TOWARDS A MORE JUST U.S. IMMIGRATION SYSTEM:

EXAMINING AND CRITIQUING CURRENT IMMIGRATION LAWS AND POLICIES AND SUGGESTING PATHS FORWARD

By

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ABSTRACT

The policies and practices of the United States immigration system result in systemic injustices and harms. The following thesis project is composed of a series of three policy recommendations, all of which aim to ameliorate the unjust outcomes associated with immigration in the United States. The first recommendation targets the lack of appointed legal counsel for individuals facing immigration proceedings through the implementation of a universal representation policy at the federal level. Establishing universal legal representation would significantly improve the quality of justice delivered in immigration courts across the country, and in turn would provide stability, security, and unity to thousands of individuals and families affected by immigration proceedings. The second recommendation addresses the disproportionate structural barriers within United States immigration policy faced by marginalized groups and aims to provide more accessible paths to lawful status. The steps to achieve these goals include the implementation of a sliding scale of administrative fees associated with the immigration application process, the passage of legislation providing paths to citizenship and lawful status for those residing in the United States, and an update to the registry year written into the Immigration and Nationality Act. Finally, the third policy recommendation targets the inhumane and excessively punitive practice of immigration detention. It is my recommendation that immigration enforcement be shifted to a system of case management and resource provision.

INTRODUCTION

The following project aims to point out critical issues with the United States immigration system, and importantly, recommend potential solutions that can mitigate the suffering imposed by that system. This aim will be accomplished through the presentation and explanation of three policy recommendation memos. Each memo draws on the latest legal and sociological literature to justify its policy recommendation. The first memo addresses the lack of any guaranteed, universal legal representation in immigration proceedings, and advances an implementation plan for universal representation policy at the national level. The second memo analyzes existing structural barriers to lawful immigration and recommends expanding paths to lawful immigration status and relief from deportation. Finally, the third policy memo criticizes the overuse of detaining undocumented immigrants and asylum seekers. This third memo recommends several government policies that would decrease the use of detention and improve the facility conditions of those who are detained. All three memos aim to improve the fairness and justice of U.S. immigration laws and policies.

POLICY MEMO 1 – UNIVERSAL REPRESENTATION

Background

The Sixth Amendment to the U.S. Constitution establishes and guarantees the rights of individuals facing criminal trials; these include the right to a speedy trial, an impartial jury, knowledge of who the accuser(s) are and what charges are being levied, as well as the right to legal counsel ("Sixth Amendment", n.d.). This last guarantee of legal representation is key to this policy memo. Despite these constitutional protections, it is currently standard practice for someone facing deportation or detention in immigration court to present and argue their case alone, with no legal counsel present. This is because the right to appointed counsel that was won in *Gideon v. Wainwright* has only been applied to individuals in *criminal* court proceedings. Immigration proceedings are considered civil, not criminal, and therefore, the extension of the Sixth Amendment has not been applied. Consequently, individuals facing immigration proceedings who cannot afford legal counsel must present their case *pro se,* or on their own behalf, without the benefit of a lawyer.

The advantages of having legal representation in immigration proceedings are incredibly significant. First and foremost, the immigration legal system is incredibly complex, and is difficult for any person without legal knowledge and training to navigate. Without any/adequate legal representation, individuals facing immigration proceedings are much less likely to effectively present their case. For example, one immigration lawyer who specializes in asylum cases notes that "there is simply no way for a pro se applicant to know what information is important" (Salyer, 2020, p. 90). For instance, one lawyer had met with and prepared an asylum application for an individual, "but it was not until they were preparing to go to his interview with the asylum office" that she learned of "a huge scar" her client had "that he had not mentioned

previously" (Salyer, 2020, p. 90). When the lawyer "asked him why he had not mentioned it before… he told her that he simply did not know that it was important" (Salyer, 2020, p. 90). These kinds of details, which may prove hardship or persecution, and thereby strengthen the claim of the individual, are essential to an effective immigration case. Most non-lawyers would be (and are) completely ill-equipped to present these facts thoroughly and effectively.

The consequences of not being able to afford an immigration lawyer, and not having one appointed, can be extraordinarily severe; the consequences may include, but are not limited to, prolonged periods of detention, deportation (potentially to a location where the individual faces danger and/or persecution), and family separation. Given such high stakes, the differential case outcomes between immigrants with and without legal representation is substantial. The Vera Institute of Justice reports that "it is nearly impossible to win deportation cases without the assistance of counsel." After all, "only 5 percent of [deportation] cases that won between 2007 and 2012 did so without an attorney," while "95 percent of successful cases were represented" by legal counsel (Berberich & Siulc, 2018, p. 1) The Vera Institute also found that "detained immigrants" who have legal representation "are 10.5 times more likely to succeed in their legal cases than their unrepresented counterpart" (Berberich & Siulc, 2018, p. 2). These statistics clearly display the magnitude of difference made in immigration cases by legal counsel. Immigration lawyers are trained to have a thorough knowledge and understanding of complex immigration law and to present their clients' cases cogently. The specialized skillset provided by these lawyers is monumentally important in ensuring that individuals in immigration proceedings receive fair and just trials, and significantly increase the likelihood of a favorable outcome resulting from an expert presentation of facts.

Problem Statement

The issue of lack of legal representation in immigration court is both unique and incredibly significant. As outlined by immigration lawyer and author J.C. Salyer (2020), "the U.S. Supreme Court unanimously found the right to criminal defense counsel in *Gideon v. Wainwright*" in 1963 (p. 127). In this case the Supreme Court held that legal representation in criminal proceedings is an absolutely necessary element of a fair trial. Justice Hugo Black wrote the opinion for this landmark case and declared that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him" ("Facts and Case Summary - Gideon v. Wainwright", n.d., Reasoning). Salyer also maintains that the right to appointed counsel should extend to those facing immigration proceedings due to the similarities of these to criminal proceedings. Specifically, Salyer (2020) notes that "the adversarial nature of the process, the difficulties a non-lawyer has understanding complex law, and the seriousness of the consequences" of detention and/or deportation are extremely similar to the circumstances of a criminal trial, in which one is guaranteed to have appointed counsel (p. 127). Immigrants who cannot afford legal representation "are left to defend themselves in an adversarial and notoriously complex system against the United States government, which is always represented by counsel" (Berberich & Siulc, 2018, p. 1). By not being appointed legal counsel, individuals facing deportation, detention, or cancellation of their legal status are not given a fair trial.

Unfortunately, "tens of thousands of people each year go unrepresented, including asylum seekers, longtime legal residents, immigrant parents or spouses of U.S. citizens, and even children" (Berberich & Siulc, 2018, p. 1). As a result of not being appointed counsel, thousands of individuals yearly have an unfair trial resulting in unfavorable rulings. As a result of these

rulings, individuals can be deported to hostile environments. Their families can be separated. They can be indefinitely detained by Immigration and Customs Enforcement. Large numbers of people, many with legitimate immigration claims that should result in relief, are left to navigate a complex and potentially terrifying system on their own, often resulting in unfair and unjust rulings.

Recommendation

I recommend that a system of universal representation in all immigration proceedings be implemented at the federal level. A policy of this nature would ensure that individuals facing immigration proceedings are appointed a lawyer if they cannot afford one themselves. Access to legal counsel would not only improve the outcomes of individuals facing the immigration system, benefitting immigrant families and communities, but would also improve "the quality of justice rendered in the courts" where these proceedings take place (Nash, 2019, p. 106). This recommendation will proceed as follows. First, I will outline the crucial features of my implementation plan for a federal universal representation policy, enumerating where and how this system may function. Next, I will provide a plan for how this policy may be funded. Last, I will explore existing universal representation programs across the United States, including their structures and resulting effects.

Implementation

This policy would grant individuals facing immigration proceedings in the United States the right to appointed legal counsel should they be unable to afford their own representation. A strategy for implementing this kind of policy at the nationwide level is to enact standard parameters and guidelines and allocate federal funding for universal representation programs to function at the county level all over the country. Institution of these programs at the county level

is important in ensuring they are most effective, as county governments may be more in touch with the needs of immigrant communities in the area than the federal government. Lindsey Nash (2019) writes that restrictions to who receives representation from universal representation programs have been suggested. Nash (2019) states that "the two most commonly proposed restrictions are (1) residency restrictions… and (2) restrictions based on criminal history" (p. 106). Importantly, Nash (2019) notes that "the latter restriction, in particular, runs contrary to the concept underlying the universal representation model" (p. 106). In other words, the notion that individuals with criminal histories should be denied access to legal counsel in immigration court is inherently contradictory to the guiding idea that individuals facing immigration proceedings should be appointed counsel just as individuals facing criminal charges are appointed counsel. This policy recommendation advocates for limited/no restrictions to access to counsel because of the magnitude of difference made in the quality of the trial and because of the potentially high stakes faced by those who lose their proceedings.

Further, drawing inspiration from the proposed Pima County Justice for All Initiative in Arizona, this policy recommendation calls for Offices of Immigration Representation to be established at the county level. The text of the Pima County initiative outlines that "the Office of Immigration Representation shall consist of a Directing Attorney and as many attorneys, representatives, and supporting staff as reasonably necessary to provide sufficient representation to indigent Pima County residents facing immigration proceedings" (Pima County Justice for All [PCJFA], 2020, p. 4). This policy recommendation calls for a similar structure, based on the specific needs of each county.

Funding

The funding for a program of this scale will come from multiple sources. First, there should be a sliding-scale fee system implemented in each county. In other words, individuals who can afford to pay a reduced fee will do so while those who have little to no monetary resources will have the cost of their representation covered entirely. Additionally, federal funding will be allocated to each county based on the needs of the population. The federal funding will not exhaustively cover the expenses of these immigration representation programs but will be designed to support their implementation and perpetuation. Additionally, these programs will be eligible for state and public grants. As outlined by Pima County Justice for All (2020):

> "Consistent with the provisions of the Pima County Code, the Pima County Board of Supervisors, County Administrator, and Directing Attorney are authorized to seek, apply for, and receive federal, state and public grants to supplement the budget of the Office of Immigration Representation, provided the acceptance of said grant funding does not limit the scope of residents eligible for representation by the Office of Immigration Representation" (p. 6).

Inspired by this language of the initiative, this policy recommendation advises that a similar guideline be added to the federal institution of universal representation.

In addition, these county offices may be supported by donors/foundations who believe in supporting the cause of universal representation. Provided these donations make no legal or ethical impact on the work being done by these offices, monetary support should be allowed. This combination of funding resources should allow for immigration representation to become universal in the United States with little to no monetary cost for community members.

Existing Examples

The immense benefits of universal representation programs have been documented through the observation of existing programs. The most notable examples of such programs are those established in New York in November of 2013. The New York Immigrant Family Unity Program (NYIFUP) essentially functions as a public defender system for individuals facing immigration proceedings who meet the income requirements (less than 200% of the federal poverty line) (Salyer, 2020, p. 134). The Immigrant Justice Corps (IJC) "is a program funded by private foundations that places young lawyers and college graduates into existing organizations to assist with those organizations' efforts to provide legal assistance to immigrant communities" (Salyer, 2020, p. 134). According to Salyer (2020) "by 2015, the NYIFUP program was able to provide near-universal representation to detained indigent migrants facing removal in New York City" (Salyer, 2020, p. 134). These programs operate to provide individuals facing immigration proceedings with the legal representation that is so crucial to the fairness of their trial and goes a significantly long way in obtaining a favorable outcome. Funding for these programs comes from numerous sources, specifically including the City Council of New York and charitable organizations (Salyer, 2020). Beyond improving the quality of justice in New York City immigration courts, "the fact that NYIFUP is a network of multiple providers with multiple lawyers creates benefits that were not available before" (Salyer, 2020, p. 141). Salyer (2020) notes that these lawyers can formally and informally share important information among themselves; this includes legal strategies for specific courts/judges and for specific kinds of cases, as well as proceedings updates. In sum, these lawyers are able to build a communal knowledge base.

Conclusion

The lack of guaranteed legal representation for individuals in immigration court has serious and unjust consequences. Establishing legal representation at the federal level would be crucial to improving the quality of justice delivered in immigration court, and to helping immigrant communities receive outcomes which provide stability, security, and family unity. These kinds of programs currently exist in the United States, proving that they can be instituted and enacted effectively.

POLICY MEMO 2 – EXPANDED PATHS OF RELIEF

Background

Lack of legal status creates incredibly precarious living situations for individuals, families, and communities all over the United States. According to the Migration Policy Institute, there were approximately "11 million unauthorized immigrants in the United States in 2019" (Esterline & Batalova, 2022, Unauthorized Immigrants). In addition, "approximately 5.5 million children under age 18 lived with an unauthorized immigrant parent as of 2019, representing 7 percent of the U.S. child population" (Esterline & Batalova, 2022, Unauthorized Immigrants). This means that 5.5 million children are at increased risk of having a parent detained or deported. These numbers reflect the inaccessibility of United States citizenship. Moreover, the extent of that inaccessibility is substantively shaped by the immigrating person's race, ethnicity, and financial status. Before analyzing this issue and recommending ways to address the inaccessibility problem, it is important to present some background information on the processes by which one can obtain legal status in the United States.

Obtaining U.S. citizenship is not as simple as "waiting in line" to get a visa. In fact, it is a complex and intensely time and resource-consuming process. In order to convey this point and provide important context, this section will detail a few ways in which legal status/U.S. citizenship can be applied for and obtained. The most familiar narratives regarding immigration are those surrounding family-based immigration. There exists "an unlimited number of visas… every year for the immediate relatives of U.S. citizens" (American Immigration Council [AIC], 2021a, p. 1). In this way, access to citizenship is justified because it helps families reunite and stay together. Immediate relatives in this case include spouses, unmarried children under the age of 21, and parents of a U.S. citizen over the age of 21 (AIC, 2021a).

Another method of family-based immigration is the family preference system. The visas available under the family preference system are more restricted, meaning only a certain number of them are available annually. According to the American Immigration Council (2021a), "the family preference system includes: adult children (married and unmarried) and brothers and sisters of U.S. citizens (petitioner must be at least 21 years old to petition for a sibling); and spouses and unmarried children (minor and adult) of [legal permanent residents,]" or LPRs (p. 2). United States citizens or legal permanent residents who are sponsoring a relative for admission through family-based immigration "must petition for an individual relative, establish the legitimacy of the relationship, meet minimum income requirements, and sign an affidavit of support stating that the sponsor will be financially responsible for the family member(s) upon arrival in the United States or adjustment to LPR status within the United States" (AIC, 2021a, p. 3). Additionally, the relative seeking to immigrate must "[submit] to a medical exam and [obtain] required vaccinations" in addition to a criminal/immigration background check, and demonstration that "that they will not become primarily dependent on the government for subsistence" (AIC, 2021a, p. 3). This is a very basic outline of the family-based immigration process, and in reality, it requires extensive amounts of time, money, and other resources to complete successfully.

Another way in which one can obtain U.S. citizenship/legal status is through the Diversity Visa Program. This program "was created by the Immigration Act of 1990 as a dedicated channel for immigrants from countries with low rates of immigration to the United States" (AIC, 2021a, p. 6). The American Immigration Council (2021a) writes that "each year, 55,000 visas are allocated randomly through a computer-generated lottery to nationals from countries that have sent fewer than 50,000 immigrants to the United States in the previous five

years" (pp. 6-7). The qualifications for Diversity Visa applicants include "a high-school education (or its equivalent) or… within the past five years, a minimum of two years working in a profession requiring at least two years of training or experience" (AIC, 2021a, p. 7). Other types of temporary legal status are granted in cases of humanitarian relief. These include Temporary Protected Status (TPS), Deferred Enforcement Departure (DED), and Deferred Action for Childhood Arrivals (DACA). None of these three programs guarantee legal permanent resident/citizenship status, and instead are temporary approvals of residency. TPS "is granted to people who are in the United States but cannot return to their home country because of 'natural disaster,' 'extraordinary temporary conditions,' or 'ongoing armed conflict.'" (AIC, 2021a, p. 7). TPS status can be extended if the dangerous circumstances are ongoing (AIC, 2021a). DED "provides protection from deportation for individuals whose home countries are unstable, therefore making return dangerous" (AIC, 2021a, p. 7). DED is different from TPS because "unlike TPS, which is authorized by statute, DED is at the discretion of the executive branch" (AIC, 2021a, p. 7). In this way, successful immigration can depend on the whims of the U.S. president. Finally, DACA "is a program established in 2012 which permits certain individuals who were brought to the United States while under the age of 16 and who have resided continuously in the United States since June 15, 2007, to remain in the United States and work lawfully for at least two years, so long as they have no significant criminal record and have graduated high school or college or received a degree equivalent" (AIC, 2021a, p. 7). DACA status must also be renewed every two years.

Problem Statement

According to FWD.us (2021), a bipartisan political organization with organizing focuses in immigration and criminal justice, it is estimated that "nearly all undocumented immigrants

belong to groups that most Americans say should be provided a pathway to citizenship…. [including] essential workers, Dreamers who came to the U.S. as children, undocumented individuals living in the U.S. for many years, those with U.S. citizen family members, or those who currently have temporary protection from deportation" (p. 3). According to a report from the Pew Research Center, 67% of the U.S. public feel that establishing a path to lawful status is an at least somewhat important priority for future immigration policy, with 33% agreeing that it is very important (Daniller, 2019, graph 1). If the general public of the United States believes that these individuals should have a pathway to citizenship, why is legal status still inaccessible? There are numerous barriers to attaining legal status in the United States, but this policy memo will be focusing on two specific barriers that disproportionately hinder immigrants of color, women, and immigrants with limited financial capacity. These barriers are structural features of existing immigration law and policy and exist as facets of a racist and classist immigration system.

The structural barriers present in U.S. immigration law and policy are grounded in the notion that immigrants without lawful status are criminals. Much of the current rhetoric surrounding immigration, specifically undocumented individuals, in the United States is grounded in the questionable notion of "doing it the right way." This narrative wildly oversimplifies the complex, time and resource-intensive, and often frightening process of seeking legal residency/citizenship in the United States. Daniel Justino Delgado expertly analyzes the social, racialized mythologies which permeate discussions and policies related to immigration. These mythologies include commonplace notions of "good" and "bad" immigrants, notions that are dependent upon race, class, ethnicity, and country of origin. Delgado (2018) writes that "rather than being a color-blind process, citizenship and its benefits hinge on racial

identity" (p. 248). According to Delgado (2018), this mythology "maintains *binary* interpretations of crime (illegality) and citizenship– that is, either one is criminal and illegal or one is law-abiding and a citizen" (p. 249). This binary understanding of immigrant criminality is a major reason for the inaccessibility of citizenship for specific, structurally marginalized groups of immigrants. Delgado (2018) continues that "criminality for immigrants happens at the moment their documents expire and, for some, the moment they enter the country without the required documentation" (pp. 249-250). This point from Delgado highlights how criminality is substantially and harshly applied to violations of immigration procedures.

This applied criminality creates substantial structural barriers to completing the immigration process "the right way." For example, the criminalization of immigration violations results directly in the policy and practice of detaining and incarcerating undocumented individuals. The Vera Institute of Justice finds that detention is an incredibly significant factor in the likelihood of success in an individual's case for citizenship, deferral of deportation, or other positive outcomes. Specifically, "the physical constraints associated with detention mean… people," specifically those without a lawyer, "face serious obstacles to obtaining even the most basic evidence and paperwork they need to substantiate their legal claims" (Berberich & Siulc, 2018, p. 2). Without the opportunity to gather the necessary documentation, those being detained are unlikely to gain the citizenship status that they are legally entitled to. It is furthermore pertinent to reiterate that this applied criminality is disproportionately applied to Black and brown immigrants, who are globally less likely to have greater financial resources.

The process of obtaining legal residency and citizenship in the United States is a costly one as well, incurring even further barriers for immigrants who have little/limited access to financial resources. First, the process of applying for legal status is not technically impossible

without legal representation but is immeasurably more difficult and significantly less likely to be successful. As discussed extensively in my previous policy recommendation, legal counsel is not guaranteed to individuals in immigration proceedings, meaning that individuals must either pay to have a lawyer aid them with their case or represent themselves. To reiterate a statistic from the Vera Institute of Justice, "only 5 percent of [deportation] cases that won between 2007 and 2012 did so without an attorney," while "95 percent of successful cases were represented" by legal counsel (Berberich & Siulc, 2018, p. 1). Although legal counsel is such a significant factor in the outcome of immigration proceedings, legal fees are often not a feasible expense for immigrants with few financial resources. Additionally, the administrative costs of applying for legal status pose a financial barrier for all immigrants seeking to obtain residency or citizenship. Martin Guevara Urbina and Sofía Espinoza Álvarez (2018) write that "8.8 million people in the country are already eligible for citizenship but have not applied, in part because of the high cost" (p. 326). Urbina and Álvarez (2018) go on to say that in the "beginning of the George W. Bush administration, the cost of applying for citizenship was $225, but increased to $675 by 2008, the final year of Bush's administration" (p. 326). According to the website for Immigration Direct (n.d.), and immigration-related software company, "the current cost to apply for U.S. citizenship is $725 which includes $640 for the Form N-400 (Application for Naturalization) processing fee and $85 for the biometrics fee" (Immigration Direct, n.d., para. 2). A cost of $725 is by no means a trivial amount of money for many people. Fee waivers do exist for individuals who can demonstrate an inability to pay them, but Urbina and Álvarez (2018) explain that "the complicated process, which often forces [applicants] to hire an attorney, discourages or prevents people from applying" for fee waivers (p. 326). Legal fees associated with hiring an immigration attorney can amount to hundreds, and often thousands of dollars. In addition, these

administrative fees are anticipated to continue increasing. Immigration Direct (n.d.) states that "in 2020 USCIS proposed to increase the filing fee for U.S. citizenship application Form N-400 from the current $640 to $1170," but "a federal judge blocked the fee increase" before it was instated (para. 9). However, the fee "is expected to go up once this situation is sorted out;" the software company is confident that "there will be a fee increase in the near future" (Immigration Direct, n.d., para. 10). The impacts of these fees are intuitively uneven; immigrants with limited access to financial resources are more likely to remain undocumented, even if they have substantial cases for citizenship, and maintain that label of criminality elaborated on earlier.

Recommendation

This policy recommendation contains two parts that address the different barriers to citizenship that I have identified. The first entails the cancellation of administrative fees currently required to apply for United States citizenship because they pose an unnecessary financial barrier to achieving citizenship which disproportionately impacts immigrants with little financial resources. The second is the passage of legislation resembling that of the Dream and Promise Act of 2021 (H.R. 6), a piece of legislation that aims to create paths to legal status and citizenship for numerous groups of immigrants currently residing in the United States. In addition, this memo recommends an update to the registry year in the Immigration and Nationality Act as a means to provide immediate paths to lawful status for thousands of undocumented people residing in the United States.

Part One: Cancellation of Administrative Fees

As I elaborated on in the Problem Statement, immigration applications alone can carry fees exceeding $1000. These fees alone function as an unnecessary barrier to U.S. citizenship, a barrier that disproportionately impacts immigrants with limited financial resources and in turn

non-white immigrants and women, as these groups are globally less likely to have extensive financial resources at their disposal. The administrative cost of immigration applications should be cancelled for individuals who are unable to afford them. The costs associated with these applications should be covered by the federal government. This can be accomplished through a reappropriation of funds designated for United States Citizenship and Immigration Services, ICE, and Customs and Border Patrol. By covering these costs, people will be incentivized to apply for legal status/citizenship because of the removal of the financial barrier and the reduced risk of non-trivial financial loss. Furthermore, the administrative fees related to the immigration process should reflect a sliding scale based on income. Individuals or families that have high income levels should pay higher administrative costs. This way, immigrants with significant financial resources can pay this cost without experiencing hardship, and the cost can be scaled dependent on the applicants' financial capacity. With this, payments from wealthy people seeking to immigrate to the U.S. can help fund the application processes of potential immigrants with limited or low financial resources. This measure would aim to reduce, or even potentially eliminate, the financial burdens associated with obtaining lawful immigration status in the United States.

Part Two: Legislating Paths to Citizenship Decriminalization of immigration?

The United States Congress has the ability to make security and stability available to millions of people living in the country today by providing easier, simpler access to citizenship/legal status. As of April 2022, Congress has made some movement towards immigration relief legislation. Namely, H.R. 6, or the American Dream and Promise Act of 2021 introduced by Rep. Lucille Roybal-Allard passed the House on March 18, 2021. This piece of legislation would establish a "path to receive permanent resident status" for millions of DACA,

TPS, and DED recipients (Congressional Research Service [CRS], n.d., para. 1). The summary of the bill, authored by the Congressional Research Service (n.d.) reads that:

> "The Department of Homeland Security (DHS) or the Department of Justice (DOJ) shall provide conditional permanent resident status for 10 years to a qualifying alien who entered the United States as a minor and (1) is deportable or inadmissible, (2) has deferred enforced departure (DED) status or temporary protected status (TPS), or (3) is the child of certain classes of nonimmigrants" (para. 2).

H.R. 6 stipulates the criteria for these paths to citizenship. Individuals will be disqualified if they have a prior criminal history including domestic violence, felony conviction, 3 or more misdemeanors, or "aggravated felony, crimes involving moral turpitude, or any drug-related offense" (AIC, 2021b, p. 3). There are some "criminal acts" which do not result in disqualification, specifically including "crime related to lack of immigration status, minor traffic offenses, certain marijuana-related crimes, nonviolent civil disobedience, [and] domestic violence related to the applicant being the victim of certain types of violence" (AIC, 2021b, pp. 3-4). In addition, H.R. 6 would also "[repeal] the 1996 law which penalizes states that grant in-state tuition to undocumented students on the basis of residency and allows Dreamers to access federal financial aid" and would allow "eligible Dreamers deported under the Trump administration to apply for relief from outside the country" (AIC, 2021b, p. 4). Although this piece of legislation is an encouraging step, a more comprehensive and expansive bill is necessary which extends paths to lawful status to more individuals.

The piece of legislation that I am recommending would follow H.R. 6 in establishing paths to citizenship for DACA, TPS, and DED recipients, as well as the provision regarding undocumented college students, but would also update the registry date of the Immigration and

Naturalization Act to 2012. Doing so "would permit undocumented immigrants who have lived in the U.S. since that year to apply for lawful status" (FWD.us, 2021, p. 10). This change would allow undocumented individuals who have lived continuously in the United States for 10 or more years to apply for lawful status. FWD.us (2021) writes that "long-term undocumented residents living in the U.S. ten or more years… represent another large group of undocumented immigrants, making up 6.7 million people" (p. 10). Of those undocumented individuals who have lived in the U.S. for ten or more years, "about 1.9 million—or 19% of undocumented immigrants—have lived in the U.S. 25 years or longer" (FWD.us, 2021, p. 10). With this long period of residence comes connections through work, family, friends, and community. It is estimated that "3.1 million are married to a U.S. citizen spouse or have at least one U.S. citizen minor child," and "4.2 million are essential workers" (FWD.us, 2021, p. 10).

The most recent update to the registry date in the Immigration and Naturalization Act took place in 1986, when it was changed to 1972 (FWD.us, 2021). This longstanding tool of congressional immigration policy has the potential to provide relief to millions. The accessibility of legal status would provide security and stability to families and communities all over the United States. By providing paths to citizenship for DACA, TPS, DED recipients, and those undocumented individuals who have lived in the U.S. for ten or more years, millions of individuals will be able to achieve legal status. Updating the registry date in the INA would not alleviate the structural barriers of the U.S. immigration system but would function to ease the burdens and hardships faced by thousands of undocumented people residing in the United States. I include this aspect in my recommendation because of the expedient relief that it could provide to so many individuals, families, and communities.

Conclusion

Structural barriers within U.S. immigration policy disproportionately impact non-white immigrants, women, and immigrants with limited to no financial resources. These barriers create dangerous and precarious circumstances for those without lawful status in the United States, perpetuating injustices in the form of harms to immigrants, families, and communities nationwide. The steps that can be taken to alleviate these injustices include the implementation of a sliding scale of administrative fees associated with the immigration application process, the passage of legislation providing paths to citizenship and lawful status for those residing in the United States, and the update of the registry year written in the Immigration and Nationality Act.

POLICY MEMO 3 - MOVING AWAY FROM DETENTION

Background

Contrary to popular belief, immigration violations are not in themselves criminal acts. Despite this misperception, individuals who have discrepancies in their immigration status, and those without legal status, often are treated the same way that the U.S. treats people facing criminal charges. For instance, they are often incarcerated as they await their trial. As a result, they are punished in the sense that their liberty is deprived. This punitive treatment is perhaps most apparent in the policy and practice of immigration detention.

As described by Randy Capps and Doris Meissner (2021) of the Migration Policy Institute, “statutorily, the goals of immigration detention are to ensure that migrants appear for their immigration appointments and court dates and leave the United States in a timely fashion if they are ordered removed” (p. 5). This is the case that despite the fact that most individuals facing immigration proceedings do appear in court. The American Immigration Council produced a 2021 report which found that “83% of nondetained immigrants with completed or pending removal cases attended all their hearings from 2008 to 2018” and “96% of nondetained immigrants represented by a lawyer attended all of their hearings" in the same timeframe (Eagly & Shafer, 2021, p.4). These statistics seem to demonstrate that detention is not required for compliance, yet it still remains a major tool used by immigration enforcement authorities.

Interestingly, not all individuals facing immigration proceedings are required to be, nor are, detained. The Immigration and Nationality Act (INA) outlines the circumstances which lead to detention in detail and describes the breadth of discretion that immigration enforcement agencies have in deciding who is detained. The relevant sections of the INA include INA § 236 (a), INA § 236 (c), INA § 235 (b), and INA § 241 (a). The first section, INA § 236 (a),

"generally authorizes the detention of aliens pending a decision" regarding their removal/deportation "and permits those who are not subject to mandatory detention to be released on bond or their own recognizance" (Smith, 2021, p. 1).[1] This section is unique from the others mentioned in that it gives immigration authorities the discretionary power to detain individuals, rather than mandating detention as the following three do. Further, INA § 235 (b) "generally requires the detention of applicants for admission who appear subject to removal, including aliens arriving at a port of entry and certain other aliens who have not been admitted or paroled into the United States" (Smith, 2021, p. 1). Put differently, individuals who do not have proof of citizenship or legal residency at the United States border must be detained by immigration enforcement authorities under this section of the INA. Next, INA § 241(a) "generally requires an alien subject to a final order of removal to be held during the 90-day period when the alien's removal is effectuated," further stating that "DHS may detain an alien beyond this 90-day period if the agency is unable to effectuate removal and the alien falls within certain categories" including certain prior criminal or terrorism-related convictions (Smith, 2021, p. 1).

INA § 236 (c) is the section of the Immigration and Nationality Act which *requires* the detention of immigrants who "are removable because of specified criminal activity or terrorism-related grounds" (Smith, 2021, p. 1). Criminal history that specifically incurs mandatory detention includes aggravated felonies. As outlined by INA §101(a)(43), aggravated felonies include:

[1] The language used by author Hillel Smith of the Congressional Research Service to describe the text of the Immigration and Nationality Act includes the use of the term "alien" to describe individuals who do not have lawful immigration status. I in no way endorse this term, and intentionally do not use it in my own writing because I believe that it is dehumanizing. The term appears in phrases that I am citing, which I have not edited for the sake of clarity.

- alien smuggling
- attempt to commit an aggravated felony
- bribery of a witness
- burglary
- child pornography
- commercial bribery
- conspiracy to commit an aggravated felony
- counterfeiting
- crime of violence as defined under 18 USC 16
- destructive devices
- drug offenses
- failure to appear
- false documents
- firearms
- forgery
- fraud or deceit offense if the loss to the victim exceeds $10,000
- illegal re-entry after deportation or removal for conviction of an aggravated felony
- money laundering
- murder
- threat of national defense
- obstruction of justice
- perjury or subornation of perjury
- prostitution
- ransom demand
- rape
- receipt of stolen property
- revealing identity of undercover agent
- RICO offenses
- sabotage
- sexual abuse of a minor
- slavery
- tax evasion if the loss to the government exceeds $10,000
- theft
- trafficking in vehicles with altered identification numbers
- treason (Brady, 2017, pp. 3-4)

This is an area of immigration law that has been expanded in recent decades. J. C. Salyer elaborates on the history of the term "aggravated felony." The term came was born with the "Omnibus Anti-Drug Abuse Act of 1988 and covered only individuals who had committed the most severe types of crimes, such as murder and serious drug and weapons trafficking offenses" (Salyer, 2020, p. 34). Two years later, "the term was expanded to include drug offenses or crimes of violence that carried prison sentences longer than five years" (Salyer, 2020, p. 34). A series of drastically more stringent immigration laws were passed in 1996. As J.C. Salyer (2020) explains, these "1996 laws radically expanded the category of deportable offenses known as aggravated felonies" to include "crimes that were not necessarily felonies as well as cases in which people had not even been sentenced to time in prison, such as when an individual was given probation or a fine" (p. 34). This includes several of the above listed criminal offenses in the case that the individual is sentenced to greater than one year in prison. Sentences of greater than one year can

be and are applied to numerous non-violent offenses. With this in mind, it is clear individuals who are labeled “aggravated felons” may be detained despite posing no threat to public safety.

In practice, ICE typically defaults to the option of detention in multiple specific immigration cases. The American Immigration Council (2019) writes that “ICE takes the position that individuals it classifies as ‘arriving’ in the United States who request asylum at ports of entry may only be released through parole” (p. 2). *This means that individuals who are seeking asylum are routinely detained with the only possibility of release being parole, despite following the letter of the law by identifying themselves as asylum seekers at a port of entry.* Furthermore, “ICE also generally refuses to release individuals who already have an outstanding or unexecuted order of removal, or who are subject to another summary removal process known as reinstatement for having previously been ordered removed and subsequently reentered without inspection” (AIC, 2019, p. 2). This means that individuals who have been sentenced to deportation are most often unable to be released from detention, regardless of the reasoning for or context of their order of removal.

In addition to the statutory outlines of immigration detention policies and processes, the conditions of immigration detention facilities serve as important background information for this memo. The Migration Policy Institute citing an official 2009 review from the Department of Homeland Security (DHS) found that “all but a few of the facilities that ICE uses to detain aliens were built as jails and prisons” (Capps & Meissner, 2021, pp. 5-6). The review further held that “movement is largely restricted, and detainees spend most of their time in their housing units, sometimes in solitary confinement” (Capps & Meissner, 2021, p. 6). There are also reports of unsafe and unsanitary conditions, as well as inaccessible and lacking health care and medical treatment. Capps and Meissner (2021) write that “in August 2019, detainees and civil-right

organizations filed a class-action lawsuit alleging deficient medical and mental health care in nearly 160 ICE facilities" (p. 6). This lawsuit cited "unqualified and short-staffed health-care providers, delays or denials of treatment, improper use of solitary confinement for sick detainees, and inadequate accommodations for people with disabilities" (Capps & Meissner, 2021, p. 6). These poor conditions were enormously exacerbated by the COVID-19 pandemic. The Migration Policy Institute writes that "by June 2021… more than 20,000 migrants had tested positive for the virus in ICE facilities and at least nine had died" (Capps & Meissner, 2021, p. 6).

Immigration detention affects thousands of people all over the United States. Under the Obama Administration, the average daily population of immigration detention facilities nationwide was consistently between 30,000 and 40,000 people (Capps & Meissner, 2021, p. 7). Under the Trump Administration this average population fluctuated greatly, with the highest average detained population being 50,000 people in 2019 and the lowest being roughly 15,000 by the start of the Biden Administration. The numbers in February of 2021 after "the first full month of the Biden administration" reflected "a two-decade low of about 14,000" (Capps & Meissner, 2021, p. 7). This historically low number of detained people "reflects a combination of increased releases from custody and lower ICE interior arrests during the pandemic, along with fewer border apprehensions due to the Trump administration's use of Title 42, a longstanding public-health statute, to expel almost all adults, children, and families arriving at the border without authorization to enter" (Capps & Meissner, 2021, p. 7). These have risen since this point, with the "average daily population of detainees" being "almost 27,000 at the end of July" 2021 (Capps & Meissner, 2021, p. 7). With tens of thousands of people being detained daily, it can clearly be seen that this detention policy is a serious matter that warrants greater attention.

Problem Statement

The process and practice of immigration as it currently stands is not creating or effectively protecting justice in the United States. Immigration detention is expensive, unnecessarily punitive, and often takes place under disturbingly inhumane conditions. The following section will elaborate on the specific issues that this recommendation seeks to ameliorate.

First, the process of detention significantly hinders the likelihood that an individual, unrepresented by counsel, can present an effective case. The Vera Institute of Justice finds that "the physical constraints associated with detention mean unrepresented people face serious obstacles to obtaining even the most basic evidence and paperwork they need to substantiate their legal claims" (Berberich & Siulc, 2018, p. 2). This means that individuals who were detained at a port of entry and those with non-violent/minor criminal convictions, who may have valid and strong cases for immigrating to the U.S., have their ability to immigrate through legal channels weakened for the sole reason of their detention. This unfair outcome results from the codified breadth of reasons for which undocumented people must be and can be detained, and from the lack of provided legal representation. These circumstances function to punish those seeking to immigrate to the United States, even when they have a history of nonviolence and a strong claim for immigration.

Next, the unhealthy, unsafe, and inhumane conditions of immigration detention facilities cannot be overlooked or ignored. The findings of the Migration Policy Institute regarding infectious disease vulnerability, inaccessible, and inadequate medical care, and restricted mobility presented in the background section support the need for attention to this issue. Furthermore, healthcare professionals globally have called for a governmental commitment to humane and safe detention conditions for immigrant populations. In an open letter from 2016

addressed to Prime Ministers Theresa May and Malcolm Trunbull of the United Kingdom, health professionals rally against immigration detention. The letter submitted on behalf of "1383 individual and 24 [organizational] signatories" states that "the current programmes of detention in countries including the UK, Australia, and the US punish people fleeing persecution and are often designed to be so cruel as to act as a deterrent for others seeking safety" (Health Professionals Against Immigration Detention [HPAID], 2016, p. 2474). The signatories identify themselves as "nurses, doctors, psychologists, midwives, and other health professionals," and argue that "claiming asylum is a human right," and so "is accessing health care" (HPAID, 2016, pp. 2473-2474). The signatories on this letter specifically "call for an immediate end to the detention of asylum seekers and refugees globally" (HPAID, 2016, p. 2474). These healthcare professionals, although addressing the leaders of the United Kingdom, explicitly name the United States as another perpetrator of inhumane detention. These kinds of conditions violate individuals' human rights, and can, and have, lead to extensive harm and even death. ICE is required to publicly disclose the deaths of individuals in custody within 90 days. While in ICE custody, 8 people died in the 2019 fiscal year (FY), 21 people in FY 2020, 5 people in FY 2021, and 1 person so far in FY 2022 (U.S. Immigration and Customs Enforcement [ICE], 2022). The issue here remains obvious, there is no justification for the creation of mentally and physically unhealthy and unsafe conditions for any purpose, including in response to people who are entitled to apply for asylum and who are awaiting trial.

Finally, the large-scale practice of immigration detention is an incredibly monetarily expensive process. The Migration Policy Institute finds that detention "[comprised] $2.8 billion out of ICE's total budget of $8.4 billion in FY 2021" (Capps & Meissner, 2021, p. 9). Further, ICE officially reports that "detention costs" an "average [of] $144 per migrant per day" (Capps

& Meissner, 2021, p. 9). However, there exists "unofficial estimates [that] run as high as $200 per day, with some arguing that ICE's official estimates exclude ICE staffing and administrative costs related to detention" (Capps & Meissner, 2021, p. 9). The effects of this are numerous. First and foremost, taxpayer dollars are paying for the often-inhumane detention of tens of thousands of people, the majority of whom pose no threat to their surrounding community. Additionally, because of the expenses associated with detaining people, "immigration courts prioritize the removal cases of immigrants who are detained over those who are not." Consequently, immigrants who are not being detained "must wait much longer for their asylum or other deportation relief claims to be adjudicated" (Capps & Meissner, 2021, p. 10). Individuals who are not being held in detention facilities are therefore put in prolonged precarious positions, waiting months and even years for their cases to be heard.

Recommendation

The aim of the following recommendations is to ameliorate the three classes of problems identified above. My recommendations draw significantly from the Migration Policy Institute's multi-year report entitled: "From Jailers to Case Managers: Redesigning the U.S. Immigration Detention System to Be Effective and Fair." This report specifically recommends the prioritization of expanding custody options, accurately and rationally assessing individuals' risks and vulnerabilities, and "using the least restrictive feasible settings" (Capps & Meissner, 2021, p. 12). This report also supports the reinstitution and reevaluation of the Obama-era Family Case Management Program, or FCMP.

The first specific change that should be made to the U.S. system of immigration detention is the narrowing of those who can/must be detained upon being taken into custody of immigration authorities. This change specifically entails the reevaluation of the concept of

"aggravated felonies" and an improved assessment process for determining which individuals may be detained. According to the MPI report, "the assessment should identify those who may present public safety risks as well as vulnerable populations such as families with young children and people who are pregnant, elderly, disabled, LGBTQ, or have serious medical or mental health conditions" (Capps & Meissner, 2021, p. 12). With this change, people with specific needs can be given individualized resources based on their situation. In particular, the term "aggravated felonies" carries such immense consequences should not be applied to non-violent crimes. The application of this term to a person without lawful immigration status all but guarantees worse outcomes in immigration proceedings and sentencings, and result in mandatory detention in ICE custody. These changes would ideally divert many individuals away from detention, and reduce the overall population of individuals detained by ICE.

ICE currently uses a program known as Alternatives to Detention (ATD), which uses non-detention options to ensure individual's compliance with existing immigration law, specifically including appearing in court and complying with orders of removal. According to ICE, "ATD seeks to increase compliance with release conditions, court appearances and final orders of removal while allowing noncitizens to remain in their communities" (ICE, 2021, p.2). The tools used by ATD include facial recognition technologies through which individuals can virtually report their compliance, GPS monitoring, and telephonic reporting (ICE, 2021). Which ATD tool, or combination of tools is employed depends on the following characteristics of the individual: "current immigration status, criminal history, compliance history, community or family ties, being a caregiver or provider," and "other humanitarian or medical conditions" (ICE, 2021, p.1). However, "careful oversight and evaluations of ATD programs have not been carried out, and they have had serious shortcomings, which would need to be addressed before simply

expanding current initiatives" (Capps & Meissner, 2021, p. 19). The specific shortcomings cited by Capps and Meissner (2021) are related to lack of ensured compliance. Additionally, the authors cite issues with the tracking technologies, stating that they have been called "intrusive and harmful in both immigration and criminal justice contexts" (Capps & Meissner, 2021, p. 19). Specific issues include the recording of "calls and conversations without the wearer's knowledge," as well as the fact that "some ankle-bracelet models… have caused cuts, bruises, and even electric shocks, and wearers can be stigmatized because of the highly visible devices" (Capps & Meissner, 2021, p. 19). These issues of invasion of privacy, stigmatization, and physical harm must be addressed. It is my recommendation that the ATD be transformed from an invasive and punitive program to one that supports undocumented individuals with caseworkers and client advocates to assist them through the immigration bureaucracy, instead of punishing them for their immigration status.

A system of case management, as opposed to a system of incarceration, would effectively help individuals and families navigating the immigration process, ensure their appearance in court, and keep people out of detention facilities. As outlined by Capps and Meissner (2021), "custody tools that do not involve detention should be built around measures proven to promote compliance," specifically including case management (Capps & Meissner, 2021, p. 12). Here is where the Family Case Management Program becomes relevant to this recommendation. FCMP was launched as a pilot program in January of 2016 by the Obama Administration. The program "served about 2,000 family members in five metropolitan areas across the United States" (Capps & Meissner, 2021, p. 13). Capps and Meissner (2021) write:

> "[The program] involved intensive case management and service referrals through a variety of for-profit and nonprofit community organizations that provided orientations to

> the U.S. legal and immigration systems, referrals to attorneys to assist with asylum applications and removal proceedings, and basic stabilization services such as medical, food, and educational assistance. Case managers and ICE officers met frequently, often monthly, with participating families. The frequent contact of active case management, along with basic support services, helped build trust among the families, while orientations and access to legal counsel helped them understand their rights and responsibilities in the U.S. immigration enforcement system" (p. 13).

The program bypassed detention and was extremely effective in ensuring compliance with immigration policy. The program "reported 99-percent compliance rates for immigration court proceedings and ICE check-in appointments," and "just 4 percent of participants failed to appear for immigration court hearings" (Capps & Meissner, 2021, p. 13). The clear success of FCMP shows that *detention is not necessary to ensure compliance*. With evidence from this program, it is clear that successful and compassionate alternatives do exist and should be implemented at the federal level.

In addition, the reduced use of detention would significantly lower the costs to taxpayers. Capps and Meissner (2021) point out that "instead of large contracts with for-profit prison companies, multiple smaller contracts would be required with agencies qualified to provide case management, social services, medical and mental health assessments, and referrals for legal advice and representation" (p. 18). This shift in resource allocation would result in both more just, fair outcomes and lower monetary cost. This would be significant considering that ICE detention costs nearly 3 billion dollars annually, as mentioned earlier.

Finally, it is absolutely non-negotiable that detention facilities in any form recognize and respect the human rights, health, and safety of those being detained there. As mentioned in the

previous paragraph, for-profit incarceration corporations should be eliminated in order to reduce or eliminate monetary incentives for detention. With this governmental detention facilities should be closely monitored by legislative bodies, as well as by human rights and activist organizations and the public. Conditions in detention facilities should be transparent, and above all compassionate and humane. Further, the funds saved by reducing the use of detention should be reallocated to improving the legal, health, and social service needed to assist undocumented immigrants.

Conclusion

Present immigration policy and enforcement in the United States heavily employs the detention of immigrants without lawful status. Although the ostensible reason for detention is compliance with court appearances and orders of removal, it has been shown that detention is not necessary to ensure legal compliance. Additionally, large numbers of detained individuals have committed neither a violent crime nor any other type of crime. In this way, detention does not serve as a public safety measure and instead overwhelmingly functions as an excessively punitive tool of U.S. immigration enforcement. Moreover, the unsafe and unhealthy conditions of detention centers nationwide are unacceptable from a human rights perspective and must not be overlooked. To ameliorate this harmful reality, it is my recommendation that immigration enforcement be shifted to a system of case management and resource provision, as opposed to a punitive and inhumane system of incarceration.

CONCLUDING REMARKS

The aim of this project is to critically examine and problematize different legal and political aspects of the U.S. immigration system. Several mechanisms of the U.S. immigration system produce injustices, from legal proceedings to detention. The preceding policy recommendations serve as suggestions of actionable steps that can be taken by legislative bodies and executive agencies of the U.S. government to improve the U.S. immigration system by making it deliver better qualities of justice and fairness. This is not to say that these policies, if all ideally enacted, would perfect immigration policy in the U.S. or eliminate all instances of injustice and harm. This is especially true because of the historical origins of the U.S. immigration system as grounded in racism, white supremacy, and xenophobia. However, these recommendations are conceivable, potentially near-future steps towards reducing the harms done to individuals, communities, and families affected by past and present injustices.

I was inspired to undertake this project by volunteering with the Pima County Justice for All campaign in Tucson, Arizona. As mentioned previously, this campaign is currently working to codify immigration representation in Pima County. While working with this campaign, I met wonderful and hardworking volunteers, organizers, and lawyers who are committed to creating more just immigration system in Pima County. To witness and be a part of this work galvanized my interest in immigration law and motivated me to explore this subject in my Honors thesis. After completing my research and this series of policy recommendations, it is even clearer to me how necessary it is to overhaul U.S. immigration policy and practice. The creation of these memos has further encouraged me to pursue a career in law because I have now listed and researched actionable steps towards a more just immigration system. These changes that I have explored will act as continued motivation for my education and activism. It is absolutely

necessary that processes of immigration reflect practicality, compassion, and humanity. It is my sincere hope that these recommendations and/or similar changes be brought into reality in the near future.

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