name a few—contributed to a wellspring of ideas about what it means to be a conservative. Lee Edwards, a historian of conservative thought, distills conservatism into three core principles:

That liberty is indivisible, and that political freedom cannot long exist without economic freedom; That the purpose of government is to protect those freedoms through the preservation of internal order, the provision of national defense, and the administration of justice; That the Constitution of the United States is the best arrangement yet devised for empowering government to fulfill its proper role, while restraining it from the concentration and abuse of power...⁸

From these principles, conservatism combines a libertarian affinity for “economic freedom” and restrained government, with a belief that government must preserve internal order and national defense. Edwards further refines these precepts into one concept: “ordered liberty.”⁹ To the conservative, then, government should be fiscally prudent and should not infringe on the economic liberty of its citizens, but it must also instill order and protect public safety. The state must uphold the due process rights of its citizens while still being able to carry out its law enforcement functions.

Conservative governance is a balancing act, and a given policy can be judged on the extent to which its outcomes satisfy each of these maxims. So, how does the current administration’s immigration enforcement, and specifically its “zero tolerance” policy, perform on measures of conservative policymaking? Put simply, it fares miserably.

“Zero tolerance” removed the historical discretion federal attorneys had to decide how to prioritize their caseloads. It mandated that prosecutors pursue criminal charges for all low-level, illegal entry cases referred to them—cases that would have previously been pursued through the civil system. These cases can still lead to deportation and other penalties, but do not require the time and resources of a criminal case in federal court. To be clear, zero tolerance amounted to little more than virtue signaling.

The administration chafed U.S. attorneys by removing their ability to prioritize cases. As a result, federal judicial districts near the border saw their dockets swell with illegal entry and re-entry cases while prosecutions for other, more serious federal crimes declined due to lack of bandwidth.

Zero tolerance also trounces on due process rights, as the sheer volume of people hauled into criminal court has led

to “streamline” hearings, in which dozens of defendants are herded into group hearings—with little or no access to counsel—and plead guilty to criminal charges they do not understand in as little as 25 seconds.¹⁰ This practice that runs directly counter to the protections against the government laid out in the Bill of Rights.

The administration’s enforcement incurs wasteful government spending that does not offer taxpayers a prudent return as the administration rounds up more and more individuals without any criminal record instead of investigating actual public safety threats.¹¹ Perhaps worst of all, it justifies its policies on the basis of fearmongering and emotionality.

Conservatives have often distanced themselves from liberals by pointing to the latter’s disregard of the facts in pursuit of social engineering projects. The adage that “if you’re not a socialist at twenty, you have no heart, and if you’re not a conservative at forty, you have no brain,” stems from a notion that conservatives are uniquely predisposed to a sober assessment of reality. However, the Trump administration’s talking points on this issue reveal a stunning lack of reckoning with reality, and a reliance on alarmism rather than evidence.

Conservatives should reject such a wasteful, dragnet model of immigration enforcement, and the new administration should repeal and replace it with a commonsense approach—one that prioritizes enforcement based on real threats to public safety.

ZERO TOLERANCE AND THE HISTORY OF CRIMINAL IMMIGRATION ENFORCEMENT

To understand what is meant by “zero tolerance” immigration policy, one must first understand the law itself. Unlawful presence by itself—for example, overstaying one’s visa—is only subject to a civil charge rather than a criminal charge. Entering the country illegally, however, can result in criminal charges.

Title 8, sections 1325 and 1326 of the U.S. Criminal Code give federal prosecutors the authority to charge improper entry and re-entry into the United States as misdemeanors and felonies, respectively.¹² These two criminal charges, referred to collectively as “entry-related offenses,” carry jail sentences as well as all the collateral consequences of a crim-

8. Lee Edwards, “What is Conservatism?” The Heritage Foundation, Oct 25, 2018. <https://www.heritage.org/conservatism/commentary/what-conservatism>.

9. Ibid.

10. Fernanda Santos, “Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border,” *The New York Times*, Feb. 11, 2014. <https://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html>.

11. “ICE Focus Shifts Away from Detaining Serious Criminals,” TRAC Immigration Project, June 25, 2019. <https://trac.syr.edu/immigration/reports/564>.

12. 8 U.S. Code § 1325 and 1326.

inal conviction.¹³ This is in contrast with civil infractions, which do not result in prison time or a criminal record, but still entail significant penalties—“civil,” does not necessarily mean “lenient.”¹⁴ Civil punishments include: deportation, monetary fines, bars on any form of future legal immigration and criminal liability upon illegal re-entry.¹⁵

Before 1929, border enforcement was largely an administrative affair, with border patrol officers placing illegal immigrants through deportation proceedings rather than going through a criminal trial. Some in government thought this was not a sufficient deterrent, and so they turned to criminal sanctions. In 1929, legislation introduced by Sen. Coleman Livingston Blease made illegal entry and re-entry violations a misdemeanor and felony, respectively.¹⁶ Within the first year after the proposed legislation passed, the government prosecuted almost 7,000 illegal entry and re-entry cases, consisting of nearly one-third of the total deportable aliens apprehended for the entire year.¹⁷ A letter that year from the Secretary of Labor, the department then charged with carrying out immigration policy, stated: “[the prosecutions] will provide an effective deterrent and that, as knowledge of its existence becomes more widespread, violations will diminish.”¹⁸

This use of criminal penalties to discourage illegal entries was mostly symbolic as the number of convictions throughout the following decades varied, but remained a relatively low share of overall apprehensions. Prosecutors sent most of the cases through the civil system instead of prosecuting them directly through the criminal courts. In fact, as recently as 1993, the government prosecuted only 801 illegal-entry and 2,361 illegal re-entry cases out of a total of 1.3 million people stopped at the border.¹⁹

This trend continued until the mid-90s, when anti-immigration sentiment started to increase as illegal border crossings

skyrocketed.²⁰ In response, entry-related criminal court convictions grew by roughly 500 percent, from fewer than 6,500 in 1995 to over 30,000 in 2005.²¹ Then, in 2005, President George W. Bush’s Operation Streamline added prosecution requirements for entry-related offenses.²² Instead of allowing attorneys to use their discretion and pass cases off to civil immigration courts, Operation Streamline required them to prosecute these offenses through the criminal courts.

Criminal prosecutions of entry-related offenses continued to increase dramatically well into President Barack Obama’s administration as Operation Streamline continued on throughout his first term.²³ Prosecutions fell toward the end of his second term after three separate memos established new priorities around which immigration violators to take into custody, detain and deport, thereby reinstating some level of discretion.²⁴

However, this discretion was short-lived. Shortly after President Trump took office, Attorney General Jeff Sessions implemented the “zero tolerance” policy, an even more aggressive approach than Operation Streamline.²⁵ While President Bush’s policy allowed border sectors to choose how to prioritize prosecutions—or whether to participate in the program at all—the zero tolerance policy offered no such sector-based discretion. In fact, Sessions explicitly expressed a wish to prosecute adults traveling with their children: “If you’re smuggling a child, then we’re going to prosecute you, and that child will be separated from you. [...] If you don’t want your child separated, then don’t bring them across the border illegally.”²⁶

Not long after zero tolerance was implemented, news broke of widespread family separations at the border, compelling the administration to scale back the policy for family units while promising to continue it for all other cases. However,

13. See, e.g., “Collateral Consequences,” The Sentencing Project, last accessed Oct. 20, 2020. <https://www.sentencingproject.org/issues/collateral-consequences>.

14. Dara Lind, “Removals vs returns: how to think about Obama’s deportation record,” Vox, April 11, 2014. <https://www.vox.com/2014/4/11/5602272/removals-returns-and-deportations-a-very-short-history-of-immigration>.

15. Randy Capps et al., “Advances in U.S.-Mexico Border Enforcement: A Review of the Consequence Delivery System,” Migration Policy Institute, May 2017. <https://www.migrationpolicy.org/research/advances-us-mexico-border-enforcement-review-consequence-delivery-system>.

16. Isaac Stanley-Becker, “Who’s behind the law making undocumented immigrants criminals? An ‘unrepentant white supremacist,’” *The Washington Post*, June 27, 2019.

17. Doug Keller, “Re-thinking Illegal Entry and Re-entry,” *Loyola University Chicago Law Review* 44:1 (Fall 2012), p. 76. <https://pdfs.semanticscholar.org/1c90/a990eaacc1547420ce3c7dad9d58c39dca71.pdf>.

18. Ibid.

19. Liam Brennan, “Sessions is criminalizing immigration violations. That upends centuries of history,” *The Washington Post*, May 10, 2018. <https://www.washingtonpost.com/news/posteverything/wp/2018/05/10/sessions-is-criminalizing-immigration-violations-that-upends-centuries-of-history>.

20. United States Customs and Border Protection, “Nationwide Illegal Alien Apprehensions Fiscal Years 1925-2019,” U.S. Dept. of Homeland Security. <https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Apprehensions%20%28FY%201925%20-%20FY%202019%29.pdf>.

21. “Criminal Immigration Convictions Drop 20 Percent,” TRAC Immigration Project, June 12, 2015. <https://trac.syr.edu/immigration/reports/392>.

22. “Fact Sheet: Operation Streamline,” National Immigration Forum, Sept. 1, 2020. <https://immigrationforum.org/article/fact-sheet-operation-streamline>.

23. “Criminal Immigration Prosecutions Down 14% in FY 2017,” TRAC Immigration Project, Dec. 6, 2017. <https://trac.syr.edu/tracreports/crim/494>.

24. “The End of Immigration Enforcement Priorities Under the Trump Administration,” American Immigration Council, March 2018. <https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration>.

25. Muzaffar Chishti and Jessica Bolter, “Family Separation and ‘Zero-Tolerance’ Policies Rolled Out to Stem Unwanted Migrants, But May Face Challenges,” Migration Policy Institute, May 24, 2018. <https://www.migrationpolicy.org/article/family-separation-and-zero-tolerance-policies-rolled-out-stem-unwanted-migrants-may-face>.

26. Brennan. <https://www.washingtonpost.com/news/posteverything/wp/2018/05/10/sessions-is-criminalizing-immigration-violations-that-upends-centuries-of-history>.

administration officials indicated that they would be willing to resume zero tolerance for family units in the future.²⁷

Zero tolerance reinforced the Bush-era break from a long, successful precedent of prosecutorial discretion—that is, prioritizing cases in line with public safety considerations and allowing prosecutors to choose how to expend scarce resources based on these priorities. Without this discretion, zero tolerance caused entry-related offense cases to consume a larger share of the federal docket. From the mid-1990s through 2004, immigration-related prosecutions typically made up between 10 and 20 percent of federal prosecutions, but after Operation Streamline, they increased to over 30 percent of prosecutions.²⁸ By November of 2018, immigration cases took up nearly 70 percent of federal prosecutions.²⁹

ZERO TOLERANCE AND DUE PROCESS

Due process allows people to bring a case to be heard by a neutral arbiter for any infringements of their liberty made by the government. Due process also recognizes the plaintiff's rights, including having their case heard quickly, being advised of their rights in court and their right to legal representation. These are necessary safeguards to protect against potentially harmful decisions made by a powerful government. Unauthorized immigrants are also constitutionally entitled to due process if they are within U.S. borders.³⁰

But thanks in part to indiscriminate immigrant enforcement policies like zero tolerance, wait times for immigration hearings now average just under 800 days, which has led to a backlog of more than 1.2 million cases.³¹ This exorbitant wait time violates the right to a speedy trial, a crucial part of due process. Even during the coronavirus pandemic, individuals in Immigration and Customs Enforcement (ICE) custody are lingering in detention centers longer than ever, with the average length of stay close to 100 days.³²

To deal with the backlog, the administration expanded the criteria for “expedited removal”—a process that allows

immigration officers to deny hearings to certain migrants.³³ Before the Department of Homeland Security's (DHS) new regulation, a migrant must have been picked up within 100 miles of the border and have been unable to furnish evidence that they were living within the United States for at least two weeks.³⁴ The expanded policy allows immigration officers to pick up an individual anywhere in the country—regardless of proximity to a border—and increases the length of residence time one must prove to two years.

This policy could unintentionally lead to the wrongful deportation of citizens, green-card holders and other legal immigrants.³⁵ In fact, since 2002, 2,840 American citizens have been wrongly identified as eligible for deportation by ICE, and at least 214 citizens have been taken into custody because of these errors.³⁶

In order to protect due process for citizens and migrants, future administrations should use the various tools at their disposal to reduce the immigration backlog and minimize reliance on expedited removal in addition to rolling back zero tolerance.³⁷

THE PUBLIC SAFETY IMPLICATIONS OF ZERO TOLERANCE

Predictably, shifting the focus of law enforcement away from those with criminal convictions has led to substantial increases in ICE arrests of noncitizens with clean criminal records.³⁸ According to an ICE report, in the first 100 days of the Trump administration, 41,300 noncitizens were arrested, which represented a 38 percent increase from 2016.³⁹ Further, the ICE report claimed that 75 percent of immigrants arrested had criminal convictions, but it also showed

27. Ron Nixon et al., “Border Officials Suspend Handing Over Migrant Families to Prosecutors,” *The New York Times*, June 25, 2018. <https://www.nytimes.com/2018/06/25/us/politics/border-officials-suspend-handing-over-migrant-families-to-prosecutors.html>.

28. Donald Kerwin and Kristen McCabe, “Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes,” Migration Policy Institute, April 29, 2010. <https://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes>.

29. “Federal Criminal Prosecutions Sharply Lower in December,” TRAC Immigration Project, Feb. 20, 2018. <https://trac.syr.edu/tracreports/crim/547/>.

30. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

31. “Immigration Court Backlog Tool,” TRAC Immigration Project, last accessed Oct. 20, 2020. https://trac.syr.edu/phptools/immigration/court_backlog.

32. Mica Rosenberg and Kristina Cooke, “Amid pandemic, sharply increased U.S. detention times put migrants at risk,” *Reuters*, Oct. 9, 2020. <https://www.reuters.com/article/us-usa-immigration-detention-insight-idUSKBN26U15Y>.

33. Hamed Aleaziz, “ICE Is Planning To Fast-Track Deportations Across The Country,” *Buzzfeed News*, Oct. 7, 2020. <https://www.buzzfeednews.com/article/hamedaleaziz/ice-fast-track-deportations>.

34. Ted Hesson, “DHS draft proposal would speed deportations,” *Politico*, April 25, 2019. <https://www.politico.com/story/2019/04/25/deportation-undocumented-immigrants-1380380>.

35. Laurence Benenson, “Expanded Expedited Removal,” National Immigration Forum, July 25, 2019. <https://immigrationforum.org/article/expanded-expedited-removal>.

36. Joel Rubin and Paige St. John, “How a U.S. citizen was mistakenly targeted for deportation. He's not alone,” *Los Angeles Times*, Nov. 29, 2017. <https://www.latimes.com/local/lanow/la-me-ice-citizen-arrest-20171129-story.html>.

37. See, e.g., Cristobal Ramón and Tim O'Shea, “Why Hiring More Judges Would Reduce Immigration Court Backlogs,” Bipartisan Policy Center, July 25, 2018. <https://bipartisanpolicy.org/blog/why-hiring-more-judges-would-reduce-immigration-court-backlogs>; Melanie Huettman, “The Causes of our Immigration Court Backlog, and How We Can Fix It,” Niskanen Center, July 19, 2017. <https://www.niskanencenter.org/causes-immigration-court-backlog-can-fix-2>.

38. Taylor Dolven, “ICE is aggressively prosecuting immigrants it used to let go,” *Vice News*, Aug. 11, 2017. <https://www.vice.com/en/article/d3xkga/ice-is-aggressively-prosecuting-immigrants-it-used-to-let-go>.

39. Aria Bendix, “Immigrant Arrests Are Up, but Deportation Is Down,” *The Atlantic*, May 17, 2017. <https://www.theatlantic.com/news/archive/2017/05/under-trump-immigrant-arrests-are-up-but-deportation-is-down/527103>.

that immigrants with convictions for violent crimes only accounted for 6 percent of the total, and the category with the largest arrest increase was immigrants with no convictions at all.⁴⁰

Under the Trump administration, immigrants convicted of level three crimes—the least serious category, overwhelmingly comprised of convictions for low-level infractions like traffic offenses and illegal entry—have made up the largest category of ICE arrests.⁴¹ Together, level three arrests and arrests of those with no criminal convictions account for 59 percent of all ICE arrests. Level one arrests—the most serious conviction—represent less than a third of arrests.⁴²

Between 2017 and 2018, drug-trafficking prosecutions plummeted by 30 percent just as illegal-entry case prosecution numbers soared to a level greater than any in the past two decades.⁴³ In addition, ICE's large-scale human-smuggling cases dropped by almost 60 percent during Trump's first fiscal year as president.⁴⁴ The increase in immigration prosecutions have been joined by a decrease in the prosecutions of other federal crimes at the same time.⁴⁵ It may not be possible to prove that zero tolerance has caused these outcomes; however, a report from the Transactional Records Access Clearinghouse (TRAC) notes that: "Unless crimes are suddenly less prevalent in the districts along the southwest border, the odds of being prosecuted for many federal offenses have declined."⁴⁶ Likewise, a leaked Department of Justice (DOJ) Inspector General report claims: "Border Patrol officers missed serious felony cases because they were stretched too thin by the zero-tolerance policy requiring them to detain and prosecute all of the misdemeanor illegal entry cases."⁴⁷

Dragnet immigration enforcement programs like zero tolerance may also harm public safety by deterring immigrants from working with law enforcement and reporting crimes out of fear of deportation. A recent report found that victim reporting for crimes such as sexual assault, domestic violence and human trafficking had fallen significantly in the

past year due to sweeping immigration raids.⁴⁸ Additionally, 67 percent of law enforcement officers reported that their ability to protect victims was affected by immigrants' fears of deportation, and 64 percent of officers said that this had "an adverse impact on officer safety."⁴⁹ In addition, as ICE and Customs and Border Protection (CBP) officers have increased arrests under zero tolerance, arrests of immigrants at courthouses who may be testifying in criminal cases have increased. Indeed, over 50 percent of surveyed judges confirmed that their courtrooms were interrupted for this exact reason.⁵⁰

A Poor Return on Taxpayer Investment

Every year, the federal government spends \$18 billion on immigration enforcement and the prosecution of entry-related offenses has become an increasingly large portion of that budget.⁵¹ Indeed, one report calculated that the government spent \$1.3 billion in fiscal year 2014 on incarcerating individuals for illegal entry and re-entry.⁵²

These costs may worry fiscal conservatives, but if they actually deterred illegal immigration, they could be worthwhile. However, multiple studies show that aggressive arrests and convictions for entry-related offenses may be largely ineffective deterrents.⁵³ This is especially true for migrants looking to reunite with family members as well as those who are fleeing violence.⁵⁴ These two categories—largely made up of family units from Central America seeking asylum—fueled the surge at the border that coincided with zero tolerance.⁵⁵ However, recent border apprehensions show a return to past

40. Ibid.

41. "Immigration and Customs Enforcement Arrests," TRAC Immigration Project, last accessed Oct. 20, 2020. <https://trac.syr.edu/phptools/immigration/arrest>.

42. Ibid.

43. Brad Heath, "As feds focused on detaining kids, border drug prosecutions plummeted," *USA Today*, Oct. 10, 2018. <https://www.usatoday.com/story/news/investigations/2018/10/10/border-drug-trafficking-prosecutions-plunged-zero-tolerance/1521128002>.

44. Sebastian Rotella et al., "Human Smugglers Are Thriving Under Trump," *The Atlantic*, Feb. 21, 2019. <https://www.theatlantic.com/politics/archive/2019/02/human-smugglers-thrive-under-trumps-zero-tolerance/583051>.

45. "Stepped Up Illegal-Entry Prosecutions Reduce Those for Other Crimes," TRAC Immigration Project, Aug. 6, 2018. <https://trac.syr.edu/immigration/reports/524>.

46. Ibid.

47. Shear et al. <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rostenstein.html>.

48. "Freezing Out Justice: How Immigration Arrests at Courthouses are Undermining the Justice System," American Civil Liberties Union and National Immigrant Women's Advocacy Project, May 2, 2018. <https://www.issuelab.org/resource/freezing-out-justice-how-immigration-arrests-at-courthouses-are-undermining-the-justice-system.html>.

49. Ibid, p. 1.

50. Ibid, p. 2.

51. Kari E. Hong, "The Costs of Trumped-Up Immigration Enforcement Measures," *Cardozo Law Review de novo* 119 (2017), pp. 121-122. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2957888#.

52. Kit Johnson, "A Cost-Benefit Analysis of the Federal Prosecution of Immigration Crimes," *Denver University Law Review* 92:4 (September 2015), p. 874. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2656568.

53. Joanna Lydgate, "Assembly-Line Justice: A Review of Operation Streamline," Warren Institute, January 2010, p. 5. https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

54. Jonathan T. Hiskey et al., "Understanding the Central American Refugee Crisis: Why They Are Fleeing and How U.S. Policies are Failing to Deter Them," American Immigration Council, Feb. 1, 2016, pp. 6-9. https://www.americanimmigrationcouncil.org/sites/default/files/research/understanding_the_central_american_refugee_crisis.pdf.

55. Nick Miroff, "Hundreds of migrant families arrive at remote border crossings, overwhelming U.S. agents," *The Washington Post*, Dec. 22, 2018. https://www.washingtonpost.com/world/national-security/hundreds-of-immigrant-families-arrive-at-remote-border-crossings-overwhelming-us-agents/2018/12/22/44f869f2-055d-11e9-9122-82e98f91ee6f_story.html.

trends of predominantly single adults from Mexico.⁵⁶ This might augur success for deterrence-based strategies like zero tolerance, but research on Operation Streamline, which aimed to deter this same population, found no evidence of successful deterrence.⁵⁷

But perhaps undocumented immigrants are more prone to committing serious and violent crimes than native-born Americans, meaning we should ramp up criminal prosecutions irrespective of their deterrent effect on illegal immigration. However, the research suggests otherwise. An analysis of 51 studies on immigration and crime conducted between 1994 and 2014 showed that the relationship between immigration and crime is either nonexistent or negative—meaning that immigration appears to reduce crime.⁵⁸

Research looking specifically at illegal immigration and crime is sparse due to data limitations, but the relationship appears to be the same as that of their legal counterparts. For example, new research examining incarceration rates in Texas prisons found that, proportionally, illegal immigrants had nearly half the incarceration rate of native-born Americans.⁵⁹

As evidence indicates, criminal prosecutions for entry-related offenses appear to have limited and diminishing marginal effects on deterring migration. Moreover, the subjects of these prosecutions are often—outside of their immigration violations—law-abiding individuals who contribute to society. They bring down crime rates, contribute to taxes without receiving many of the benefits, buy from American businesses and start businesses of their own. Given everything listed above, any policy that encourages extensive and expensive incarceration and prosecution of a population that offers more benefits than costs to society is a clear mismanagement of taxpayer resources.

Fear and the Formulation of Immigration Enforcement Policy

Fear has been the driving force in U.S. immigration policy since the birth of the United States. In 1798, ten short years after the Constitution was ratified, the nation's fear of immigrants was codified into law through the Alien and Sedition Acts. These bills gave the government increased power to

deport foreigners and suppress the speech of political enemies.⁶⁰

Over a century later, during World War I, legislation was enacted that arose from the growing fear of inflammatory and radical aliens. Simply having German attributes—looking or speaking like a German—caused German Americans to be suspected of being disloyal to the American government. Nebraska enacted a law that prohibited teaching any language other than English and defended the statute with popular anti-German sentiment:

The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety.⁶¹

After World War I, fear-driven immigration policy shifted from Germans to communists,⁶² then to the Japanese,⁶³ and then back to communists.⁶⁴ The 1952 McCarran-Walter Act, known as the Immigration and Nationality Act, arose directly from this anti-communist sentiment.⁶⁵ The act started an ideological litmus test for immigrant admission, and it gave the government power to deny entry to immigrants and foreign visitors because of their political philosophies.

Today, although there is no impending Mexican-American War, the changes to immigration policy stem largely from fear of our neighbors to the south. The president himself has characterized the situation at the border as “an extended invasion” with immigrants “pouring into and infesting our country.”⁶⁶ Quite often, he conflates vicious cartel and gang members (usually members of MS-13) with undocumented immigrants in general. Indeed, one of his campaign

56. Cristobal Ramón, “Everything Old Is New: Southwest Border Migration Evokes Past Trends,” Bipartisan Policy Center, July 21, 2020. <https://bipartisanpolicy.org/blog/everything-old-is-new-southwest-border-migration-evokes-past-trends>.

57. Michael Corradini et al., “Operation Streamline: No Evidence that Criminal Prosecution Deters Migration,” Vera Institute of Justice, June 2018. https://www.vera.org/downloads/publications/operation_streamline-report.pdf.

58. Graham Ousey and Charis Kubrin, “Immigration and Crime: Assessing a Contentious Issue,” *Annual Review of Criminology* 1 (January 2018), pp. 63–84. <https://www.annualreviews.org/doi/full/10.1146/annurev-criminol-032317-092026>.

59. Alex Nowrasteh et al., “Illegal Immigration and Crime in Texas,” *Cato Working Paper* No. 60, Oct. 13, 2020, p. 4. <https://www.cato.org/sites/cato.org/files/2020-10/working-paper-60.pdf>.

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66. Ben Zimmer, “Where Does Trump’s ‘Invasion’ Rhetoric Come From?” *The Atlantic*, Aug. 6, 2019. <https://www.theatlantic.com/entertainment/archive/2019/08/trump-immigrant-invasion-language-origins/595579>.

ads accused Democrats of being “complicit in all murders by undocumented immigrants.”⁶⁷

While the situation at the border has grown increasingly chaotic under the Trump presidency, no one would mistake it for a warzone. According to CBP data, only about 0.3% of unauthorized border crossers are gang members.⁶⁸ For supporters of the outgoing president and lawmakers to have likened the situation to D-Day was a bald exhibit of fear-mongering.⁶⁹

Of course, MS-13 members should face prosecution and incarceration if they are found crossing the border, but to use the mere existence of gang members to imply that undocumented immigrant populations are bringing a crime wave with them across the border—especially when crime is at historic lows—is to traffic in misinformation.⁷⁰ The best evidence suggests that unauthorized immigrants commit crimes at lower rates than native-born Americans, yet the Trump administration implies a relationship between immigration and crime at nearly every opportunity.⁷¹

The truly conservative mind would recoil at emotional appeals and scare tactics in complex policy discussions. Regrettably, the outgoing administration’s narrative surrounding the border, crime and immigration plays loose with the facts and persuades through fear and impulse. Those of us on the political right should rise above such tactics, regardless of where we stand on immigration enforcement.

CONCLUSION

When considering whether it is appropriate to use the heavy hammer of criminal law to carry out immigration policy, the answer is, at times, yes. However, that power must be tempered with wisdom and balance.

67. Elizabeth Vale, “New Trump ad blasts Democrats and calls them ‘complicit’ in all murders by undocumented immigrants,” *Rare*, Jan. 20, 2018, <https://rare.us/rare-news/new-trump-ad-blasts-democrats-and-calls-them-complicit-in-all-murders-by-undocumented-immigrants>.

68. David J. Bier, “0.1% of Border Patrol Arrests Are MS-13,” Cato Institute, June 28, 2018, <https://www.cato.org/blog/01-border-patrol-arrests-are-ms-13>.

69. See, e.g., David Brennan, “Rush Limbaugh Compares Immigrants at Mexico Border to D-Day ‘Invasion Force,’” *Newsweek*, June 7, 2019, <https://www.newsweek.com/rush-limbaugh-migrants-d-day-invasion-force-border-1442706>; Brett Samuels, “GOP lawmaker compares illegal immigration to D-Day invasion,” *The Hill*, March 6, 2019, <https://thehill.com/homenews/house/432853-gop-rep-compares-scope-of-illegal-immigration-to-d-day-invasion>.

70. Maggie Koerth and Amelia Thomson-DeVeaux, “Many Americans Are Convinced Crime Is Rising In The U.S. They’re Wrong,” *FiveThirtyEight*, Aug. 3, 2020, <https://fivethirtyeight.com/features/many-americans-are-convinced-crime-is-rising-in-the-u-s-theyre-wrong>.

71. See, e.g., Michelangelo Landgrave and Alex Nowrasteh, “Illegal Immigrant Incarceration Rates, 2010–2018: Demographics and Policy Implications,” *Cato Institute Policy Analysis* No. 890, April 21, 2020, p. 2, <https://doi.org/10.36009/PA.890>; Michael Light and Ty Miller, “Does Undocumented Immigration Increase Violent Crime,” *Criminology* 56:2 (May 2018), <https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9125.12175>; Thomas Miles and Adam Cox, “Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities,” *The Journal of Law and Economics* 57:4 (November 2014), <https://www.journals.uchicago.edu/doi/abs/10.1086/680935?journalCode=jle>.

President Trump’s “tough on immigration” approach reflects a “tough on crime” mindset that criminal justice reformers, particularly conservative ones, have repudiated in favor of “smart on crime” approaches. The latter approach favors directing taxpayer and law enforcement resources toward actual public safety threats and treating individuals facing the justice system with basic human dignity. The former favors symbolic “tough” policy gestures that hurt public safety while claiming to protect it.

Trump apparently sees the value in this change in strategy, as he was instrumental in passing the FIRST STEP Act, a bipartisan prison reform bill that represents one of his most notable legislative victories. In signing the bill, the president showed he understands several core ideas that undergird the conservative criminal justice reform movement—that the criminal justice system is a blunt instrument best reserved for those who pose a clear public safety threat, that “smart on crime” approaches can better deal with crime than outdated “tough on crime” models and that people deserve second chances.

Conservatives should return to prosecutorial discretion, and they should view criminal sanctions as a dangerous hammer and not as a universal solution. By embracing conservative principles on immigration enforcement, we recall that we live in a nation built by immigrants; a place that has welcomed the persecuted and offered them shelter. We will find ourselves a lesser nation if we forget the truths upon which it was built.

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