

## ABOLISHING THE ICEBERG

2018 was a difficult year for many migrants and their allies. In February, the Supreme Court held that the Immigration and Nationality Act permits the seemingly indefinite detention of certain migrants in removal proceedings without a bond hearing.<sup>1</sup> In April, then-Attorney General Jefferson Sessions announced a “zero tolerance” policy<sup>2</sup> that created the highly visible family separation crisis—a crisis that culminated in the federal government offering a false dilemma between family separation and prolonged family detention.<sup>3</sup> In June, the Court upheld President Trump’s travel ban because, despite significant evidence that the ban was part of “an unrelenting attack on the Muslim religion and its followers,”<sup>4</sup> the Court found that the ban was “plausibly related to the Government’s stated objective.”<sup>5</sup> In November, the Trump Administration announced an “asylum ban” that would prevent migrants from seeking asylum if they crossed the southern border at any location other than a port of entry,<sup>6</sup> and in December the Department of Homeland Security (DHS) proclaimed that all migrants seeking asylum in the United States from México must remain in México while their claims are processed.<sup>7</sup> To finish the year, President Trump demanded billions for a wall along the México-U.S. border, causing a good portion of the federal government to shut down.<sup>8</sup> Meanwhile, Felipe Gómez Alonzo, an eight-year-old boy from Guatemala, died on Christmas Eve in the custody of Customs and Border Protection (CBP).<sup>9</sup> He took his last breaths a few minutes before

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1. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 842, 844–47 (2018).

2. See Memorandum from Jefferson Sessions, Att’y Gen., U.S. Dep’t of Justice, to Federal Prosecutors along the Southwest Border (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

3. See Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and “Zero Tolerance” at the Border*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border>; Clara Long, *The False Choice between Family Separation and Detention*, HUMAN RIGHTS WATCH (June 26, 2018), <https://www.hrw.org/news/2018/06/26/false-choice-between-family-separation-and-detention>.

4. *Trump v. Hawaii*, 138 S. Ct. 2392, 2439 (2018) (Sotomayor, J., dissenting); see also *id.* at 2435–40 (describing the evidence that the ban was motivated by animus toward Islam).

5. *Trump v. Hawaii*, 138 S. Ct. 2420 (majority op.).

6. See *East Bay Sanctuary Covenant v. Trump*, 18-CV-06810-JST, 2018 WL 6660080, at \*1 (N.D. Cal. Dec. 19, 2018).

7. Anne Flaherty, *Homeland Security Secretary Nielsen Says Asylum Seekers Will Be Forced to Wait in Mexico*, ABCNEWS (Dec. 20, 2018), <https://abcnews.go.com/beta-story-container/politics/dhs-secretary-nielsen-asylum-seekers-forced-wait-mexico/story?id=59920782>.

8. John Bresnahan & Jake Sherman, *The ‘All-I-Want-for-Christmas-Is-\$5-billion-for-the-Wall’ Shutdown*, POLITICO (Dec. 23, 2018), <https://www.politico.com/story/2018/12/23/government-shutdown-2018-border-wall-deal-1074563>.

9. Nomaan Merchant, *CBP Orders Medical Checks after Second Child’s Death*, APNEWS (Dec. 25, 2018), <https://apnews.com/0a7e7ec16cd743e4840c321a99e005ef?>

midnight and about two weeks after Jakelin Caal Maquin, a seven-year-old girl from Guatemala, also died in CBP custody.<sup>10</sup>

But 2018 also brought migrants and their allies a few glimmers of hope. In response to the human devastation of family separation, hundreds of thousands took to the streets.<sup>11</sup> Almost six hundred people were arrested after protesting the Trump Administration's approach to migration in the Hart Senate Office Building,<sup>12</sup> and something of a movement calling for the abolition of U.S. Immigration & Customs Enforcement (ICE) took on momentum.<sup>13</sup>

What these glimmers of hope might mean for immigration reform, however, is up for debate. Confusion remains regarding what those calling to abolish ICE seek to accomplish and whether their resolve to abolish ICE remains now that the mid-term elections have passed.<sup>14</sup> What would it mean to terminate the agency responsible for enforcement of U.S. immigration laws in the interior of the United States? Do ICE abolitionists seek to end deportation entirely? Or merely reduce it? Would they be satisfied if ICE was abolished and its duties distributed? Or do they seek to wholly reimagine approaches to migration, for instance, by rejecting U.S. immigration policy's fundamental premise that U.S. citizens are innately more deserving than others?

Answering these questions on behalf of the entire "abolish ICE movement" is, of course, impossible. Like any social movement, "the abolish ICE movement" consists of various parts—numerous individuals with their own approaches to broader goals, which could change over time.<sup>15</sup> Nonetheless, we can begin to understand the range of ideas the

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10. *Id.*; Nick Miroff & Robert Moore, *7-Year-Old Migrant Girl Taken into Border Patrol Custody Dies of Dehydration, Exhaustion*, WASH. POST (Dec. 13, 2018), [https://www.washingtonpost.com/world/national-security/7-year-old-migrant-girl-taken-into-border-patrol-custody-dies-of-dehydration-exhaustion/2018/12/13/8909e356-ff03-11e8-862a-b6a6f3ce8199\\_story.html?noredirect=on&utm\\_term=.0d9aa595f3b0](https://www.washingtonpost.com/world/national-security/7-year-old-migrant-girl-taken-into-border-patrol-custody-dies-of-dehydration-exhaustion/2018/12/13/8909e356-ff03-11e8-862a-b6a6f3ce8199_story.html?noredirect=on&utm_term=.0d9aa595f3b0).

11. Andrea Castillo et al., *From L.A. to N.Y., Hundreds of Thousands Join Nationwide Rallies to Protest Trump's Immigration Policies*, L.A. TIMES (June 30, 2018), <http://www.latimes.com/local/lanow/la-me-rally-family-separation-20180629-story.html>.

12. Marissa J. Lang, *'We Will Not Obey': 575 Arrested as Hundreds of Women Rally in D.C. to Protest Trump's Immigration Policy*, WASH. POST (June 28, 2018), [https://www.washingtonpost.com/local/we-will-not-obey-hundreds-of-women-rally-in-dc-to-protest-zero-tolerance-immigration-policy/2018/06/28/d1aca604-7a4a-11e8-aece-4d04c8ac6158\\_story.html?utm\\_term=.1811d1a15dc5](https://www.washingtonpost.com/local/we-will-not-obey-hundreds-of-women-rally-in-dc-to-protest-zero-tolerance-immigration-policy/2018/06/28/d1aca604-7a4a-11e8-aece-4d04c8ac6158_story.html?utm_term=.1811d1a15dc5).

13. Gregory Krieg, *The Movement to 'Abolish ICE' Is Heating Up -- And Going Mainstream*, CNN (July 2, 2018), <https://www.cnn.com/2018/06/30/politics/abolish-ice-movement-gaining-support-democrats/index.html>.

14. See Bo Erickson & Sarah Horbacewicz, *Progressive Dems Back Off "Abolish ICE" at First Meeting since Midterms*, CBSNEWS (Nov. 12, 2018), <https://www.cbsnews.com/news/progressive-dems-back-off-abolish-ice-at-first-meeting-since-midterms/>.

15. See Julianne Hing, *What Does It Mean to Abolish ICE?*, NATION (July 11, 2018), <https://www.thenation.com/article/mean-abolish-ice/> ("Activists and advocates who were willing to comment made clear that, while 'Abolish ICE' has moved into the mainstream, people mean very different things when they wield those two powerful words.").

call to abolish ICE might encompass. This Article takes initial steps toward this goal by examining the immigration bureaucracy in which ICE is housed, the historical origins of ICE, and two possible interpretations of the call to abolish ICE.

### I. ICE AND THE IMMIGRATION BUREAUCRACY

ICE is an agency housed in DHS responsible for enforcing immigration laws in the interior of the United States.<sup>16</sup> Enforcement and Removal Operations (ERO), a unit within ICE, identifies migrants who are potentially removable, finds them, arrests them, incarcerates them, “prosecutes” them by showing they are “removable,” and effects their physical removal from U.S. territory.<sup>17</sup> ICE is thus responsible for a large number of the United States’ deportations as well as for the civil detention of hundreds of thousands of people each year.<sup>18</sup>

But ICE is just one part of a much larger immigration enforcement bureaucracy. CBP enforces immigration laws at ports of entry and along the border, including anywhere within one hundred miles of a border—an area that encompasses approximately two-thirds of the U.S. population.<sup>19</sup> CBP can issue expedited removal orders pursuant to 8 U.S.C. § 1225(b)(1)(A)(i).<sup>20</sup> This form of rapid-fire removal plays an enormous but largely hidden role in the deportation landscape, accounting for 42 percent of all removals in fiscal year 2014.<sup>21</sup> Like ICE, CBP also incarcerates migrants, operating detention facilities whose chain link fences, concrete floors, and mylar sheets became notorious during the 2018 family separations.<sup>22</sup> Further, CBP made the 2018 family separations possi-

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16. U.S. Immigration & Customs Enf’t, *What We Do*, <https://www.ice.gov/overview> (last updated Jan. 3, 2018) [*hereinafter What We Do*]. In addition to enforcing immigration laws in the interior of the United States, an entity within ICE called Homeland Security Investigations (HSI) investigates potentially criminal cross-border conduct. U.S. Immigration & Customs Enf’t, *Homeland Security Investigations*, <https://www.ice.gov/hsi> (last updated Sept. 9, 2018). This article addresses ICE’s civil immigration enforcement activities via Enforcement and Removal Operations rather than HSI’s duties because the enforcement of immigration laws in the interior of the United States is “the largest single area of responsibility for ICE.” *What We Do*, *supra* note 16.

17. *Arizona v. United States*, 567 U.S. 387, 397 (2012).

18. For example, in fiscal year 2016, ICE detained 352,882 people and removed 240,255 people. U.S. DEP’T OF HOMELAND SECURITY, DHS IMMIGRATION ENFORCEMENT: 2016 3 (2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20Immigration%20Enforcement%202016.pdf>; U.S. Immigration & Customs Enf’t, *FY 2016 ICE Immigration Removals*, <https://www.ice.gov/removal-statistics/2016> (last updated Dec. 5, 2017) [*hereinafter FY 2016 ICE Immigration Removals*].

19. *Arizona*, 567 U.S. at 397; ACLU, *The Constitution in the 100-Mile Border Zone*, <https://www.aclu.org/other/constitution-100-mile-border-zone> (last accessed Oct. 3, 2018); U.S. Customs & Border Protection, *About CBP*, <https://www.cbp.gov/about> (last modified Nov. 21, 2016).

20. *See, e.g., Khan v. Holder*, 608 F.3d 325, 327 (7th Cir. 2010).

21. Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 350 (2018).

22. *See, e.g., Susannah Cullinane, Inside Border Protection’s Processing Detention Center: Chain Link Fences and Thermal Blankets*, CNN (June 18, 2018), <https://www.cnn.com/2018/06/18/politics/immigration-mcallen-border-patrol-photos/index.html>; *see*

ble because, after announcement of the “zero tolerance” policy, CBP referred parents and other caregivers to DOJ for prosecution for illegal entry or reentry.<sup>23</sup> The children of those prosecuted were separated from their caregivers and placed in the custody of the Office of Refugee Resettlement in the Department of Health and Human Services.<sup>24</sup>

DOJ also plays a significant role in the enforcement of U.S. immigration laws. DOJ prosecutes individuals for illegal entry and illegal reentry<sup>25</sup>—two criminal offenses which, although not technically part of the civil immigration law apparatus, are inevitably tied to migration.<sup>26</sup> DOJ’s United States Marshals Service manages pre-trial incarceration for those awaiting prosecution of illegal entry or reentry (and other criminal offenses related to migration), and DOJ’s Bureau of Prisons imprisons those who are convicted.<sup>27</sup> DOJ also houses the Executive Office for Immigration Review, or “immigration court,” where immigration judges, operating at the behest of the Attorney General, determine which migrants placed in formal removal proceedings will be removed.<sup>28</sup> Further, the Office of Immigration Litigation within DOJ denaturalizes naturalized U.S. citizens<sup>29</sup> and defends immigration agencies in federal courts.<sup>30</sup>

Additionally, U.S. Citizenship and Immigration Services (USCIS) adjudicates applications for immigration benefits, such as applications to adjust status to that of lawful permanent resident or naturalize.<sup>31</sup> Like ICE, USCIS has the power to initiate removal proceedings by issuing a “Notice to Appear,”<sup>32</sup> and the agency is now playing a more active role in enforcement.<sup>33</sup> Last summer, USCIS issued a memorandum that essen-

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*also* Doe v. Kelly, 878 F.3d 710 (9th Cir. 2017) (addressing a challenge to conditions in CBP detention in Tucson, Arizona).

23. U.S. DEP’T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GEN., OIG-18-84, SPECIAL REVIEW – INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 2–3 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>

24. *Id.*

25. 8 U.S.C. §§ 1325, 1326.

26. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U.L. REV. 1281, 1282–86 (2010).

27. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-66, BORDER PATROL: ACTIONS NEEDED TO IMPROVE OVERSIGHT OF POST-APPREHENSION CONSEQUENCES 11 (2017), <https://www.gao.gov/assets/690/682074.pdf>.

28. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE 1, 7 (2017) [https://www.justice.gov/eoir/page/file/eoir\\_an\\_agency\\_guide/download](https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download).

29. U.S. Dep’t of Justice, *District Court Section*, <https://www.justice.gov/civil/district-court-section> (last updated Aug. 14, 2017).

30. U.S. Dep’t of Justice, *Office of Immigration Litigation*, <https://www.justice.gov/civil/office-immigration-litigation> (last updated Oct. 20, 2014).

31. See 6 U.S.C. § 271(b).

32. U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0050.1, UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS 2 (2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

33. Am. Immigration Lawyers Ass’n, *New USCIS Policy Will Needlessly Push Thousands More Cases into the Deportation Machinery*, AILA.ORG (July 6, 2018), <https://www.aila.org/advocacy/press-releases/2018/uscis-push-thousands-cases-deportation>.

tially requires the agency to initiate removal proceedings whenever a beneficiary or applicant is “not lawfully present in the United States” at the time a petition or application is denied.<sup>34</sup> Previously, many such individuals could depart the United States voluntarily without facing potential detention and deportation.<sup>35</sup> In other words, although USCIS is traditionally an adjudicator, the agency is now more involved in detention and deportation.

Other agencies, including the Department of State, Department of Labor, and Department of Health and Human Services, also help administer immigration laws.<sup>36</sup> In short, ICE plays but one part in a much larger bureaucracy designed to determine which human beings merit inclusion in the U.S. political community.

## II. THE RISE OF THE ICEBERG

ICE did not emerge from a void. Rather, ICE was born after a punitive bent in criminal justice and immigration policy had already created the conditions for mass detention and deportation.<sup>37</sup>

After the civil rights movement rendered explicit racism taboo, politicians took a newly severe approach to both criminal justice and immigration policy that maintained racial subordination through facially neutral laws enforced to racially disproportionate effects.<sup>38</sup> Lawmakers declared “war” on crime and drugs,<sup>39</sup> passed harsh new laws with mandato-

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34. U.S. CITIZENSHIP & IMMIGRATION SERVS, *supra* note 32, at 7.

35. See AM. IMMIGRATION LAWYERS ASS'N, AILA POLICY BRIEF: NEW USCIS NOTICE TO APPEAR GUIDANCE 1, 7 (2018), <https://www.aila.org/infonet/aila-policy-brief-new-uscis-notice-to-appear>.

36. See 8 U.S.C. § 1104(a) (powers and duties of the Secretary of State); 6 U.S.C. § 279 (relating to duties of the Department of Health and Human Services); 45 C.F.R. §§ 50, 400 (same); 20 C.F.R. §§ 656.2(c)(1), 656.10 (relating to duties of the Department of Labor).

37. See Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1115–17 (2017) [hereinafter *The Missing Piece*] (describing the relationships between the criminal justice system and the immigration system during the War on Crime and War on Drugs and thereafter); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 81–82 (2005) (“[I]mmigration legislation passed years before the [9/11] attacks, embraced the criminal justice system's severe treatment of drug offenders and the poor.”).

38. César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1493–1503 (2013) [hereinafter *Creating Crimmigration*]; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 49–55 (2010) (discussing the racialized impact of a rise in “tough on crime” approaches to criminal justice); Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. ST. THOMAS L.J. 532, 548 (2017) (“Both criminal and immigration law have a history of racially disparate enforcement in spite of facial colorblindness.”); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1025 (2016) (explaining that while both the criminal justice and immigration enforcement systems are facially neutral, “both systems in operation have overwhelmingly negative impacts on Latina/os”).

39. These “wars” did not necessarily correspond to a rise in crime. Patrisia Macías-Rojas, *Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 6 J. MIGRATION & HUM. SECURITY 1, at 2–3 (2018)

ry minimum sentences,<sup>40</sup> reduced judicial discretion in sentencing,<sup>41</sup> and increasingly tied immigration decisions to criminal activity.<sup>42</sup> President Reagan adopted new policies to deter migration via detention, while many inaccurately condemned new waves of Haitian and Cuban migrants as criminal.<sup>43</sup> Immigration officials increased collaboration with criminal law enforcement officials<sup>44</sup> and adopted more of their trappings,<sup>45</sup> while prosecutors drastically increased prosecution of migration-related offenses.<sup>46</sup> The 1986 Immigration Reform and Control Act set the stage for the militarization of the México-U.S. border<sup>47</sup>; the Anti-Drug Abuse Act of 1988 created a new category of migrants deportable for conviction of an “aggravated felony”<sup>48</sup>; and the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 vastly expanded the number of criminal offenses that can result in deportation, reduced migrants’ ability to seek relief from removal, limited judicial review, and made detention mandatory for many migrants.<sup>49</sup> Enforcement of this punitive system, including policing, arrest, prosecution, conviction, sentencing, and (for migrants) deportation, was (and remains) disproportionately directed at communities of color.<sup>50</sup> In short, the legal mechanisms that enable a ra-

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(“Reagan’s Drug War tripled the prison population and pushed hundreds of thousands of Americans into already overcrowded prisons, even as the crime rate was declining.”).

40. See, e.g., Anti-Drug Abuse Act of 1986 § 1002, 21 U.S.C. § 841(b)(1) (establishing mandatory minimum sentences for certain drug crimes).

41. Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3586.

42. Miller, *supra* note 37, 84–85.

43. Macías-Rojas, *supra* note 39, at 4.

44. See Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1579–98 (2010); Christopher N. Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 166–67 (2008).

45. See, e.g., Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 274 (2018) (referring to “aggressive, gun-wielding immigration raids” carried out by immigration officials under President George W. Bush). Today, although ICE’s primary role is to enforce civil immigration law, the agency has adopted the trappings of criminal law enforcement: ICE officials collaborate with criminal law enforcement officials, wear uniforms that say “police,” carry firearms, and run jails. ICE’s homepage even has a section for “ICE’s Most Wanted” which lists “fugitives” who are “wanted” and sometimes “captured.” U.S. Immigration & Customs Enft., *Home: ICE Most Wanted*, <https://www.ice.gov/> (last visited Oct. 5, 2018). The website fails to mention that “fugitives” wanted by ERO have already been convicted of an offense and served their criminal sentences. They are “wanted” for removal, a purportedly civil matter, not by any criminal justice system.

46. Although Congress first criminalized unauthorized entry into the U.S. in 1929, see Act of March 4, 1929, ch. 690, § 2, 45 Stat. 1551, 1551, prosecutors rarely enforced those laws until the 1980s. *The Missing Piece*, *supra* note 37, at 1120.

47. Yolanda Vázquez, *Enforcing the Politics of Race and Identity in Migration and Crime Control Policies*, in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL 149 (Mary Bosworth, Alpa Parmar, & Yolanda Vázquez eds. 2018) [hereinafter *Enforcing the Politics of Race*].

48. CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 9–10 (2015).

49. Macías-Rojas, *supra* note 39, at 11–15.

50. Indeed, ninety-seven percent of individuals removed from the United States are from Latin and Caribbean countries. *Enforcing the Politics*, *supra* note 47, at 144. Further, individuals from El Salvador, Guatemala, Honduras, and Mexico account for 66.3 percent of unauthorized migrants but 88 percent of all interior removals. Tanya Golash-Boza, *Raced and Gendered Logics of Immigration Law Enforcement in the United States*, in RACE, CRIMINAL JUSTICE, AND MIGRATION

cialized system of mass detention and deportation were established long before ICE came into existence.

After the attacks of September 11th, Congress abolished the United States Immigration and Naturalization Service (INS), which was previously responsible for immigration enforcement, and established DHS, which would both “prevent terrorist attacks within the United States”<sup>51</sup> and “carry out all functions of entities transferred to the Department,”<sup>52</sup> including those related to immigration enforcement.<sup>53</sup> Funding for ICE has increased steadily since its 2003 founding, starting at \$3.1 billion in 2003 and reaching \$6.4 billion in fiscal year 2017.<sup>54</sup> Today, ICE plays one part in administering a massive and highly racialized system of detention and deportation justified by rhetoric that conflates migration with criminality.<sup>55</sup>

Although the federal government has deported and sometimes detained migrants since it first declared its authority to do so,<sup>56</sup> detention and deportation rates have exploded during the past few decades.<sup>57</sup> DHS reports that the federal government formally removed 2,801 people in 1892.<sup>58</sup> Between 1892 and 1970, the average number of annual removals was 15,329, and the highest number of migrants removed in any given year was 37,651 in 1914.<sup>59</sup> In comparison, ICE reported 240,255 remov-

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CONTROL 231 (Mary Bosworth, Alpa Parmar, & Yolanda Vázquez eds. 2018). See also Utah v. Strieff, 136 S. Ct. 2056, 2070-71 (2016) (Sotomayor, J., dissenting) (“It is no secret that people of color are disproportionate victims of this type of scrutiny,” referring to suspicionless stops by the police); ALEXANDER, *supra* note 38, at 95–136; *The Missing Piece*, *supra* note 37, at 1108 (“Arrests, court processing, incarceration, and death penalty rates are all largely skewed by race.”); Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 610 (2016); Johnson, *supra* note 38, at 998; Rebecca Sharpless, “*Immigrants Are Not Criminals*”: *Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 716 (2016).

51. Pub. L. No. 107-296, 116 Stat. 2135 § 101(b)(1)(a) (Nov. 25, 2002).

52. *Id.* § 101(b)(1)(d).

53. See *id.* § 441.

54. EXEC. OFFICE OF THE PRESIDENT, STRONGER BORDER SECURITY (2018), [https://www.whitehouse.gov/wp-content/uploads/2018/02/FY19-Budget-Fact-Sheet\\_Border-Security.pdf](https://www.whitehouse.gov/wp-content/uploads/2018/02/FY19-Budget-Fact-Sheet_Border-Security.pdf); *What Does It Mean?*, *supra* note 16 (“Since its creation, ICE’s annual budget has grown 85 percent, from \$3.3 billion [in] 2003 to \$6.1 billion in 2016. In those 13 years, ICE has tripled the number of agents it employs.”).

55. See Johnson, *supra* note 38, at 998 (referring to the “widespread popular belief that Mexican immigrants as a group are predisposed to criminal activity”); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 419 (2006) (“[A]liens [have] become synonymous with criminals.”).

56. See U.S. Dep’t of Homeland Security, *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2016* (Nov. 30, 2017), <https://www.dhs.gov/immigration-statistics/yearbook/2016/table39> (reporting removal and returns since 1892) [hereinafter *Table 39*].

57. Johnson, *supra* note 38 at 1016–17 (“Total removals of noncitizens by the U.S. government reached an all-time high of 438,421 in 2013, a jump of at least ten-fold from the total annual removals in the 1990s.”); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 634 (2012) (“[T]he number of individuals removed from the United States annually has increased significantly—from about 18,000 in 1980 to about 30,000 in 1990 to about 188,000 in 2000, and reaching a record high of about 392,000 in 2011.”).

58. *Table 39*, *supra* note 54.

59. *Id.* (average calculation my own); see also TORRIE HESTER, DEPORTATION: THE ORIGINS OF U.S. POLICY 1 (2017) (explaining that immigration officials “deported fewer people in the first

als in fiscal year 2016<sup>60</sup> and 226,119 in fiscal year 2017.<sup>61</sup> Over the past ten years, formal removals reached their peak in fiscal year 2012 when ICE reported 409,849 removals.<sup>62</sup> During the Obama Administration alone, ICE removed roughly three million people from the interior of the U.S.<sup>63</sup> And since 1996, the federal government has formally removed 5,823,240 people.<sup>64</sup>

Detention rates have similarly skyrocketed.<sup>65</sup> For most of the twentieth century, immigration detention was the exception rather than the rule.<sup>66</sup> In 1980, immigration officials had the capacity to detain about 1,800 migrants daily.<sup>67</sup> In 1994, the average number of migrants in detention on any given day was 6,785.<sup>68</sup> In 2004, that number was 21,298.<sup>69</sup> By 2017, DHS was detaining approximately 38,106 migrants every day, and DHS has set a target of detaining 47,000 migrant detainees daily during fiscal year 2019.<sup>70</sup> Today, the U.S. government incarcerates hundreds of thousands of migrants annually in civil immigration detention.<sup>71</sup> Since 1996, the population of migrant detainees has tripled, and the U.S. now operates the world's largest immigration detention system.<sup>72</sup>

ICE is but one player in this mammoth regime.<sup>73</sup>

### III. ABOLISHING THE ICEBERG

Given that ICE is but one entity in a system that had been designed to produce mass detention and deportation before ICE ever existed, what might it mean to abolish ICE? The simplest answer to this question is, “nothing,” and proposals have been set forth that would accomplish just

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forty years of carrying out deportations than immigration authorities would in any single year after 1970”).

60. *FY 2016 ICE Immigration Removals*, *supra* note 17.

61. U.S. IMMIGRATION & CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 13 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf>.

62. *FY 2016 ICE Immigration Removals*, *supra* note 17.

63. *Enforcing the Politics of Race*, *supra* note 45, at 144.

64. *Table 39*, *supra* note 56.

65. See Sharpless, *supra* note 50, at 713–14; Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 47–50 (2010) (discussing the “remarkable” growth of immigration detention since 1994).

66. Congress first authorized immigration detention (a form of civil incarceration) in 1891, but the federal government hardly used that authority until the 1980s. *Creating Crimmigration*, *supra* note 38, at 1466.

67. Macías-Rojas, *supra* note 39, at 4.

68. J. Rachel Reyes, *Immigration Detention: Recent Trends and Scholarship*, CTR. FOR MIGRATION STUD. (Mar. 26, 2018), [http://cmsny.org/publications/virtualbrief-detention/#\\_ftnref46](http://cmsny.org/publications/virtualbrief-detention/#_ftnref46).

69. *Id.*

70. *Id.*

71. See César Cuauhtémoc García Hernández, *ICE Detention Population Closed Obama Era at Record Daily High*, CRIMMIGRATION.COM (Mar. 27, 2018), <http://crimmigration.com/2018/03/27/ice-detention-population-closed-obama-era-at-record-daily-high/>.

72. *The Missing Piece*, *supra* note 37, at 1138–39.

73. See *supra*, Part I.



that.<sup>74</sup> The call to abolish ICE is significant, however, if it is a call to abolish the United States's overall punitive approach to migration rather than a single agency.

Taken literally, the call to abolish ICE is virtually meaningless. Abolishing this agency would be simple and produce few, if any, changes to current practice if ICE's duties were merely distributed among existing agencies or assigned to a new agency bearing a name other than "ICE." Indeed, the Homeland Security Act of 2002<sup>75</sup> abolished INS<sup>76</sup> and simply distributed its duties to other agencies,<sup>77</sup> including by establishing ICE.<sup>78</sup> Similarly, the Establishing a Humane Immigration Enforcement System Act,<sup>79</sup> a bill introduced by certain democratic lawmakers on July 12, 2018, would abolish ICE within one year but retain "any essential functions carried out by ICE that do not violate fundamental due process and human rights."<sup>80</sup> The bill thus leaves the door open for a simple transfer of functions to another agency. Further, the bill endorses immigration detention and might even expand it, providing that some agency would "prioritiz[e] the hiring of personnel to address the legal, health, and social-service needs of detained individuals."<sup>81</sup> Under this bill, abolition means little.

But the abolish ICE movement is not limited to such a narrow approach. Mijente, a group of Latinx and Chicax activists working for "justice and self-determination for all people,"<sup>82</sup> has created a policy platform that builds on the call to abolish ICE but offers a more historically grounded vision of what an alternative to current practices might entail.<sup>83</sup> Among other plans, Mijente would abolish immigration detention; end all deportation; eliminate state and local support for ICE; repeal unlawful entry and reentry; and defund Border Patrol as it currently exists, creating instead a border agency that provides emergency rescue services.<sup>84</sup> Mijente expressly grounds its proposal in an understanding that the U.S. government's punitive approach to migration is part and parcel of broader policies that maintain the subordination of historically

74. See, e.g., the Establishing a Humane Immigration Enforcement System Act, H.R. 6361, 115th Cong. (2018).

75. Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

76. 6 U.S.C. § 291.

77. 6 U.S.C. § 251.

78. 6 U.S.C. § 252 (establishing a "Bureau of Border Security", which was later renamed "U.S. Immigration and Customs Enforcement"); see 80 Interpreter Releases 149 (Feb. 3, 2003); 80 Interpreter Releases 1244 (Sept. 8, 2003).

79. H.R. 6361, 115th Cong. (2018).

80. *Id.* § 2.

81. *Id.* §§ 3, 4.

82. Mijente, *Principles of Unity* (June 30, 2018), <https://mijente.net/2018/06/30/mijente-principles/>.

83. MIJENTE, FREE OUR FUTURE: AN IMMIGRATION POLICY PLATFORM FOR BEYOND THE TRUMP ERA 2 (2018), [https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform\\_0628.pdf](https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf).

84. *Id.* at 2–6.

subordinated groups.<sup>85</sup> Indeed, Mijente ties the separation of migrant families during the summer of 2018 to other examples of state violence against subordinated groups, including the historical separation of black families subjected to slavery<sup>86</sup>; the contemporary separation of black families via the criminal justice system<sup>87</sup>; the U.S. government's historical and contemporary separation of indigenous families<sup>88</sup>; the internment of Japanese-American families during World War II<sup>89</sup>; and the forced institutionalization, sterilization, and criminalization of people with disabilities.<sup>90</sup> Mijente's vision thus extends far beyond the mere abolition of an agency. Rather, it calls for a fundamental rethinking of the United States's current approach to migration—an approach that relies on a racist criminal justice system to “divid[e] our communities between those labeled ‘deserving’ of humanitarian reform, and those who will be left in the system of immigration enforcement, detention, and incarceration.”<sup>91</sup>

In short, while a literal reading of the call to abolish ICE renders that rallying cry meaningless, a proposal inspired by that rallying cry but grounded in a deeper understanding of the history out of which ICE was born is a call for profound change.

#### IV. CONCLUSION

The call to abolish ICE has inspired protestors, vexed mainstream politicians, and raised questions regarding exactly what that rallying cry might mean. If taken literally, the call to abolish ICE is a meaningless slogan that would accomplish little or nothing. However, if that call draws on a deeper understanding of the historical and bureaucratic systems in which ICE is embedded, demanding ICE's abolition asks for something more—such a call seeks not merely the end of an agency and redistribution of its duties, but requires us to reconsider the premises of U.S. immigration policy. It asks us to reconsider whether the incarceration and banishment of hundreds of thousands of people annually is morally acceptable, whether the U.S. electorate—largely born into the privilege of citizenship—should endorse the separation of families born without such privilege, and whether a nation founded on a proclamation of equality should continue to accept as inevitable a hierarchy driven by race and birthplace. Whether the electorate will heed that call remains to be seen.

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85. See, e.g., *id.* at 1 (“The prisons and military camps being planned and built right now endanger all communities who are targeted by law enforcement - poor folk, Black folk, queers, Muslims, people with disabilities, indigenous folk - and anyone else the Trump administration considers a barrier to their white supremacist vision for this country.”).

86. *Id.* at 2.

87. *Id.* at 2, 5.

88. *Id.* at 3.

89. *Id.* at 4.

90. *Id.* at 6.

91. *Id.* at 1.

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