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Taming Immigration

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**TAMING IMMIGRATION: THE 64TH HENRY J.
MILLER DISTINGUISHED LECTURE SERIES
REMARKS**

David A. Martin*

Migration has always been a feature of human existence. Today it is a hot political topic—the source of much benefit to receiving nations and to the migrants themselves but also a chronic source of tension and conflict. I will speak today about the acute need for taming immigration and about ways to reach that goal. And I express my thanks to the Georgia State University College of Law and to those who established the Henry J. Miller Distinguished Lecture Series for this opportunity.

I. Setting the Stage

First, some preliminaries: why “taming”? The title of my Lecture has evoked disparate responses from people who have heard a preview. Some worried that this notion means radical cutbacks or harsh enforcement measures. I should talk instead, they suggested, about protecting immigrants or expanding immigration. Others thought that mere taming is either too weak or insufficiently ambitious in a time when control systems have suffered major breakdowns.

To unpack this contrast, let’s start by examining what people might mean, in light of recent history, when they consider the concept of untamed migration. In 2015, the notion probably would have conjured images of flimsy rafts on a stormy sea between Turkey and nearby Greek islands—Syrians who had fled a vicious civil war, now exiting Turkey in huge numbers and trying to reach Greece as the gateway to

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asylum in Europe.¹ The voyage was relatively short but quite hazardous. Many died. You probably remember a photo of a drowned child named Alan Kurdi, facedown on the Turkish sand—graphic, painful, heartbreaking.

Our hemisphere produces similar scenes of untamed migration. Southern Mexico has seen migrant caravans—hundreds of people together, many on foot, heading eventually for the U.S. border. The travelers were overwhelmingly from Guatemala, Honduras, and El Salvador. Their determined movement provoked heated comments about “invasion” from President Trump during the congressional election season of 2018.²

Neither the Syrians nor the Central Americans had visas. To call their migration untamed is not necessarily to disparage the reasons these people migrated, whether or not they ultimately have a basis for permanent relocation. Instead the label recognizes dangers to the participants, as well as potential alarm and backlash from the citizens of the receiving state, because of the high volume and the unruly arrival, without advance permission.

Now to shift the focus. What about the idea of taming immigration? At one pole might be the scenes of crying children from Guatemala or Honduras in crude rooms of concrete and steel and chain-link fencing in mid-2018. During those months, such children, even toddlers, were routinely separated from their families and detained by U.S. authorities while the parents were criminally prosecuted.³ The practice was expressly intended by several officials in the Trump Administration to assert control by deterring further migration of families seeking

1. See Natalia Banulescu-Bogdan & Susan Fratzke, *Europe's Migration Crisis in Context: Why Now and What Next?*, MIGRATION POL'Y INST. (Sept. 24, 2015), <https://www.migrationpolicy.org/article/europe%E2%80%99s-migration-crisis-context-why-now-and-what-next> [<https://perma.cc/DT48-86EB>]; Demetrios G. Papademetriou, *Migration Crisis Tests European Consensus and Governance*, MIGRATION POL'Y INST. (Dec. 18, 2015), <https://www.migrationpolicy.org/article/migration-crisis-tests-european-consensus-and-governance> [<https://perma.cc/4JCV-5QHN>].

2. Jordan Fabian, *Trump: Migrant Caravan 'Is an Invasion,'* HILL (Oct. 29, 2018, 11:08 AM), <https://thehill.com/homenews/administration/413624-trump-calls-migrant-caravan-an-invasion> [<https://perma.cc/KX3R-8XML>]; *Migrant Caravan: What Is It and Why Does It Matter?*, BBC (Nov. 26, 2018), <https://www.bbc.com/news/world-latin-america-45951782> [<https://perma.cc/C7BL-JTCJ>].

3. JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP'S ASSAULT ON IMMIGRATION 252–68 (2019).

asylum.⁴ That policy evoked an overwhelmingly negative public reaction. President Trump—uncharacteristically—backtracked, rescinding the separation policy.⁵ But inexcusably casual government record-keeping hindered reunification of families.

German Chancellor Angela Merkel implemented, in August 2015, a sharply different notion of taming from that of President Trump in response to the perilous maritime flow of Syrians to Greece. Just a few days after the Alan Kurdi photo appeared on front pages around the world,⁶ she directed that refugees would be accepted in Germany without regard to the tight constraints of the Dublin Regulation,⁷ and she urged other European Union (EU) countries to open their doors. At first this courageous humanitarian stand drew praise and seemed to go well.⁸ German citizens staged public rallies in support, and Merkel received warm welcomes when she visited refugee hostels.

But that public reaction did not endure. The numbers were huge, a million arrivals in one year to Germany alone, and insufficient thought was given to how the people landing in Greece would actually reach Germany or other potential asylum countries.⁹ For several weeks, the arrivals simply started walking north, producing a different kind of dramatic photo—enormous columns of pedestrians trudging across open fields in Slovenia or clogging superhighways in Hungary.¹⁰

4. *Id.* at 253–54, 260, 270.

5. *Id.* at 277–79.

6. *The Makings of Merkel's Decision to Accept Refugees*, SPIEGEL INT'L (Aug. 24, 2016, 1:59 PM), <https://www.spiegel.de/international/germany/a-look-back-at-the-refugee-crisis-one-year-later-a-1107986.html>.

7. For a general description of the Dublin Regulation and its relevance to the European refugee crisis of the last five years, see Patrick J. Lyons, *Explaining the Rules for Migrants: Borders and Asylum*, N.Y. TIMES (Sept. 16, 2015), <https://www.nytimes.com/2015/09/17/world/europe/europe-refugees-migrants-rules.html?auth=login-email&login=email> [https://perma.cc/E6W6-PZ8B]. The Dublin rules, adopted by the European Union, generally provide that the responsibility for judging asylum claims falls upon the state of first arrival, which must keep the asylum seeker on its territory during that adjudication. *Id.*; *The Makings of Merkel's Decision to Accept Refugees*, *supra* note 6.

8. Melissa Eddy, *As Germany Welcomes Migrants, Some Wonder How to Make Acceptance Last*, N.Y. TIMES (Sept. 5, 2015), <https://www.nytimes.com/2015/09/06/world/europe/germany-welcomes-migrants-and-refugees.html> [https://perma.cc/8F25-KLD5].

9. See David A. Martin, *What Angela Merkel's New Refugee Policy Misses*, FORTUNE (Dec. 20, 2015, 10:00 AM), <https://fortune.com/2015/12/20/angela-merkel-migrants-syria/>.

10. See, e.g., Anemona Hartocollis, *How the Migrants' March Toward Germany Began*, N.Y. TIMES (Sept. 6, 2015), <https://www.nytimes.com/interactive/projects/cp/reporters-notebook/migrants/march-budapest-hungary> [https://perma.cc/LA5B-WD2N]; Alan Taylor, *Thousands of Migrants Are Crossing*

Moreover, most other European countries resisted Merkel's initiative, and many actively blockaded the refugees. Viktor Orban, the authoritarian prime minister of Hungary, strung razor wire along his country's border.¹¹ And—of great significance to the argument for why taming is necessary—Orban has relentlessly used the issue of uncontrolled migration to expand his party's voting strength and weaken Hungary's checks and balances. He does so in order to create what he has proudly labelled “illiberal democracy.”¹² Keep this in mind. Orban's skillful playing of immigration backlash has proved a model for other would-be autocrats.¹³

The backlash also mushroomed in Germany. Six months after Merkel's policy announcement, adverse outcomes in local elections, combined with criticism from EU members, convinced the Chancellor that the policy could not be sustained.¹⁴ The EU negotiated a new agreement with Turkey in March 2016. It provided essentially for Turkish efforts to stop the outbound boat flow, assurances of safe conditions for Syrians in Turkish refugee camps, and EU aid and other concessions to Turkey.¹⁵ But even after the flow was contained, Merkel lost political ground. Far-right parties won a place in the

the Balkans on Foot, ATLANTIC (Oct. 26, 2015), <https://www.theatlantic.com/photo/2015/10/thousands-of-migrants-are-crossing-the-balkans-on-foot/412453/> [<https://perma.cc/JW7G-GP3A>].

11. Helene Bienvu & Rick Lyman, *Hungary Blocks Migrants in Border Crackdown*, N.Y. TIMES (Sept. 15, 2015), <https://www.nytimes.com/2015/09/16/world/europe/hungary-detains-migrants-in-border-crackdown.html> [<https://perma.cc/GPD4-XS37>].

12. Steven Erlanger, *What Should Europe Do About Viktor Orban and 'Illiberal Democracy'?*, N.Y. TIMES (Dec. 23, 2019), <https://www.nytimes.com/2019/12/23/world/europe/tusk-orban-migration-eu.html> [<https://perma.cc/H6UU-YMHU>].

13. See Robert Kagan, *The Strongmen Strike Back*, WASH. POST (Mar. 14, 2019), <https://www.washingtonpost.com/news/opinions/wp/2019/03/14/feature/the-strongmen-strike-back/> [<https://perma.cc/RGU2-XSG5>]; see also Simon Shuster, *European Politics Are Swinging to the Right*, TIME (Sept. 22, 2016), <https://time.com/4504010/europe-politics-swing-right/> [<https://perma.cc/444H-CLCP>].

14. Madeline Chambers & Tina Bellon, *German Voters Batter Merkel Over Migrant Policy*, REUTERS (Mar. 12, 2016, 6:15 PM), <https://www.reuters.com/article/us-germany-election/german-voters-batter-merkel-over-migrant-policy-idUSKCN0WE0ZQ> [<https://perma.cc/E7CA-4E7B>].

15. Press Release, European Council, EU–Turkey Statement (Mar. 18, 2016); Anthony Faiola & Griff Witte, *E.U. Strikes Deal to Return New Migrants to Turkey*, WASH. POST (Mar. 18, 2016), https://www.washingtonpost.com/world/europe/europe-offers-deal-to-turkey-to-take-back-migrants/2016/03/18/809d80ba-ebab-11e5-bc08-3e03a5b41910_story.html [<https://perma.cc/8JEC-FT6C>].

Bundestag for the first time in modern Germany.¹⁶ Poland, Italy, and Austria also brought anti-immigrant parties to power.¹⁷

II. *What Is at Stake*

These are the stakes—now as never before. We used to worry that polarization and backlash against untamed migration would lead to bad immigration policy. But today, ineffectiveness in immigration policy threatens much wider consequences. Extremist parties regularly find in immigration-control failures their richest opportunities to sow division, win power, and infuse a wide range of authoritarian features into what were once stalwart democracies.¹⁸ Regrettably—remarkably—the United States is also vulnerable. Our democracy is more fragile than most would have thought.¹⁹

To preserve the political space for reasonably open immigration policy, and more broadly to contain and reverse a global wave of authoritarianism, we do not need deep cuts in legal migration or harsh treatment of migrants. But we do need restoration of the rule of law—in reality and in shared public perception. We need a revitalization of regular migration following proper screening. We need resolute but proportional enforcement. We need taming, not hobbling—reassurance, not overreaction.

Sometimes it looks as though we are divided between those on the right who chant “build the wall,” “send them back,” or “no amnesty” and factions on the left who want to decriminalize clandestine entry or abolish ICE (Immigration and Customs Enforcement, the agency with primary responsibility for interior enforcement and detention).

16. Jabeen Bhatti, *Germany's Far-Right AfD Party Gains Seats in National Parliament in Major Cultural Shift*, USA TODAY (Sept. 24, 2017, 5:50 PM), <https://www.usatoday.com/story/news/world/2017/09/24/germany-afd-gains-seats-national-parliament/698039001/> [https://perma.cc/7XMZ-VV5D].

17. Krisztina Than, *Hungary Seeks Broader Anti-Migrant Alliance After Austria, Italy Elections*, REUTERS (Mar. 12, 2018, 12:05 PM), <https://www.reuters.com/article/us-europe-migrants-hungary-minister/hungary-seeks-broader-anti-migrant-alliance-after-austria-italy-elections-idUSKCN1GO21D> [https://perma.cc/MF83-LSLL].

18. *Europe and Right-Wing Nationalism: A Country-by-Country Guide*, BBC NEWS (Nov. 13, 2019), <https://www.bbc.com/news/world-europe-36130006> [https://perma.cc/EJZ5-RY45].

19. See generally STEVEN LEBITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); TIMOTHY D. SNYDER, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY* (2017).

Political bargaining can barely get off the ground because on both sides the loudest voices are from self-appointed purity police, who pounce on the slightest indications of compromise.²⁰ Purists from both sides torpedoed promising deals in 2017 that could have legislated a full legal status for Dreamers in return for modest new enforcement measures.²¹

III. Paths Toward Solutions

A. The Groundwork

We need to find ways to sideline or ignore the purity police. This won't be easy, but there is definitely ground to build on. Let me paint a more nuanced picture of the current attitudinal landscape. That panorama can help us design reforms that might someday succeed.

In my judgment, the vast majority of Americans are in neither of those polarized camps. They pay attention to immigration issues episodically, and how they react at any given time depends on the

20. See Jason Willick, *The DACA Fight and the End of Politics*, AM. INT. (Sept. 5, 2017), <https://www.the-american-interest.com/2017/09/05/daca-fight-end-politics/> [https://perma.cc/224T-L2QP] (“Instead of a set of public-spirited representatives bargaining for partial victories, we are now watching maximalist factional leaders performing ideological purity rituals to increase their status within their tribes.”).

21. On the efforts of conservatives to derail a deal and avoid an “amnesty” precedent, see DAVIS & SHEAR, *supra* note 3, at 156–86. On the Democrats’ difficulties in agreeing to any enforcement measures, see Obed Manuel, *DACA, Immigration Advocates Say They Won’t Support Trump’s Wall but Are Open to Some Compromise*, DALL. MORNING NEWS (Dec. 18, 2018, 6:45 AM), <https://www.dallasnews.com/news/immigration/2018/12/18/daca-immigration-advocates-say-they-wont-support-trump-s-wall-but-are-open-to-some-compromise/> [https://perma.cc/V3MR-RQXS].

“Dreamers” refers generally to persons who came to the United States as children and have lived in the United States for at least five years. *A Brief History of Civil Rights in the United States*, GEO. L. LIBR. (last updated Feb. 7, 2020, 3:35 PM), <https://guides.ll.georgetown.edu/c.php?g=592919&p=4170929> [https://perma.cc/R79C-PZGY]. The term derives from the DREAM Act (Development, Relief, and Education for Alien Minors Act), first introduced by Senators Richard Durbin (D-IL) and Orrin Hatch (R-UT), in 2001 as S. 1291, 107th Cong. (2001), and regularly reintroduced, with variations, through 2019. *Id.* Each bill would have provided for a path to lawful permanent residence for persons who came to the United States as children, had resided for a stated period, and met certain other requirements. *Id.* Despite majority support at various times in the two chambers of Congress, no version has been enacted. *Id.* Under President Obama, the Department of Homeland Security provided a form of interim relief, including work authorization, for persons who met DREAM-Act-type requirements; the relief became known as Deferred Action for Childhood Arrivals (DACA). Memorandum from Janet Napolitano, Sec’y, Dep’t Homeland Sec., on Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012); *A Brief History of Civil Rights in the United States, supra*.

incident that happens to spark the latest headlines. Most Americans—though not all—share genuine pride in our heritage as a nation of immigrants and want to see that continue. But this welcoming impulse coexists, for most of us, with a concern about control, a worry that immigration could get out of hand, either through high numbers who enter or stay illegally or through lax screening in an era of significant threats—from terrorism, for example, or contagious disease. To be clear, this impulse to control does *not* demand zero immigration or even sharp cuts. It can coexist with relatively high levels of immigration, as long as the flow is seen as subject to deliberate decisions by the polity.²²

Here's the main takeaway: Building a sustainable, workable immigration management system has to win the support of most of this large and somewhat conflicted constituency in the middle. To do so, we have to serve both the *impulse to welcome* and the *impulse to control*—that is, to honor our identity as a nation of immigrants while also defending our proud commitment to the rule of law.

My many decades of work in this field lead me to this conclusion: The most effective way to preserve that balance is not to cut overall numbers of lawful admissions, but to get a solid handle on reducing unauthorized migration.²³ There are both good ways and bad ways to get there.

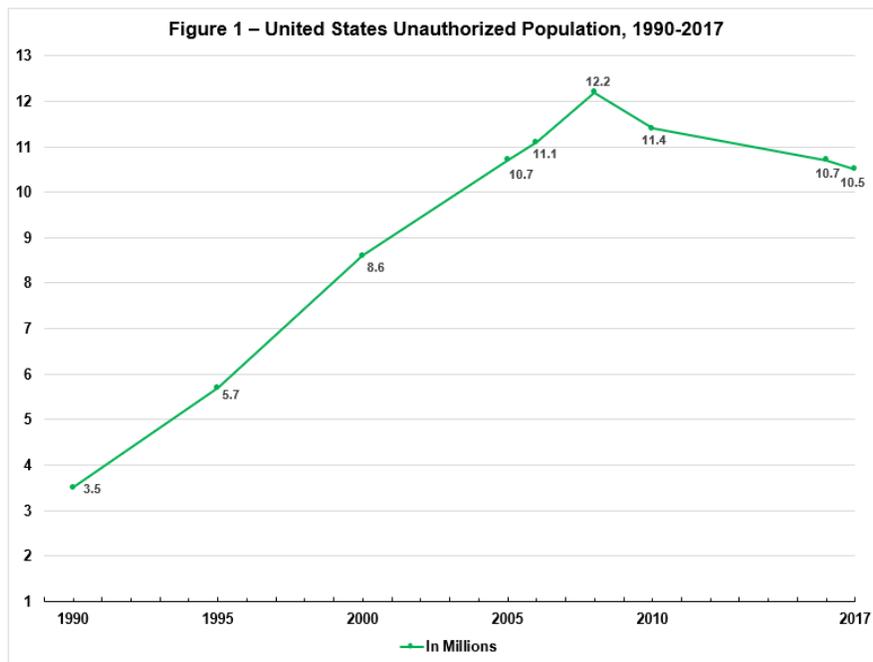
B. Background Conditions: A Look at the Migration Data

If we take a step away from the slogans and purity rituals, the objective conditions today, in late 2019, for achieving reform are actually pretty favorable. The overall flow of unlawful migration to the United States has been greatly reduced as compared to a decade ago, and the number of unauthorized residents has declined steadily from

22. An extensive and well-designed multi-factor polling project carried out in disparate European countries strongly supports the idea that most publics support immigration, but also highly value governmental control. Anne-Marie Jeannet et al., *What asylum and refugee policies do Europeans want? Evidence from a cross-national conjoint experiment* 9 (European Univ. Inst., Working Paper No. RSCAS 2019/73).

23. For an expanded treatment of this claim, see David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J. L. & POL. 411, 412 (2015).

2008 through the last authoritative estimate in 2017. As one can see in Figure 1, based on estimates by the respected Pew Research Center, the unauthorized population topped out at 12.2 million in 2008, then declined slowly but steadily for several years.²⁴ The final entry on the graph is 10.5 million.

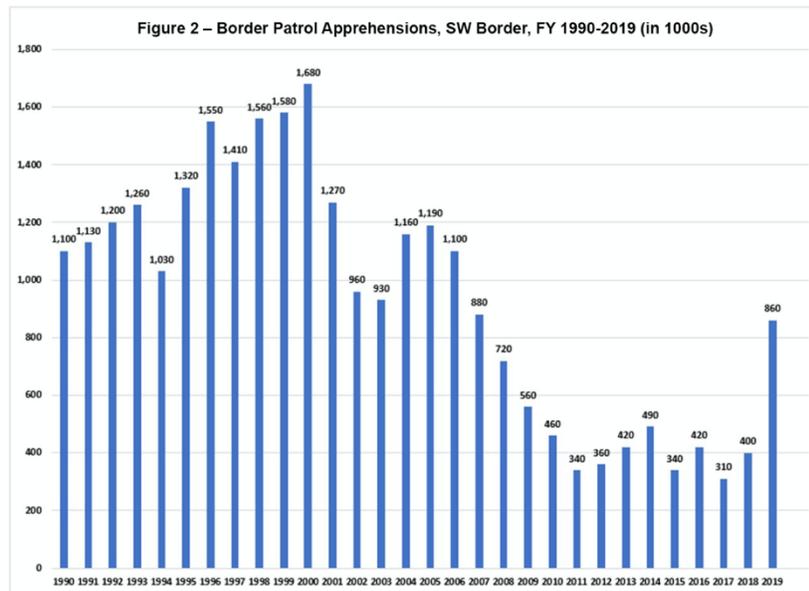


Now focus on the left side of the graph, especially 1995–2008, with its steeper upward slope. During that period, net growth of the unauthorized resident population was 500,000 to 800,000 each year. A high percentage were settling in new destinations—states and municipalities that had previously seen few immigrants. Those speedy and visible local changes stressed social interactions and increased demands on local government resources. We tend to forget this then-dominant mood today, a dozen years later, but these community

24. See Jeffrey S. Passel & D’Vera Cohn, *Mexicans Decline to Less Than Half the U.S. Unauthorized Immigrant Population for the First Time*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/> [<https://perma.cc/7T9K-6QQD>].

stresses in turn produced widespread local demands for *more* federal enforcement,²⁵ as well as enactment of restrictionist state and local laws.²⁶

I need to add an important asterisk to this account. We don't yet have comparable estimates of the overall unauthorized population for 2019, and as I'm sure you know, we had a major upsurge in migration that year—primarily Central Americans coming to the southwest border and claiming asylum. The next graph depicts that surge (Figure 2). It shows Border Patrol statistics on border apprehensions for the last thirty years—a primary, though imperfect, indicator of the magnitude of unauthorized migration. The highest year was 2000, when apprehensions reached nearly 1.7 million. But the picture turned sharply for 2009 through 2018, when apprehensions frequently fell in the 300–400,000 range, down by 75% from the flow in 2000.



Source: US Border Patrol, Southwest Border Monthly Apprehensions

25. See Martin, *supra* note 23, at 443.

26. THOMAS ALEXANDER ALENIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1204–06, 1227–51 (8th ed. 2016).

Fiscal year 2019 shows a big jump from 400,000 to 860,000 apprehensions. If that trend had continued, the background conditions for the reform I advocate would be far less favorable than I am generally portraying. But the monthly apprehensions showed a significant decline late in the 2019 fiscal year, owing to several enforcement initiatives fully implemented beginning in mid-summer. Whatever one thinks of the specific initiatives, the changes are probably going to be in effect for a lengthy period. The first months of fiscal year 2020 show a continuing decline: January's enforcement total fell below 37,000, and it is likely that the full year's count will remain below 500,000.²⁷ The surge asterisk will probably apply only to 2019. We'll see. But with that caveat in mind, I return to the broader population trends.

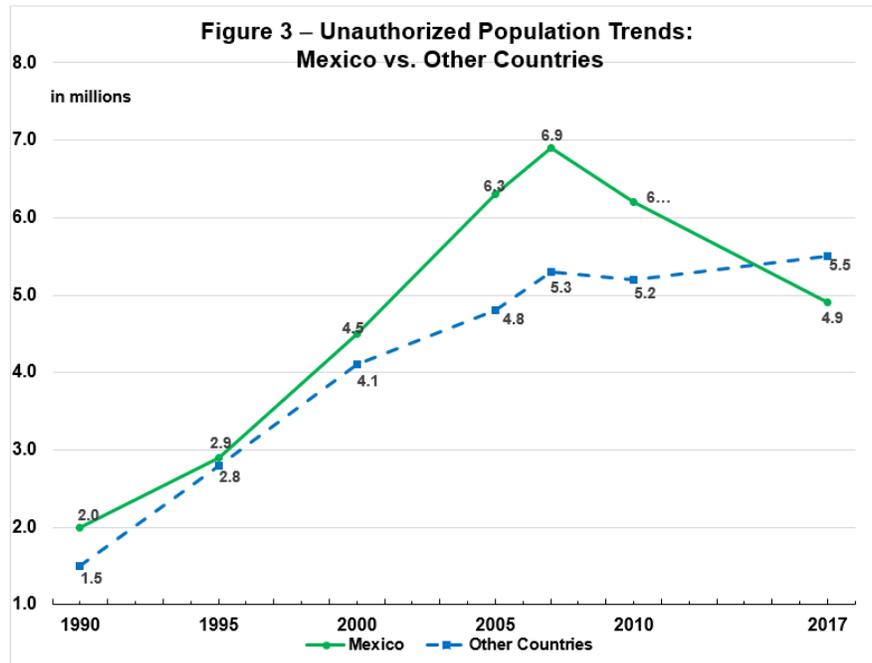
Because the graph in Figure 1 shows that the unauthorized population curve began to turn downward in 2008, many casual commentators assume that this was just the product of the Great Recession. But the decline continued through 2018—even with a roaring economy. More effective border enforcement, based on thousands of new Border Patrol agents hired since the 1990s, plays an important role.²⁸ Even more important are durable economic and demographic changes in Mexico, historically the source of the overwhelming majority of unauthorized migrants. Mexico's birth rate has declined significantly. It is now 2.2, not much higher than the U.S. rate—down from 3.5 in 1990 and nearly 7 births per woman in 1970.²⁹ Social science experts state that the era of large-scale migration from

27. *Southwest Border Migration FY 2020*, DEP'T HOMELAND SECURITY (Mar. 12, 2020), <https://www.cbp.gov/newsroom/stats/sw-border-migration> [<https://perma.cc/Q34F-QJYR>]. The cited source shows border statistics from FY 2015 through the present. *Id.* This series, updated monthly by the Border Patrol, is based on both southwest border apprehensions and persons found inadmissible based on processing at southwest ports of entry. *Id.* Figure 2, in contrast, is based solely on Border Patrol apprehensions and does not include persons deemed inadmissible upon inspection at a port of entry. Nonetheless, the broad picture of migration trends is the same using either measure.

28. See Marc C. Rosenblum, *New Era in Immigration Enforcement at the U.S. Southwest Border*, MIGRATION INFO. SOURCE (Dec. 16, 2014), <https://www.migrationpolicy.org/article/new-era-immigration-enforcement-us-southwest-border> [<https://perma.cc/6RWR-LUAK>].

29. Richard Miles, *A Smaller, Wealthier Mexico Is on the Horizon*, CTR. FOR STRATEGIC & INT'L STUD. (Dec. 11, 2017), <https://www.csis.org/analysis/smaller-wealthier-mexico-horizon> [<https://perma.cc/UY6H-LJMA>].

Mexico is over.³⁰ The graph in Figure 3, showing that Mexicans now constitute a minority of unauthorized migrants, highlights this evolution.



C. Taking a Cue from Local Law Enforcement

With that groundwork, we can find important guideposts toward workable and sustainable reforms by paying close attention to how localities have responded to the reduced flow of unlawful migration since 2008.

Over the last dozen years, though the picture is by no means uniform, we have seen a significant pendulum swing at the local level, away from demands by local police for greater federal immigration enforcement against newcomers arrested for a local crime. When I was

30. See Kevin Sieff, *Why Is Mexican Migration Slowing While Guatemalan and Honduran Migration Is Surging?*, WASH. POST (Apr. 29, 2019, 6:00 AM), https://www.washingtonpost.com/world/the_americas/why-is-mexican-migration-slowing-while-guatemalan-and-honduran-migration-is-surgin/2019/04/28/fad52432-6493-11e9-a698-2a8f808c9cfb_story.html [https://perma.cc/S2RN-9QHE].

General Counsel to the Immigration and Naturalization Service in 1995 to 1998, such calls were common and insistent—though, as noted, that attitude is largely forgotten today. Today’s trend is instead toward local resistance to immigration enforcement. More and more jurisdictions are restricting their cooperation with federal immigration authorities. Restrictions take many different forms but are often grouped together under the misleading label “sanctuary cities.”³¹ Many jurisdictions decline to honor ICE detainers, which are requests to hold persons identified as immigration violators who have been arrested on a state or local criminal charge, so that ICE can pick them up when the criminal justice process concludes. Some decline even to notify ICE of the time when release is going to occur. Others are more selective; they will notify about persons charged with, or perhaps only those convicted of, serious offenses, but not for persons with lesser crimes.³²

So how did we get here, to that kind of resistance by law enforcement organizations? And how did it happen in an arena where before about 2010 there had generally been cooperative relations, and the federal government was seen as rightfully taking the lead—on both priorities and enforcement strategies?³³ Have these law enforcement organizations been converted to the doctrine that there should be no immigration control? Have they become believers in open borders?

From my research and from conversations with sheriffs and police chiefs, the evidence is to the contrary. That fact provides an unappreciated but essential foothold for finding a way out of our lengthy stalemate over immigration reform. These sanctuary policies

31. See Tal Kopan, *What Are Sanctuary Cities, and Can They Be Defunded?*, CNN (Mar. 26, 2018, 3:40 PM), <https://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html> [https://perma.cc/49QM-EV5L].

32. See Martin, *supra* note 23, at 450.

33. In *Arizona v. United States*, 567 U.S. 387, 393–94, 416 (2012), the U.S. government challenged the constitutionality of a highly restrictive immigration enforcement law enacted by the state legislature. Several prominent immigrant advocacy organizations (including those now supporting sanctuary cities) filed amicus briefs strongly favoring the U.S. position and the primacy of the federal government in making immigration enforcement decisions. *Id.* The Court struck down most of the challenged Arizona provisions, relying significantly on this argument for federal primacy. See, e.g., *id.* at 394–95, 407–10. The amicus briefs are available through SCOTUSblog. *Arizona v. United States*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/arizona-v-united-states/> [https://perma.cc/9LJX-ZSYQ] (last visited Mar. 31, 2020).

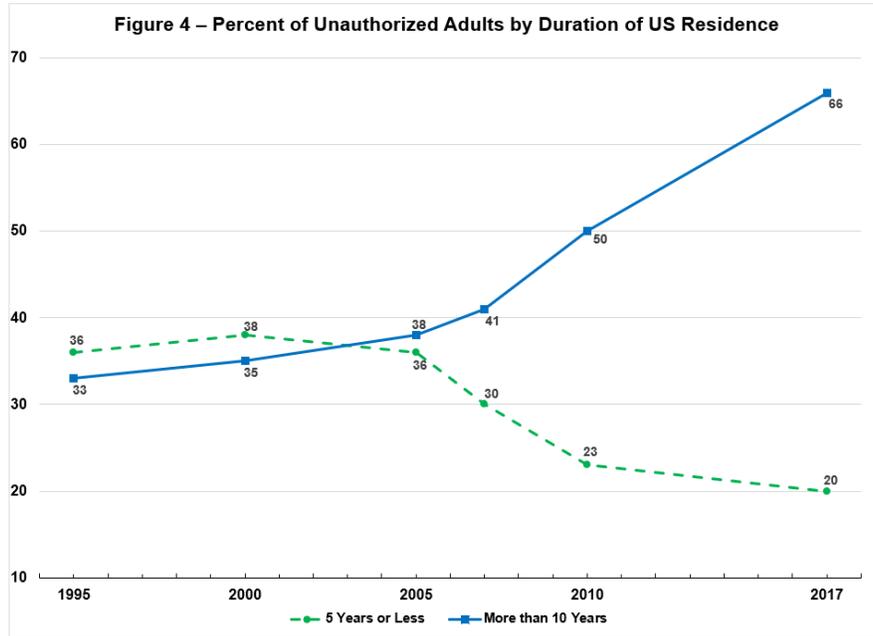
have taken hold precisely because the last ten years have seen such a decline in illicit border crossing. The unauthorized population is stable in most locations. Unlike the high-growth era of the 2000s, such people, after years of living here, have been woven into the economic and social fabric of the local community.³⁴ The police chiefs and mayors staking out a sanctuary stance are not calling for withdrawing the Border Patrol from the border or abandoning immigration controls. Indeed, they implicitly *depend* on effective border control to make sanctuary feasible. What has sparked their resistance to cooperation is the perception that, in the current climate, cooperation with ICE will ensnare mostly long-standing residents of the community, persons with deep ties to local employers, churches, PTAs, soccer leagues—the list goes on.³⁵

Moreover, in the early days of the federal program called Secure Communities, which automated the sharing with ICE of fingerprints taken upon local arrest and booking, a great many of the affected people were put into removal proceedings based not on major criminal charges but on low-level offenses and arrests—notably driving without a license. But most such people could not obtain a driver's license because of ill-advised state law restrictions enacted in a stampede in 2007–2008.³⁶ Look carefully at Figure 4, depicting duration-of-residence data for the unauthorized population. Because almost 70% have been here for more than ten years, the risk of finding long-stayers in any local jail arrest line is quite high.

34. See Martin, *supra* note 23, at 417–20; Damien Cave, *Living with Immigration*, N.Y. Times (June 21, 2014), <http://www.nytimes.com/interactive/2014/us/the-way-north.html#p/>; Damien Cave, *On Immigration, the Hard Lines Start to Blur*, N.Y. TIMES (June 20, 2014), http://www.nytimes.com/2014/06/21/us/on-immigration-the-hard-lines-start-to-blur.html?_r=1 [<https://perma.cc/9YAG-KYTA>].

35. Martin, *supra* note 23, at 444–45.

36. *Id.* at 446.



Source: Pew Research Center, June 2019

I doubt we would have seen the same growing backlash against cooperation with ICE if federal officers—from the beginning—had exercised discretion to issue detainers only against recent violators or persons with serious criminal charges. This is highly important. Sheriffs mostly would not object to action against someone who entered without inspection three months ago or a tourist who overstayed his brief admission period by seven months and then got arrested in a bar fight.

Most such local officials are not opposed to all immigration control but instead are rebelling against what they see as a disproportionate sanction—deportation—being imposed on longstanding and well-integrated residents. If that is correct, then we could deploy a sharply different method to start winning back their cooperation. It marks out a strategy that should also gain support for resolute enforcement from a far wider segment of the public—from left and right.

D. The Central Importance of a Well-Designed Legalization Program

Legalization of long-staying unauthorized residents—in a phased process that could include modest penalty fees and other requirements—would provide the clearest possible assurance that future immigration enforcement is going to focus on *new and recent violators*. Most advocacy for an expansive legalization program, of the kind that actually passed the Senate in 2013 by a huge bipartisan majority of 68–32,³⁷ focuses on humanitarian reasons to recognize the contributions of those who have lived and worked in our communities. That is a solid and worthy foundation. But those who desire a healthy and vigorous enforcement system—stable and sustainable over the years—should support legalization as well. It is indispensable in order to free up enforcement resources and immigration court capacity to deal with new and recent violators. Legalization, done right, *empowers* resolute enforcement against the remaining pool of recent violators. As to them, a much greater consensus exists about the justice of enforcement. Furthermore, a swift return of recent violators to the country of origin sends a far more effective deterrent message than the deportation of people who had lost touch after a decade or more in the United States.

Only by patiently widening the circle of support for measured and balanced enforcement can we find our way to a sustainable equilibrium, an equilibrium that also—and significantly—preserves public support for our traditional levels of legal permanent immigration.

E. The Key Elements of Reform

What to do? As a matter of policy science (rather than immediately actionable political will), there has been surprising consensus for at least fifteen years on the basic elements of a solution. It includes three

37. Ed O’Keefe, *Senate Approves Comprehensive Immigration Bill*, WASH. POST (June 27, 2013), https://www.washingtonpost.com/politics/senate-poised-to-approve-massive-immigration-bill/2013/06/27/87168096-df32-11e2-b2d4-ea6d8f477a01_story.html [https://perma.cc/C73J-DTfB].

main parts, summarized in the first three headings on Table 1.³⁸ And after the painful experiences of this past year—the large-scale arrival of asylum seekers and a blizzard of poorly managed, gratuitously harsh, or ill-considered policies in response—we need to add a fourth heading: asylum reform.

Table 1 - Primary Elements of Reform

- Legalization of those long present
- Legal migration category revisions
- Resolute enforcement against new and recent violators:
 - Sustaining border deployment
 - Reducing immigration court backlogs
 - Specific and focused cooperation with state and local law enforcement
 - E-Verify for all new hires, with better identity checks
 - Enforcement against overstayers
- Asylum reform

The first element, as I mentioned, would be a generous legalization or amnesty program, with conditions, for most of the 10 million in the current unauthorized population. There would be a cutoff date; applicants would have to show they began residing here at some point two or three years in the past, for example, and they would probably

38. I have provided more details on this sort of proposal in Martin, *supra* note 23, at 426–64 and David A. Martin, *Go Comprehensive, Go Bold*, MILLER CTR. (May 25, 2016), <https://millercenter.org/issues-policy/us-domestic-policy/go-comprehensive-go-bold> [<https://perma.cc/5H9U-FY6D>].

have to pay various fines and fees. Persons with a significant criminal record would not qualify.

The remaining elements amount to steps to minimize and deter future illegal migration so that we don't get ourselves into the same soup again a decade or so down the road, with a newly arrived population of millions of unauthorized residents.

Element two would be revisions to our legal migration provisions—both permanent and temporary—so that they would better match up with migration pressures and desires. This reform is important, but it calls for a big caveat. Some commentators suggest that we can provide legal channels wide enough to capture or satisfy nearly all migration pressures.³⁹ This is simply wrong. Migration desires are not static. An expansive guest worker program, for example, will generate rising pressure for more such migration on the part of foreign workers and especially of U.S. employers.⁴⁰ That reality has to be addressed through proper program design that helps make sure temporary migration remains temporary. And more broadly, in a world of 7.7 billion people, we cannot conceivably hold forth an opportunity for all who would like to come to the United States. We will still need to choose, and we will still need to say a firm “No” to a lot of admirable, productive, hard-working people who would like to migrate.

Nonetheless, better tailoring of our legal migration categories is worthwhile. We can improve our provisions for employment-based migration and also phase out some family categories that now face enormous backlogs—particularly the category for siblings of U.S. citizens, for whom visas are now being issued only to people who applied over thirteen years ago.⁴¹ That would enable quicker unification of the remaining family categories. I would argue, however, against significant cutbacks in the overall family admissions

39. See for example, Daniel T. Griswold, *Willing Workers: Fixing the Problem of Illegal Mexican Migration to the United States*, CATO INSTITUTE'S CTR. FOR TRADE & POL'Y STUD., Oct. 15, 2002, at 1, 11, critiqued in David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 533 (2007).

40. Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, 80 FOREIGN AFF. 117, 119–21 (2001).

41. See BUREAU OF CONSULAR AFFAIRS, VISA BULLETIN 2 (Mar. 2020).

ceiling, as some urge in order to free up more spaces for employment-based immigrants. Recent scholarship suggests that family-based immigrants make vital and underappreciated contributions to the health of our economy, not significantly different from the measurable economic benefit derived from immigrants explicitly selected based on skills.⁴² And pre-existing family networks speed the transition of the new arrivals, foster early integration, and improve resilience as an immigrant changes jobs or encounters setbacks.

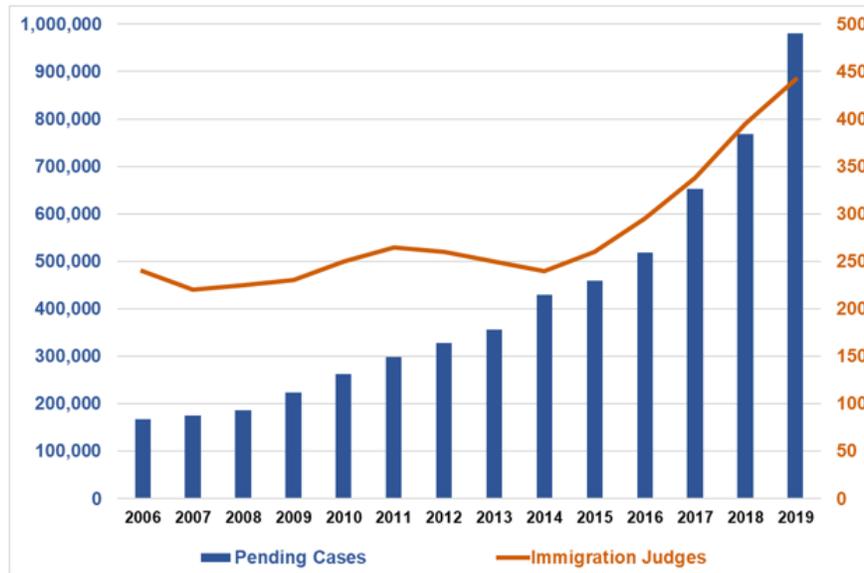
Element number three of my reform agenda is resolute enforcement focused on recent and new violators—that is, against a reconceived target landscape. This element has many components. It begins with continued border deployment. The Border Patrol is now five times larger than when I was first in government, in 1978⁴³—with a notable effect on border crossings, as the border apprehensions graph in Figure 2 depicts.

In part it is also a matter of fully funding immigration courts, which now have record-level backlogs—nearly a million as of 2019, as shown in Figure 5.⁴⁴ The resulting multi-year delays undercut and demoralize almost all other parts of the enforcement agenda. Mastering this situation is not just a matter of hiring more judges. A broad legalization would be the most effective single stroke to make the immigration court system healthy again. Hundreds of thousands in those backlog bars would be diverted to a speedier administrative process that would assess their eligibility for legalization and, if they qualify, produce the dismissal of their deportation charges.

42. See e.g., Alan Hyde, *The Law and Economics of Family Unification*, 28 GEO. IMMIGR. L.J. 355, 355 (2014); David Brancaccio, *How Family-Based Immigration Can Boost the Economy*, MARKETPLACE (Feb. 27, 2018), <https://www.marketplace.org/2018/02/27/immigration-data/> [<https://perma.cc/4H4G-2JQJ>].

43. See UNITED STATES BORDER PATROL, BORDER PATROL AGENT NATIONWIDE STAFFING BY FISCAL YEAR 1 (2019).

44. See Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, MIGRATION POL'Y INST. (Oct. 3, 2019), <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point> [<https://perma.cc/7Q6N-NRLZ>].

Figure 5 – Backlogs in immigration court; immigration judge staffing

Source: Migration Policy Institute, <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point>; Executive Office for Immigration Review, <https://www.justice.gov/eoir/page/file/1104846/download>

Further, resolute enforcement involves pursuing serious, fair interior enforcement—the domain of ICE. We need gradual restoration of carefully designed cooperation programs with state and local law enforcement. This will probably have to wait until we are several months into the granting of legalization to substantial numbers of applicants—the most reliable guarantee that a jurisdiction’s cooperation on enforcement will spare the long-time unauthorized resident. Cooperation should not mean that local law enforcement officers become immigration agents. They should instead concentrate on doing their own jobs, enforcing the criminal law in the context of their own communities.⁴⁵ But after long-stayers are legalized, local law enforcement should cooperate with requests for information and handovers to ICE in response to detainees.

Another crucial change is to supplement direct government enforcement with measures that will discourage migration by drying up job opportunities for the unauthorized. Current employer screening

45. Martin, *supra* note 23, at 438–58.

of new hires is often easily defeated by false documents. But we have an existing and well-tried system, called E-Verify, that allows employers to do a simple computer check of the work authorization of their new hires.⁴⁶ Right now, participation in E-Verify is largely voluntary with employers, but even so, over 50% of U.S. hires go through this system.⁴⁷ Reform legislation would phase in mandatory participation for virtually all jobs; it also needs resolute measures to strengthen the system's capacity to defeat identity fraud.⁴⁸

Finally, we should undertake a new and systematic campaign to enforce the law against visa overstayers—people who enter legally on a temporary visa, but then don't leave when they should. Contrary to the popular image of undocumented workers, most new immigration violators today are overstayers rather than people who sneak across the border. The best estimates say that that has been the case for the past seven years or more.⁴⁹

For decades, overstay enforcement has been a low priority for the enforcement agencies. That has not changed much, even with new Homeland Security data systems that can now provide, each day, a reliable list identifying those whose stay expired but for whom there is no evidence that they departed. We need to assign a large cohort of ICE officers to take the list, locate these recent violators promptly, and put them systematically into removal proceedings. We do not have to guarantee finding every overstay for this change to be effective. The visible prospect of swift consequences for new violators will teach all persons here in temporary status that they must take seriously the end date printed on their admission card. Spontaneous compliance should quickly improve.⁵⁰

46. *Id.* at 427–32.

47. *See id.* at 428 & n.66 (estimating coverage of 40% of hires in 2015, when 500,000 employers were using the E-Verify system; today 870,000 employers participate); *What Is E-Verify*, DEP'T OF HOMELAND SECURITY, <https://www.e-verify.gov/about-e-verify/what-is-e-verify> [<https://perma.cc/6L4J-A6AY>] (last visited Apr. 1, 2020).

48. *See* Martin, *supra* note 23, at 429–30.

49. *See* Robert Warren, *U.S. Undocumented Population Continued to Fall from 2016 to 2017 and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year*, 7 J. MIGRATION & HUM. SECURITY 19, 20 (2019).

50. Martin, *supra* note 23, at 432–37.

Applying serious resources to these diverse efforts would provide a powerful and early indicator of commitment to resolute enforcement, enforcement tempered by a rigorous focus on recent violators.

IV. The Asylum Dilemma

The reforms just sketched would address the primary immigration problems that have preoccupied our country for two decades. They would lay the foundation for one day achieving a stable and sustainable U.S. immigration system—a system affording reasonable assurance that ordinary unauthorized migration is under control, while preserving the political space for generous legal immigration.

But there is one final arena that cries out to be addressed—a form of migration that cannot really be described as ordinary. I am speaking of political asylum. Asylum is rich with the impulse to welcome, especially when one focuses on individual claimants. But asylum sows deep worry, especially in times of high flow, for the impulse to control. Why? Under treaties drafted in the 1950s and 1960s, accepted by most nations around the world, asylum and related protections are available to people who flee their home countries and prove that they fear return because of a “well-founded fear of being persecuted.”⁵¹ That elusively worded standard is often exceptionally difficult to apply. And crucially, the laws and treaties don’t say that such protections are available only to the first 1,000 or 10,000 or 500,000 who meet the standard each year.⁵²

51. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

52. An ambitious empirical study involving 12,000 respondents from eight European countries found strong public desire for such features, even though they may be inconsistent with treaty provisions:

[European publics are] generally committed to policies that provide protection to asylum-seekers and refugees but this commitment tends to be contingent upon policy features which allow for a means of control

. . . .

[P]olicies which place annual limits on the number of asylum applications are significantly more supported than those that do not apply limits [. . . .

. . . .

It seems that some aspects of the current model of the international refugee system are misaligned with the more control-based model that Europeans would prefer. For example, an annual limit on the number of asylum seekers would be incompatible with the 1951 Geneva Convention [O]ur results raise questions about the political

The United States, like other wealthy countries, has primarily implemented these legal protections through detailed individual adjudications. In the early 1990s, the system was overwhelmed with applications (over 150,000 annually), partly because mere application routinely led, at that time, to prompt work authorization that continued throughout the process. Therefore, even marginal or bogus claims quickly produced a secure status likely to last for years.⁵³

Reforms that began in 1995 restored sound functioning and produced firm decisions within six months in nearly all cases. This was a major achievement, based on sound design and on the virtual doubling of the asylum officer corps and of the ranks of immigration judges. Merely filing an asylum application no longer resulted in work authorization. That had to await an actual grant of asylum. In a solid case, a grant from an asylum officer could happen within six weeks. Unsuccessful applicants, on the other hand, were routinely placed in deportation proceedings. This gave them a further opportunity to present evidence supporting their claim. But if the immigration judge then found against them, they would typically receive a removal order within six months of initial filing.⁵⁴ Once that process became established—it took a couple of years—applications dropped considerably. Weak or false claims were deterred. Asylum faded from the headlines.⁵⁵

How did that seemingly stable solution come unraveled? Part of the answer is this: short-sighted federal budgeting in the lean years brought on by the recession, beginning about 2011. The Department of Justice (DOJ) suspended replacement hiring of immigration judges. Look back at Figure 5, where the vertical bars show the case backlog by year and the more horizontal line represents the rise and fall in the

sustainability of some aspects of the status quo of international asylum and refugee policies.

Jeannot et al., *supra* note 22, at 2, 9, 12–13.

53. See David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 733–37 (1995) [hereinafter *Making Asylum Policy*].

54. See *id.* at 745–54.

55. Noah Lanard, *The Clinton Administration Solved Its Own Asylum Crisis: Here's What Trump Can Learn*, MOTHERJONES, (Jan. 25, 2019) <https://www.motherjones.com/politics/2019/01/the-clinton-administration-solved-its-own-asylum-crisis-heres-what-trump-can-learn/> [https://perma.cc/NAA3-KMQ2].

total number of judges. The line dropped steadily from 2011 to 2014. Dockets backed up. This produced more than just longer waiting times for decisions. DOJ budget planners unforgivably overlooked a key part of the 1995 reforms: if asylum processing did not result in a decision by an immigration judge within six months, the regulations required issuance of work authorization.⁵⁶ Once delays became commonplace in about 2013, new applicants could feel assured that mere filing would result in work authorization after six months. That reality—plus the diminished prospect of a deportation order anywhere on the horizon—attracted more and more asylum claims, many of them marginal. Claims from foreigners already in the country, from a wide range of nationalities, escalated. The word also reached Central America, contributing to striking surges in undocumented arrivals from Honduras, Guatemala, and El Salvador.⁵⁷ I want to emphasize that there *is* real violence and persecution occurring in those source countries. We need to avoid overgeneralizing about weak claims. But not everyone is equally threatened. Not everyone's case meets the legal standard for asylum. The overloaded system lost the capacity to make those legal distinctions within a timeframe that was operationally necessary.

The problem hit home for the Obama Administration in 2014 through 2016. The arrival of asylum seekers from El Salvador, Guatemala, and Honduras surged during this period, including tens of thousands of unaccompanied children. They were not evading U.S. authorities; they would typically cross the border and immediately seek out the Border Patrol so they could initiate an asylum claim.⁵⁸ President Obama's measures in response had some initial effect in

56. 8 C.F.R. § 208.7(a) (2011) (implementing Immigration and Nationality Act § 208(d)(2), 8 U.S.C. § 1158(d)(2)).

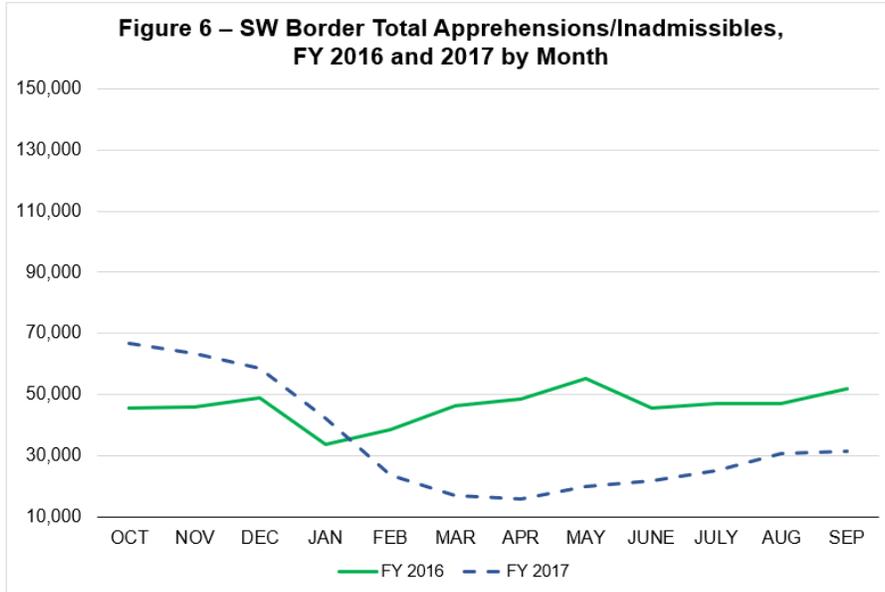
57. David M. Davies, *Documentary Report: The Surge in Immigration from Central America*, TEX. PUB. RADIO (July 7, 2014), <https://www.tpr.org/post/documentary-report-surge-immigration-central-america>, [https://perma.cc/RZS5-M7FV]; David A. Martin, *How to Fix the Crisis Caused by Central American Asylum Seekers — Humanely*, VOX (July 4, 2018, 10:44 AM), <https://www.vox.com/the-big-idea/2018/7/2/17524908/asylum-family-central-america-border-crisis-trump-family-detention-humanereform> [https://perma.cc/XZH9-KEQH].

58. See Gustavo Valdes et al., *Obama Vows Urgent Action as Children Make Perilous Illegal Journey into U.S.*, CNN (June 10, 2014, 10:13 AM), <https://www.cnn.com/2014/06/09/us/undocumented-children-immigrants/index.html> [https://perma.cc/74GS-72X5].

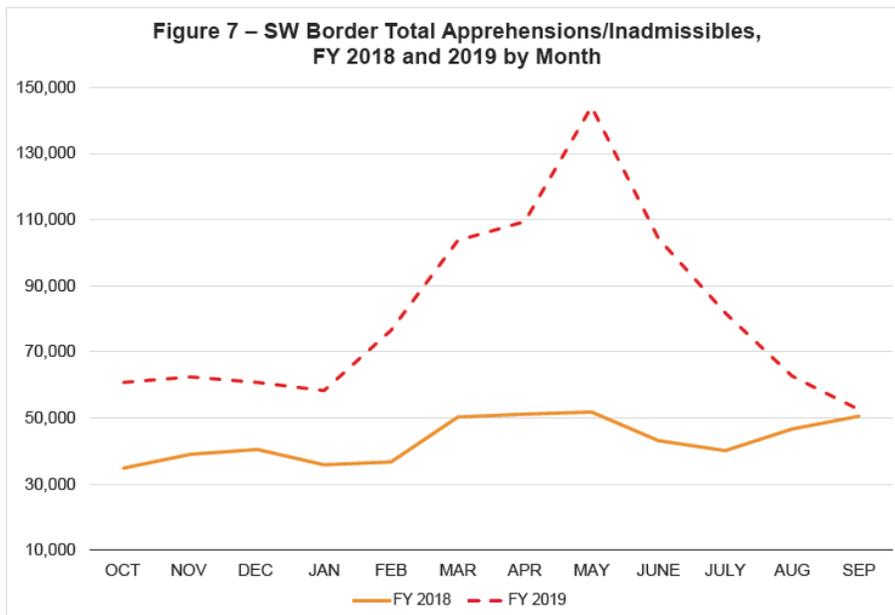
reducing the numbers through 2015, but court rulings eventually limited his options.⁵⁹ In May 2016, we were back to receiving approximately 50,000 asylum seekers monthly at the southwest border. Then-candidate Trump highlighted this ineffectiveness as part of his strong anti-immigrant and anti-refugee message—a centerpiece of his campaign.

Trump then won the election, and the arrival numbers showed an immediate drop, quite visible in Figure 6, which graphs the benchmark numbers for fiscal years 2016 and 2017. In March, apprehensions were down by almost 70% over the same period a year earlier. Donald Trump may have flattered himself into thinking that his tough rhetoric and his mere presence for two months in the Oval Office had solved the problem. But any such deterrent effect predictably wore off, and the monthly intake for fiscal year 2018 mirrored Obama's 2016 experience with remarkable fidelity. Check out Figure 7.

59. See *Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016), *aff'g in relevant part Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015). This litigation produced a ruling that a 1997 settlement of long-running litigation over the treatment of minors in immigration custody applied not solely to unaccompanied minors but also to those accompanied by family members. See Peter Margulies, *What Ending the Flores Agreement on Detention of Immigrant Children Really Means*, LAWFARE (Aug. 29, 2019, 5:39 PM), <https://www.lawfareblog.com/what-ending-flores-agreement-detention-immigrant-children-really-means> [<https://perma.cc/2QAA-CKU3>]. Of particular importance was a provision that limited detention to a maximum of twenty days (with limited exceptions). *Id.* As a result, DHS had to release most persons apprehended as family units before the twenty days expired. *Id.*



Source: U.S. Customs and Border Protection, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>



Source: U.S. Customs and Border Protection, <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>

Figure 7 shows a striking increase in border arrivals for 2019. The growth consisted mostly of family units traveling with children—in apparent response to court decisions that limited family detention to twenty days. That surge overwhelmed DHS resources and facilities.⁶⁰ President Trump was reportedly furious. In response, the Administration flailed about for a while, testing dramatic new deterrents or obstacles—and also regularly throwing high officials out the window at DHS (some of them are friends of mine), replacing them with a series of acting officers.⁶¹ These impulsive control initiatives have at times triggered visceral public condemnation—particularly the child separation policy—and they certainly fanned the flames of judicial skepticism, resulting in numerous preliminary injunctions against Trump’s initiatives.⁶²

The judicial skepticism is deserved because many steps were inconsistent with the statute, badly lawyered or administered, or just inhumane.⁶³ But a few court injunctions went too far—especially the ruling imposing a twenty-day limit on family detention, which was based, in my view, on a misreading of the 1997 *Flores* settlement

60. The primary decisions are cited in note 59 *supra*. Further commentary on the role of these court decisions can be found in HOMELAND SEC. ADVISORY COUNCIL, FINAL EMERGENCY INTERIM REPORT: CBP FAMILIES AND CHILDREN CARE PANEL 1, 2, 8 (Apr. 16, 2019) [hereinafter HSAC INTERIM REPORT] (early 2019 crisis was “further exacerbated” by the *Flores* ruling); HOMELAND SEC. ADVISORY COUNCIL, CBP FAMILIES AND CHILDREN CARE PANEL FINAL REPORT 1, 5, 14, 15, 23 (Nov. 14, 2019) [hereinafter HSAC FINAL REPORT] (the 2019 surge in family unit migration was “extraordinary and unprecedented”; “the *Flores* decision was perhaps the single greatest factor in creating the current crisis”). See generally Margulies, *supra* note 59.

61. Davis & Shear, BORDER WARS, *supra* note 3, at 378–88 (chapter titled “The Purge”).

62. See *id.* at 253–79, 285, 292–93.

63. See, e.g., *id.* at 70–91. The spate of rulings against President Trump’s January 2017 travel ban forced two extensive revisions to the ban order before the Supreme Court upheld the final version in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). In *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 755 (9th Cir. 2018), a motions panel found the plaintiffs likely to succeed on the merits of their claim that a presidential proclamation and resulting regulations, which would have prohibited grants of asylum to persons entering the United States away from ports of entry, are invalid as inconsistent with the asylum statute. *Id.* The panel therefore denied a stay pending appeal of the district court’s preliminary injunction. *Id.* Judicial rulings also carefully supervised efforts to reunite with their parents thousands of children who had been separated under the “zero tolerance” policy of mid-2018. Maria Sacchetti, *In Another Blow to Trump, Judge Rules in Favor of ACLU in Family Separations Case*, WASH. POST (Mar. 8, 2019, 10:11 PM), https://www.washingtonpost.com/local/immigration/in-another-blow-to-trump-judge-rules-in-favor-of-aclu-in-family-separation-case/2019/03/08/9199f0c8-3938-11e9-a06c-3ec8ed509d15_story.html [https://perma.cc/3J2V-NMTC].

agreement. That ruling had a major effect on migration patterns from 2015 onward.⁶⁴

What should be done to get the system back to a sustainable equilibrium? That is a deeply challenging and complex question. I'll offer here a few brief suggestions, summarized in Table 2.

Table 2 - Primary Elements of Asylum Reform	
○	Mastering the immigration court backlog
○	Asylum processing centers in U.S. near border
➤	Housing for virtually all border applicants, including families
➤	Strong standards to govern conditions of detention
➤	Access to counsel, ideally public defender model
○	U.S. aid to reduce violence and persecution in source country
○	Regional cooperation
➤	Potential extraterritorial sites for U.S. adjudication
➤	Humane living conditions and assistance for preparation of asylum claims
➤	Expanded range of countries providing asylum to successful claimants

First, absolutely central to any long-term answer is getting our individual adjudication system healthy again—back to the point where it can produce yes-or-no decisions by immigration judges within six months. Such decisions constitute the fairest and most reliable deterrent: prompt denial of asylum (thereby precluding work authorization) to specific people whose claims have been heard and judged unqualified—rather than harsh measures visited on all who

64. See note 59 *supra*.

seek asylum.⁶⁵ We urgently need to bend downward the curve on these immigration court backlog numbers. But that may take many years, especially if no legalization program emerges. We need other creative steps in the meantime.

The best ideas I have seen for that interim period came from a bipartisan panel of the Homeland Security Advisory Council (HSAC). Its initial report in April 2019, when monthly arrivals of asylum seekers reached 100,000, recommended legislative and executive action to establish three or four regional processing centers along the southwest border. The centers, the second component of a strengthened system, would centralize and standardize both housing and legal decision-making on asylum claims filed in that region. Applicants would remain in custody there until either granted asylum or ruled deportable, but firm standards would command humane conditions in both family and individual detention centers. The report soundly called for legislation to override the *Flores* court's twenty-day limit on family detention, but every effort would be made to expedite decisions, by hiring more officers, judges, lawyers, interpreters, and other support staff. Denied claimants could be readily located for removal because they would be housed at the center.⁶⁶

And then the report offered a politically bold surprise: the panel urged consideration, primarily for reasons of efficiency, of government-funded defense counsel for asylum seekers at the centers, modeled on public defender offices in the criminal justice system. That should mean no delays awaiting representation from the limited supply of pro bono lawyers. Further, with attorneys present from the beginning, we could expect greater accuracy and better respect for procedural rights, and therefore fewer reversals in federal court.⁶⁷

65. See *Making Asylum Policy*, *supra* note 53, at 746–50 (discussing the design of 1994 reforms meant to serve that end); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1289–94 (1990) (on the importance of developing a deterrent focused on unqualified cases).

66. HSAC INTERIM REPORT, *supra* note 60, at 9–12. The HSAC panel's final report, issued seven months later, elaborated on the initial recommendations. HSAC FINAL REPORT, *supra* note 60, at 7–8, 14–16, 26–29.

67. HSAC INTERIM REPORT, *supra* note 60, at 10.

Third, whatever we do about border processing centers, we need to apply greater resources and creative diplomacy toward eliminating root causes, reducing the gang violence and human rights abuses that send people in search of international protection. Addressing root causes of refugee migration is easy to prescribe and exceptionally hard to do effectively. But the track record on addressing source-country problems is better than is usually recognized. The Central American security initiatives funded by the U.S. government have provided \$2.6 billion to these efforts over the past four years. They have had a demonstrable impact in helping to reduce gang violence and murder rates.⁶⁸

The fourth item on my list is regional cooperation: nearby nations share with others the responsibilities involved in this complex business of asylum. The potentially shareable tasks, which could be parceled out in various patterns among cooperating nations, include shelter or housing for asylum seekers, designing and operating adjudication procedures, removing unsuccessful claimants, providing durable residence for at least some of those who succeed, and of course providing funding for the overall enterprise. Burden-sharing has been a familiar theme in dealing with refugee issues in the developing world, but rare in the wealthier regions where asylum has typically been dealt with through individual adjudications. That neglect is changing, both because asylum dilemmas are now harder and more politically salient and because Mexico, our crucial neighbor, has recently shown real willingness for more extensive cooperation. Particular versions of cooperation are central in the Trump Administration's actions, but the current mix is deeply deficient. Some thinkers who object to Trump's approach are quietly exploring alternative regional models that would advance control but be more

68. See PETER J. MEYER, CONG. RESEARCH SERV., R44812, U.S. STRATEGY FOR ENGAGEMENT IN CENTRAL AMERICA: POLICY ISSUES FOR CONGRESS 10–14, 18–19 (2019) (describing the regional challenges, U.S. programs, and their impact). The HSAC panel's final report, discussed above, also analyzed source country "push factors" in Guatemala, Honduras, and El Salvador, offering suggestions for international aid and training meant to improve governmental protection in the source countries and even to create "shelter in-country where needed." HSAC FINAL REPORT, *supra* note 60, at 9–10, 26–29.

protective of migrants awaiting a decision, and also provide better outcomes for those whose claims are successful.⁶⁹

There are three main reasons why regional options are thought promising. First, breaking the direct link between a successful asylum claim and residence in a wealthy country chosen by the claimant could help discourage marginal or abusive claims and help make numbers more manageable.⁷⁰ You might win asylum, but then wind up in San Jose, Costa Rica, instead of San Antonio, Texas. Second, the system could reach final actionable decisions more quickly, through the possibility of less complex hearing and appeal procedures. And third, adjudicating closer to the source country makes it easier to repatriate those who do not qualify.

Each of these potential advantages comes with risks. Namely, governments may find it easier to take shortcuts—on housing, procedures, legal aid. That is a genuine worry. Vigilance against backsliding will be required. But the system we now have is filled with longcuts, so to speak, which simply aren't working well; they bog the system down and drive the public away from supporting refugees. We need balance.

Possible variations on task sharing are endless, and observers can offer only preliminary guesses at this point. But among the more promising models are the HSAC advisory panel's proposal for U.S. processing centers just inside our southwest border, discussed before.⁷¹ Other plans, such as one pushed by Senator Lindsey Graham (R-SC),⁷² call for establishing regional refugee processing facilities in Central America or southern Mexico. The United States might fund much of

69. See David A. Martin, *The Refugee Act of 1980: A Forlorn Anniversary*, LAWFARE (Mar. 19, 2020, 2:30 PM), <https://www.lawfareblog.com/refugee-act-1980-forlorn-anniversary> [<https://perma.cc/L9F8-ZW55>] [hereinafter *Forlorn Anniversary*].

70. For early and quite systematic consideration of alternative plans of this sort, see Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997).

71. See sources cited *supra* note 60 and accompanying text.

72. Secure and Protect Act of 2019, S. 1494, 116th Cong. (introduced May 16, 2019). The bill was marked up and adopted by the Senate Judiciary Committee in August 2019. Tanvi Misra, *Senate Panel Advances Asylum Bill over Democratic Objections*, CQ NEWS (Aug. 1, 2019, 3:46 PM), <https://www.rollcall.com/2019/08/01/senate-panel-advances-asylum-bill-over-democratic-objections/> [<https://perma.cc/5SG3-3KN4>].

the effort, and it could provide expert asylum officers to interview and adjudicate, or to train and supervise other countries' adjudicators. Repatriation duties might fall to the host country. To the greatest extent possible, other countries in the hemisphere would join in resettling those who meet the protection standards.

After many unsuccessful trial balloons on asylum restrictions, the Trump Administration seems now to be placing its main reliance on certain types of regional coordination, primarily the so-called "Remain in Mexico" program for Central Americans caught or identified by U.S. agents near the U.S. border.⁷³ Serious implementation began in early summer 2019. In my view, the sharp drop in border apprehensions since May is mainly attributable to this policy.

Under it, the United States takes on responsibility for asylum processing and adjudication. But the applicants wait in Mexico for a delayed appointment just to file their application at the port of entry, and later for a hearing at the border before a U.S. immigration judge. The numbers processed each day are tightly "metered" at each port.⁷⁴ A district court enjoined this overall policy, and the court of appeals affirmed in February 2020, finding the policy inconsistent with U.S.

73. See Dara Lind, "Remain in Mexico": Trump's Quietly Expanding Crackdown on Asylum Seekers, Explained, VOX (Mar. 22, 2019, 2:04 PM), <https://www.vox.com/2019/3/5/18244995/migrant-protection-protocols-border-asylum-trump-mexico> [<https://perma.cc/3L28-38T5>]; *The Real Border Crisis Is Trump's Remain in Mexico Policy*, WASH. POST (Mar. 7, 2020, 7:00 AM), https://www.washingtonpost.com/opinions/the-real-border-crisis-is-trumps-remain-in-mexico-policy/2020/03/06/02d6964c-5cd8-11ea-9055-5fa12981bbbf_story.html [<https://perma.cc/349Q-GVK7>].

The Trump Administration is also adding "asylum cooperative agreements" with Guatemala, El Salvador, and Honduras, negotiated in 2019, as additional means to turn asylum seekers away without considering their applications, sending them to have their claims heard in one of those Central American nations. Nicole Narea, *Trump's Agreements in Central America Are Dismantling the Asylum System as We Know It*, VOX (Nov. 20, 2019, 3:08 PM), <https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained> [<https://perma.cc/AD6X-QM99>]. The implementing regulations appear at 84 Fed. Reg. 63,994 (Nov. 19, 2019). The Administration claims authority for these steps in INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A) (2018), which permits the barring of an asylum application, without consideration of the merits, if the person may be removed to a "safe third country" pursuant to an international agreement. These agreements constitute a type of regional cooperation, but to claim that these three countries, the primary sources of recent asylum claims in the United States, are safe according to the statutory standards is, on its face, highly dubious. Nevertheless, the statute imposes strong limits on judicial review. INA § 208(a)(3), 8 U.S.C. § 1158(a)(3). It is too early to know how extensively these agreements will be used and whether they might largely replace the "Remain in Mexico" procedure.

74. Lind, *supra* note 73. For more on metering, see generally *Al Otro Lado v. Wolf*, 952 F.3d 999 (2020).

statutes and international treaty commitments. The Supreme Court has stayed the injunction pending final appeals, which probably will not be resolved before 2021.⁷⁵ Since its inception, the Remain in Mexico policy has expanded to more border cities, and as of March 2020, over 60,000 people find themselves in that pipeline.⁷⁶

The basic concept could perhaps be defended, if implemented in good faith. But current implementation is marked by shortcuts in the three areas highlighted above: housing, procedures, and legal assistance.⁷⁷ Under the Administration's approach to operations, there are no systematic arrangements for housing within Mexico, much less for lodging funded by the United States. Many waiting families survive in tent cities or flimsy shelters, with limited access to social services or schooling. No reliable notification system exists to tell them when their U.S. cases are scheduled or rescheduled. Attorneys who would like to help in preparing a U.S. asylum claim face enormous practical obstacles. And the border regions where asylum seekers wait are prime operating ground for violent Mexican cartels. Migrants have become frequent victims of crime—both petty and violent.⁷⁸ In actual operation so far, Remain in Mexico serves mainly to multiply hardships in order to discourage asylum seekers.

It doesn't have to be that way. Each of the negative features I just listed could be fixed by an enlightened executive. Or attention could instead shift to a system like what I sketched earlier, with adjudications done at refugee processing centers inside the United States or, alternatively, done on a multilateral basis in the region, producing resettlement shared among nearby countries.

75. *Wolf v. Innovation Law Lab*, No. 19A960, 2020 WL 1161432, at *1 (U.S. Mar. 11, 2020) (staying injunction issued in *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir. 2020)). For a broader description, see Nicole Narea, *The Supreme Court Just Allowed Trump to Continue Sending Migrants Back to Mexico*, VOX (Mar. 11, 2020, 2:59 PM), <https://www.vox.com/2020/2/28/20907053/remain-in-mexico-mpp-supreme-court-opinion> [<https://perma.cc/2PXL-AGFT>].

76. Narea, *supra* note 75.

77. See *Forlorn Anniversary*, *supra* note 69 (describing these impacts).

78. *Marking One Year of the Horrific "Remain in Mexico" Policy – Over 800 Violent Attacks on Asylum-Seekers*, HUM. RTS. FIRST (Jan. 22, 2020), <https://www.humanrightsfirst.org/press-release/marking-one-year-horrific-remain-mexico-policy-over-800-violent-attacks-asylum-seekers> [<https://perma.cc/4L38-NC28>].

Regional cooperation *can* be made to work not as a way to impose hardships and merely discourage asylum seekers, but as a way to manage the logistics of a serious legal system. The objective is to afford protection where merited, but in a manner less subject to delay and manipulation—less likely to excite public backlash or provide red meat to extremist parties out to build “illiberal democracies.”

We need to think in systemic ways about asylum, not only about individual cases. Haven for refugees is an integral part of America’s history. Our task—all of ours—is to optimize welcome by giving due attention to the public’s impulse to control. Taming asylum is an indispensable part of taming immigration.