

# THE FALSE PROMISE OF IMMIGRATION DETERRENCE: UNAUTHORIZED MIGRANTS' DECISION-MAKING IN THE FACE OF U.S. IMMIGRATION LAW

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## ABSTRACT

*Politicians justify U.S. immigration laws and policies by claiming that harsh immigration enforcement will deter unauthorized migrants. This Article demonstrates that migrant decision-making in practice undermines common assumptions underlying how immigration deterrence is expected to operate. By highlighting research demonstrating that immigration law does not have a significant deterrent effect, this Article invites scholars and activists to challenge the use of deterrence logic as a façade to legitimate cruelty towards migrants, especially as that cruelty disproportionately affects migrants of color. This Article recommends decriminalizing unauthorized entry and reentry and ending civil immigration detention as initial steps in creating a fairer and more just future outside the confines of deterrence logic.*

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## INTRODUCTION

In the summer of 2021, during a press conference in Guatemala City, Vice President Kamala Harris said: “I believe if you come to our border, you will be turned back . . . . So let’s discourage our friends or neighbors or family members from embarking on what is otherwise an extremely dangerous journey.”<sup>1</sup> Vice President Harris had been charged by President Joe Biden with “controlling migration at the southern border.”<sup>2</sup> Her statement rests on the false premise that individuals make migration decisions by comparing the costs, such as the danger of the journey and the criminal and civil penalties for unauthorized entry, with the reward—the possibility of a better life in the United States.

Vice President Harris is not the first to make claims that implicitly endorse a deterrence logic. John Kelly, the White House Chief of Staff during the first Trump administration, speaking on immigration policy, stated that “a big name of the game is deterrence.”<sup>3</sup> When asked about family separation, he replied “[i]t

1. Noah Bierman & Tracy Wilkinson, In Guatemala, Harris Tells Would-be Migrants to the U.S., ‘You Will Be Turned Back’, L.A. Times (June 7, 2021, 4:45 PM), <https://www.latimes.com/politics/story/2021-06-07/vice-president-harris-meets-with-guatemalan-leader-on-migration-issues> [https://perma.cc/75K3-9845].

2. Anthony Zurcher, *Biden Tasks Harris with Tackling Migrant Influx on US-Mexico Border*, BRIT. BROAD. CORP. (March 24, 2021), <https://www.bbc.com/news/world-us-canada-56516332> [https://perma.cc/ZPX8-BZB3].

3. John Burnett, *Transcript: White House Chief of Staff John Kelly’s Interview with NPR*, NAT’L PUB. RADIO (May 11, 2018, 11:36 AM), <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr> [https://perma.cc/V95H-MT2B].

could be a tough deterrent—would be a tough deterrent.”<sup>4</sup> This bipartisan, deterrence-focused logic has driven U.S. immigration policies for decades,<sup>5</sup> going at least as far back as the U.S. Border Patrol’s adoption of “Prevention Through Deterrence” as its chief strategy in 1994.<sup>6</sup> But, in practice, individuals often do not actually make migration decisions by weighing the costs imposed by deterrence-motivated policies against the potential benefits of successful migration. Focusing on potential migrants “as atomistic, utility maximizing opportunists diverts our attention away from the complex and wide-ranging moral systems within which prospective migrants are embedded.”<sup>7</sup> Understanding the decision-making process of prospective unauthorized migrants<sup>8</sup> is crucial for the process of reforming the U.S. immigration system to make it more effective, humane, and just.

This Article seeks to explore how prospective migrants make decisions about entering the United States without authorization and aims to determine to what extent, if any, U.S. immigration law factors into migration decisions. To answer this question, this Article will address several underlying issues: (1) Do migrants have sufficient knowledge about the U.S. immigration system and the consequences of unauthorized entry to make fully informed choices? (2) What do prospective migrants think of the U.S. immigration system, and how does that affect their considerations about whether to follow U.S. immigration law? (3) How do migrants evaluate ethical and practical considerations, including facing immediate danger in their home country, violating U.S. immigration law, and embarking on a dangerous journey to the U.S. border? Finally (4) Which values are most powerful when individuals make their ultimate decision about migrating?

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4. *Id.*

5. See, e.g., Douglas S. Massey & Fernando Riosmena, *Undocumented Migration from Latin America in an Era of Rising U.S. Enforcement*, 630 ANNALS AM. ACAD. POL. & SOC. SCI. 294, 294–96 (2010); Wayne A. Cornelius, *Evaluating Recent U.S. Immigration Control Policy: What Mexican Migrants Can Tell Us*, in CROSSING AND CONTROLLING BORDERS: IMMIGRATION POLICIES AND THEIR IMPACT ON MIGRANTS’ JOURNEYS 191, 201 (Mechthild Baumann, Astrid Lorenz & Kerstin Rosenow, eds., 2011) (“Many elected officials believe—or wish their constituents to believe—that the U.S. government actually has the capacity to intervene in international migration flows in ways that yield the expected outcomes and minimize the unintended consequences—hence the broad, bipartisan consensus existing in the U.S. Congress that more spending on border security will yield greater control over clandestine immigration.”); DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, MIGRATION POL’Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, 14 (2013) (“There has been strong and sustained bipartisan support over successive administrations and Congresses for strengthened immigration enforcement . . .”).

6. CHAD C. HADDAL, CONG. RSCH. SERV., BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL 4 (2010).

7. Emily Ryo, *Deciding to Cross: Norms and Economics of Unauthorized Migration*, 78 AM. SOCIO. REV. 574, 593 (2013).

8. This paper uses the term “unauthorized migrant” to refer to an individual who is present in the United States without authorization, regardless of mode of entry. This includes individuals who entered the United States without inspection, presented fraudulent documents at the border, or overstayed a visa. “Unauthorized migrant” is also used to describe individuals who attempted to enter the United States without authorization but were not successful.

In answering these questions, this Article will demonstrate that migrant decision-making in practice undermines common assumptions underlying how immigration deterrence is expected to operate. The logic of deterrence tells us that making life more difficult for migrants will directly reduce the number of people willing to attempt to cross the border,<sup>9</sup> but these laws and policies do not have the effect politicians promise. Despite this reality on the ground, deterrence logic is still used to justify dangerous and inhumane treatment of migrants.<sup>10</sup> By highlighting research that illustrates how immigration law does not have a significant deterrent effect, this Article challenges the use of deterrence logic as a façade to legitimate cruelty to migrants and their families.

The paper proceeds as follows. Part I provides a brief history of immigration enforcement in the United States since 1994 and describes the current legal context, including criminal and civil immigration penalties associated with unlawful entry and the role of immigration detention. Part II surveys existing literature on the deterrent effects of U.S. immigration law and the literature on legal consciousness. Part III demonstrates that unauthorized migrants are unlikely to have sufficient legal knowledge about U.S. immigration laws for the “deterrence” approach to have the effect that U.S. policymakers imagine. Part IV describes how prospective and current unauthorized migrants see the U.S. immigration system—namely, as unfair and illegitimate. Part V describes the thought processes migrants engage in when deciding whether to migrate to the United States without authorization. Part VI discusses which factors are most influential and outcome-determinative for migrants when deciding whether to try and enter the United States without authorization. Part VII concludes with recommendations for legal reforms and advocacy in light of the findings of this paper.

## I.

### HISTORICAL AND LEGAL CONTEXT

Tracing the recent history of U.S. immigration enforcement demonstrates the central role that deterrence plays in immigration policies. The enforcement tactics

9. See Massey & Riosmena, *supra* note 5, at 296 (citing Larry A. Sjaastad, *The Costs and Returns of Human Migration*, J. POL. ECON., Oct. 1962, at 80, 80–93.) (“Although it is rarely stated explicitly, U.S. immigration and border policies basically follow the precepts of neoclassical economics, which views migration as a cost-benefit decision taken by individuals seeking to maximize earnings net of various costs.”).

10. See, e.g., Sergio Martínez-Beltrán, *Biden’s New Executive Order Denies Asylum Claims to Most Migrants Crossing the Border Unlawfully*, NAT’L PUB. RADIO (June 4, 2024, 12:00 PM), <https://www.npr.org/2024/06/04/nx-s1-4991917/biden-executive-order-asylum-migration-border> [<https://perma.cc/WV4U-TR8F>] (describing Biden’s “executive order to temporarily suspend the processing of most asylum claims at the southern U.S. border” and criticism of the executive order); Department of Homeland Security, Statement of Alejandro N. Mayorkas on the Biden-Harris Administration’s Executive Action to Strengthen Border Security (June 4, 2024), <https://www.dhs.gov/news/2024/06/04/statement-alejandro-n-mayorkas-biden-harris-administrations-executive-action> [<https://perma.cc/6DBT-TCFE>] (“This executive action is yet another step the Administration has taken within its existing authorities to deter irregular migration.”).

used at the border and in the interior, as well as the increase in the use of criminal prosecution and civil immigration detention, all have an underlying deterrence logic.

The United States' approach to immigration enforcement changed substantially in 1994 when the U.S. Border Patrol (USBP) adopted the "Prevention through Deterrence" strategy in its first National Strategic Plan.<sup>11</sup> The National Strategic Plan was enacted "[p]artly in response to public and congressional concerns about the number of illegal immigrants and drugs entering the country."<sup>12</sup> The Prevention through Deterrence strategy aimed to increase the number of USBP agents and resources on the southern border.<sup>13</sup> The strategy involved focusing resources in programs such as Operation "Hold the Line" in El Paso, Texas and Operation Gatekeeper in San Diego, California.<sup>14</sup> These operations increased the number of USBP agents at the border and the technology they utilized, including stadium lighting, cameras, and sensors.<sup>15</sup> Between 1986 and 2004, USBP's "budget increased tenfold, the number of officers tripled, and the number of hours they spent patrolling the border grew eight times."<sup>16</sup> USBP's focus on urban areas such as El Paso and San Diego drove increasing numbers of unauthorized migrants to attempt to enter the United States by crossing through remote desert and mountain regions.<sup>17</sup> This had deadly consequences: over 4,045 migrants died while attempting to cross the border between January 1995 and September 2006.<sup>18</sup>

Following the terrorist attacks of September 11, 2001, Congress passed the 2002 Homeland Security Act, which reorganized the Immigration and Nationality Service (INS) into the Department of Homeland Security (DHS).<sup>19</sup> Law professor Alina Das explains that "[t]he reorganization, under the umbrella of a national security organization, had the effect of weaponizing deportation."<sup>20</sup>

The creation of DHS coincided with an expansion of criminal prosecutions against migrants. In 2005, DHS publicly announced Operation Streamline, a plan to criminally prosecute all unauthorized migrants apprehended in the Eagle Pass,

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11. HADDAL, *supra* note 6, at 4 (explaining that prior to the first National Strategic Plan, USBP's strategy had focused on arresting unauthorized migrants after entry, rather than deterring entrance).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Massey & Riosmena, *supra* note 5, at 295.

17. Wayne A. Cornelius & Idean Salehyan, *Does Border Enforcement Deter Unauthorized Immigration? The Case of Mexican Migration to the United States of America*, 1 REGUL. & GOVERNANCE 139, 142 (2007) ("This [enhanced border enforcement] has led many migrants to attempt riskier crossing strategies over difficult and dangerous terrain; concomitantly, the risk of injury and/or death has increased sharply in recent years.").

18. *Id.* (explaining that this figure is an undercount because it only includes known fatalities and that "dehydration and hypothermia were the most common cause of death" in this time period.)

19. ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA CRIMINALIZES IMMIGRANTS 76–77 (2020).

20. *Id.* at 77.

Texas area.<sup>21</sup> By 2009, zero-tolerance programs modeled after Operation Streamline had been implemented in two-thirds of border sectors.<sup>22</sup> Operation Streamline continues to this day, and has resulted in up to 80 new prosecutions per day in some locations, leading to en masse plea hearings and defense attorneys being appointed to represent up to 80 clients in one hearing.<sup>23</sup> According to law professor Joanna Lydgate, “[m]any Streamline defendants complete the entire proceeding—meeting with counsel, making an initial appearance, pleading guilty, and being sentenced after waiving a presentence report—in a single day.”<sup>24</sup> Defense attorneys estimated that 99% of defendants processed through Operation Streamline plead guilty.<sup>25</sup>

DHS adopted the Consequence Delivery System (CDS) in 2011.<sup>26</sup> CDS combined Operation Streamline with other programs, including the Alien Transfer Program, the Mexican Interior Repatriation Program, and expedited removal.<sup>27</sup> The goal of the CDS was for each individual apprehended by DHS to receive a punishment (“consequence”) that corresponded with their immigration history and criminal infractions.<sup>28</sup> In 2014, DHS announced the “No-Release Policy” in response to rising numbers of Central American families and children seeking asylum at the southwest border.<sup>29</sup> Pursuant to this policy, DHS detained unauthorized migrant families and generally refused to consider them for release.<sup>30</sup>

These changes in immigration policy have led to the heightened militarization of the U.S. border, as well as an increased focus on detention and criminal prosecution in the name of immigration deterrence. Many scholars have focused on the escalating criminalization of immigration law by exploring how criminal law and immigration law intersect. According to law professor Juliet Stumpf in her foundational article *The Cimmigration Crisis*, “[t]he merger of the two areas in both substance and procedure has created parallel systems in which immigration law and the criminal justice system are merely nominally separate.”<sup>31</sup>

Migrants can face both criminal and civil consequences for unauthorized entry and reentry and unlawful presence in the United States. Entering the United States without authorization is a federal misdemeanor carrying a maximum

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21. Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 493 (2010).

22. *Id.* at 494–95.

23. *Id.* at 486.

24. *Id.*

25. *Id.* at 484.

26. Daniel E. Martinez, Jeremy Slack & Ricardo D. Martinez-Schuldt, *Repeat Migration in the Age of the Unauthorized Permanent Resident: A Quantitative Assessment of Migration Intentions Postdeportation*, 52 INT’L MIGRATION REV. 1186, 1191 (2018).

27. *Id.*

28. *Id.*

29. Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 239 (2019).

30. *Id.*

31. Juliet Stumpf, *The Cimmigration Crisis*, 56 AM. U. L. REV. 367, 367 (2006).

sentence of six months of incarceration for first-time migrants.<sup>32</sup> Migrants who reenter the United States without authorization following a prior deportation or removal order can be convicted of a federal felony, and such migrants generally face a maximum sentence of two years.<sup>33</sup> However, individuals convicted under this statute can face sentences of up to ten or 20 years if they have certain prior criminal convictions.<sup>34</sup>

Migrants also face civil immigration consequences for unlawful presence. For example, migrants who were unlawfully present in the United States for six months or longer can be inadmissible for three or ten years depending on their length of unlawful presence.<sup>35</sup> Commonly known as the “three-year bar” and the “ten-year bar,” these legal provisions can prevent individuals who are otherwise eligible for lawful permanent residence status from obtaining it.<sup>36</sup> Migrants with prior orders of removal can face bars of five, ten, or 20 years depending on their circumstances.<sup>37</sup> Migrants with prior removal orders who have been unlawfully present in the United States for an aggregate period of more than one year are subject to a permanent bar.<sup>38</sup>

Confinement in immigration detention is not technically a criminal punishment for civil immigration violations, as its stated purpose is to facilitate the removal of migrants who do not have authorization to be present in the United States.<sup>39</sup> However, civil immigration detention has carceral qualities which make it almost indistinguishable from, if not worse than, detention within the criminal legal system. Civil immigration detention “takes place in jail or jail-like facilities, confinement conditions are often worse than criminal incarceration, and immigrant detainees themselves experience their detention as a form of punishment.”<sup>40</sup> Despite operating “under different bodies of law,” prisons and immigration detention “use the same techniques of control and dehumanization . . . [and are] interlocked arms of the U.S. carceral system.”<sup>41</sup> Immigration detention centers “look and feel like prisons, with bars, cells, guards, and barbed wire fences. Most of the [immigration detention] facilities used to be prisons or jails.”<sup>42</sup>

Social scientist Abigail Andrews argues that the civil immigration detention system “was built on the premise of deterrence,” writing that “[t]he logic holds

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32. 8 U.S.C. § 1325.

33. 8 U.S.C. § 1326(a).

34. 8 U.S.C. § 1326(b).

35. 8 U.S.C. § 1182(a)(9)(B)(i).

36. AM. IMMIGR. COUNCIL, *The Three- and Ten-Year Bars* (Oct. 28, 2016), <https://www.americanimmigrationcouncil.org/research/three-and-ten-year-bars> [https://perma.cc/4VPR-7LC7].

37. See 8 U.S.C. § 1182(a)(9)(A).

38. 8 USC § 1182(a)(9)(C)(i).

39. Ryo, *supra* note 29, at 238.

40. *Id.* at 241.

41. ABIGAIL ANDREWS, *BANISHED MEN: HOW MIGRANTS ENDURE THE VIOLENCE OF DEPORTATION* 38 (2023).

42. *Id.* at 40.

that when states put people in cages, they ‘learn their lesson,’ whether to avoid crime or refrain from crossing the border. Supposedly, prisoners also serve as examples to others, persuading would-be migrants to obey the law.”<sup>43</sup>

The militarization at the border, increased criminal prosecution of migrants, and civil immigration detention are all based on a logic of deterrence—that making migration more difficult will deter would-be migrants from attempting an unauthorized entry. The logic goes that if it is more difficult to cross the border undetected and safely, fewer people will attempt to cross. The increased likelihood of criminal prosecution, the severity of criminal punishment for unauthorized entry and reentry, the horrific conditions in civil immigration detention, and the unlawful presence bars are similarly believed to disincentivize people from attempting to cross.

However, the actual deterrent effects of U.S. immigration law do not align with what the logic of deterrence promises.

## II.

### SCHOLARLY PERSPECTIVES ON DETERRENCE AND LEGAL CONSCIOUSNESS

#### *A. Limitations of the Scholarship on the Deterrent Effects of U.S. Immigration Law*

Much of the literature evaluating the deterrent effects of U.S. immigration law and policies focuses on large scale trends and is based on limited sets of data. In the context of deterrence research, less scholarly attention has been paid to how individual migrants experience the law and make migration decisions. As a result, little research compares migrants’ lived experiences with immigration law to the logic of deterrence that is used to justify those laws. More research on migrants’ lived experiences with immigration law and their decision-making processes would call into question why a deterrence rationale continues to be used to justify laws and policies that cause enormous human suffering.

Most of the existing literature comes from the fields of economics and sociology and focuses on the effect of large scale economic and social trends.<sup>44</sup> For example, much of the research focuses on wage differentials between the United States and countries of origin.<sup>45</sup> Authors of one paper go as far as to argue that the “non-existent long-term [deterrent] effects [of U.S. Border Patrol] are . . . the consequence of some very basic economic fundamentals.”<sup>46</sup> This research treats

43. *Id.* at 39.

44. See, e.g., Cornelius & Salehyan, *supra* note 17 at 141.

45. See, e.g., Gordon H. Hanson & Antonio Spilimbergo, *Illegal Immigration, Border Enforcement, and Relative Wages: Evidence from Apprehensions at the U.S.-Mexico Border*, 89 AM. ECON. REV. 1337, 1337-38 (1999); Rebecca Lessem, *Mexico-U.S. Immigration: Effects of Wages and Border Enforcement*, 85 REV. ECON. STUD. 2353, 2355 (2018).

46. Alberto Dávila, José A. Pagán & Gökçe Soydemir, *The Short-term and Long-term Deterrence Effects of INS Border and Interior Enforcement on Undocumented Immigration*, 49 J. ECON. BEHAV. & ORG. 459, 470 (2002).



economic factors as so influential that they are almost outcome determinative, thus reducing complex, personal migration decisions to questions of supply and demand. According to political scientist Wayne Cornelius, “[a]ll so-called immigration reforms are only as good as the assumptions they make about human behavior. This simple truth tends to get lost in complex econometric modeling exercises, but policymakers ignore it at their peril.”<sup>47</sup>

Another limitation of existing research is that it overwhelmingly focuses on actual or prospective migrants from Mexico.<sup>48</sup> Migrants from Central America are understudied populations in the research on undocumented migration.<sup>49</sup> In the studies that consider migrants from Central America or Latin America more broadly, the countries and populations considered tend to be limited to case studies that are not necessarily representative of a region or even one country’s migrants.<sup>50</sup>

Regardless of the field or methodology, most of the literature tends to share a skepticism about immigration law as an effective deterrent, often beginning with a description of evidence indicating the ineffectiveness of immigration deterrence efforts.<sup>51</sup> Additionally, much of the research is based on the premise that enhanced border enforcement reduces circularity in migration patterns and prolongs stays in

47. Wayne A. Cornelius, *Evaluating Recent U.S. Immigration Control Policy: What Mexican Migrants Can Tell Us*, in *CROSSING AND CONTROLLING BORDERS: IMMIGRATION POLICIES AND THEIR IMPACT ON MIGRANTS’ JOURNEYS* 191, 201 (Mechthild Baumann, Astrid Lorenz & Kerstin Rosenow, eds., 2011).

48. See, e.g., Manuela Angelucci, *US Border Enforcement and the Net Flow of Mexican Illegal Migration*, 60 *ECON. DEV. & CULTURAL CHANGE* 311, 312 (2012); Sherrie A. Kossoudji, *Playing Cat and Mouse at the U.S.-Mexican Border*, 29 *DEMOGRAPHY* 159, 159 (1992); Fernando A. Lozano & Mary J. Lopez, *Border Enforcement and Selection of Mexican Immigrants in the United States*, 19 *FEMINIST ECON.* 76, 76 (2013).

49. Catalina Amuedo-Dorantes, Susan Pozo & Thitima Puttitanun, *Immigration Enforcement, Parent-Child Separations, and Intent to Remigrate by Central American Deportees*, 52 *DEMOGRAPHY* 1825, 1845 (2015).

50. See, e.g., Jonathan T. Hiskey, Abby Córdova, Mary Fran Malone & Diana M. Orcés, *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America*, 53 *LAT. AM. RSCH. REV.* 429, 438 (2018) (only discussing migrants from Honduras and is not nationally representative of Honduras); Amuedo-Dorantes, Pozo & Puttitanun, *supra* note 49, at 1833 (analyzing survey data of 25,092 migrants from El Salvador, Honduras, and Guatemala but is limited to those who have been deported); Massey & Riosmena, *supra* note 5, at 301 (describing that the Mexican sample contained 11,228 male household heads, while the samples from other countries are far smaller, with samples from the Dominican Republic, Nicaragua, and Costa Rica containing 610, 1,004, and 969, respectively).

51. See, e.g., Dávila, Pagán & Soydemir, *supra* note 46, at 460; Christina Gathmann, *Effects of Enforcement on Illegal Markets: Evidence from Migrant Smuggling Along the Southwestern Border*, 92 *J. PUB. ECON.* 1926, 1927 (2008); Richard L. Johnson & Murphy Woodhouse, *Securing the Return: How Enhanced US Border Enforcement Fuels Cycles of Debt Migration*, 50 *ANTIPODE* 976, 979 (2018); Douglas S. Massey, Jorge Durand & Karen A. Pren, *Why Border Enforcement Backfired*, 121 *AM. J. SOCIO.* 1557, 1558 (2016) (finding that “the unprecedented militarization of the Mexico-U.S. border not only failed . . . but backfired in increasing the rate of undocumented population growth . . .”).

the United States.<sup>52</sup> In the rare circumstances where researchers find a deterrent effect, that effect is generally short-lived.<sup>53</sup>

There is reason to doubt the accuracy of the few research studies that find large deterrent effects. Much of the research that finds a deterrent effect was conducted by, or in connection with, the U.S. government.<sup>54</sup> This is not surprising given that the U.S. government has a strong interest in justifying the enormous amount of federal spending—\$333 billion between fiscal years 2004 and 2021—used for immigration enforcement.<sup>55</sup> Furthermore, researchers who conclude that there is a deterrent effect sometimes rely on data that is unrepresentative or downright flawed. For instance, in their analysis of the Consequence Delivery System based on data from fiscal years 2007–2014, researchers from the Migration Policy Institute found that U.S.-Mexico border recidivism fell fifteen percentage points.<sup>56</sup> They conclude that “[t]his drop points to the effectiveness of consequence enforcement alongside other strategies in deterring return migration.”<sup>57</sup> However, there are problems with using recidivism as a measure of deterrent effect. Recidivism data only includes those migrants who are apprehended more than once in the same year.<sup>58</sup> For example, an unauthorized migrant who is apprehended, removed from the United States, and re-enters the United States without detection within the same year will not be reflected in recidivism data.<sup>59</sup> Recidivism data will also not include an unauthorized migrant who is apprehended in two different

52. E.g., Catalina Amuedo-Dorantes, Thitima Puttitanun & Ana P. Martinez-Donate, *How Do Tougher Immigration Measures Affect Unauthorized Immigrants?*, 50 DEMOGRAPHY 1067, 1069 (2013); Carmen E. Carrión-Flores, *What Makes You Go Back Home? Determinants of the Duration of Migration of Mexican Immigrants in the United States*, 8 IZA J. DEV. & MIGRATION 1, 1–2 (2018); Belinda I. Reyes, *Changes in Trip Duration for Mexican Immigrants to the United States*, 23 POPULATION RSCH. & POL’Y REV. 235, 238 (2004); Erin R. Hamilton & Jo Mhairi Hale, *Changes in the Transnational Family Structures of Mexican Farm Workers in the Era of Border Militarization*, 53 DEMOGRAPHY 1429, 1433 (2016).

53. E.g., Dávila, Pagán & Soydemir, *supra* note 46, at 470 (analyzing data on border and interior apprehensions, as well as patrol hours data, from FY 1983–1997 and finding that while border enforcement has some deterrent effects, the effects “are short-lived as undocumented migrants seemingly adjust to new information.”).

54. See, e.g., OFF. OF IMMIGR. STAT., DEP’T HOMELAND SEC., EFFORTS BY DHS TO ESTIMATE SOUTHWEST BORDER SECURITY BETWEEN PORTS OF ENTRY 19 (2017) (“With respect to border enforcement outcomes, available data also indicate the lowest number of illegal entries at least since 2000, and likely since the early 1970s.”).

55. AM. IMMIGR. COUNCIL, *The Cost of Immigration Enforcement and Border Security*, 1, 1 (2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_cost\\_of\\_immigration\\_enforcement\\_and\\_border\\_security.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_cost_of_immigration_enforcement_and_border_security.pdf) [https://perma.cc/GY72-SP5L] (last visited June 23, 2024) (estimating that the Department of Homeland Security spent approximately \$333 billion funding immigration enforcement agencies for fiscal years 2004 through 2021).

56. RANDY CAPPS, FAYE HIPSMAN & DORIS MEISSNER, MIGRATION POL’Y INST., ADVANCES IN U.S.-MEXICO BORDER ENFORCEMENT: A REVIEW OF THE CONSEQUENCE DELIVERY SYSTEM 2 (2017).

57. *Id.*

58. *Id.*

59. See *id.* at 2 (defining recidivism as “the share of migrants apprehended more than once in the same year.”).

years.<sup>60</sup> As a result, recidivism data almost certainly undercounts how many migrants attempt to re-enter the United States after being removed. Despite these limitations in the data, the researchers claimed that migrants prosecuted in federal court have the lowest rate of recidivism, arguing that “this demonstrates that prosecution is an effective deterrent.”<sup>61</sup> Their claim is undermined in the same sentence, as they go on to explain that many migrants prosecuted in federal court are excluded from the recidivism data altogether because their federal prison terms last over one year.<sup>62</sup> Finding that recidivism rates decrease is of little value when migrants who are detained for over a year, migrants who re-enter without detection, and migrants who re-enter a year after their first apprehension are all excluded from the data used to calculate that recidivism rate.

Most major scholarship on immigration deterrence does not connect insights from the field of criminal law to the immigration context.<sup>63</sup> Scholarship by law professor Emily Ryo and political scientist Rene Rocha and colleagues are two key exceptions.<sup>64</sup> Ryo’s analysis of immigration detention utilizes research by law professor Paul Robinson and psychologist John Darley regarding deterrence and substantive criminal law.<sup>65</sup> Drawing on “what we know from the existing literature in psychology, behavioral economics, and criminology,” Ryo suggests that “detention as deterrence is unlikely to operate in the way some policymakers might expect or desire.”<sup>66</sup> Rocha and colleagues, in their study on the relationship between immigration enforcement and immigrant behavior, draw from general criminal deterrence theory as well as specific studies related to drunk driving and drug policy.<sup>67</sup> Drawing further connections between deterrence research in the criminal law context and in the immigration context would be a fruitful avenue of research as that would help scholars and policymakers understand to what extent

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60. *See id.* at 2.

61. *Id.* at 2.

62. *See id.* at 2–3.

63. *See e.g.*, Angelucci, *supra* note 48 (examining the effect of border enforcement on the inflow and outflow of unauthorized migrants from Mexico without discussing deterrence theories originating in criminal law); Hanson & Spilimbergo, *supra* note 45 (examining the effect of U.S.-Mexican wage differentials and border enforcement on the level of unauthorized migration without discussing deterrence theories from criminal law); Massey, Durand & Pren, *supra* note 51 (examining how border militarization affects migration patterns without considering deterrence theories originating in criminal law).

64. Ryo, *supra* note 29; Rene R. Rocha, Daniel P. Hawes, Alisa Hicklin Fryar & Robert D. Wrinkle, *Policy Climates, Enforcement Rates, and Migrant Behavior: Is Self-Deportation a Viable Immigration Policy?*, 42 POL’Y STUD. J. 79 (2014).

65. Ryo, *supra* note 29, at 240–41 (describing Robinson and Darley’s argument that criminal law will only deter crime when certain prerequisites are met, which they refer to as the legal knowledge, rational choice, and perceived cost hurdles).

66. *Id.* at 248.

67. Rocha, Hawes, Fryar & Wrinkle, *supra* note 64, at 79–82 (using studies related to drug policy and drunk driving to argue that “deterrence efforts are unlikely to be successful if: (i) personal experiences with punishment are coupled with punishment avoidance and vice versa; or (ii) if the desire to violate immigration law is inelastic or unresponsive to changes in costs.”).

insights about deterrence from criminal law are applicable to an immigration context, but this is outside the scope of this Article.

*B. Legal Consciousness as a Framework for Understanding Deterrence*

Sociologists Patricia Ewick and Susan S. Silbey define legal consciousness as the way “legality is experienced and understood by ordinary people as they engage, avoid, or resist the law and legal meanings.”<sup>68</sup> Ewick and Silbey identify three “stories of legal consciousness,” which they refer to as “Before the Law,” “With the Law,” and “Against the Law.”<sup>69</sup> According to Ewick and Silbey, an individual does not “invent an independent and unique conception of legality;” instead people rely “on culturally available narratives of the law to interpret their lives and relationships.”<sup>70</sup> Ewick and Silbey categorized these narratives about the law into their three stories of legal consciousness. Individuals “before the law” see the law as “an objective realm of disinterested action, removed and distant from the[ir] personal lives.”<sup>71</sup> Individuals acting “with the law” view legality like a game where the law is “open to challenge, vulnerable to change, and available for self-interested manipulation.”<sup>72</sup> Finally, those acting “against the law” perceive the law as arbitrary, dangerous, and “unable to respond to injustice.”<sup>73</sup> Though treated as three distinct stories of legal consciousness, an individual can exhibit all three forms in different contexts.<sup>74</sup>

This Article uses these stories of legal consciousness as analytic categories to help explain how current and prospective unauthorized migrants understand and interact with the law and broader legal system. Legal consciousness is relevant to the study of migrant decision-making because it helps contextualize how migrants perceive and experience immigration law, and the choices they make in response. Understanding the decision-making processes of migrants also adds nuance to our understanding of these stories of legal consciousness, as the legal consciousness of migrants may not fit neatly into any category.<sup>75</sup>

### III.

#### MIGRANTS’ KNOWLEDGE OF U.S. IMMIGRATION LAW AND POLICY

For U.S. immigration law to have a deterrent effect, migrants must understand what the law prohibits and what the consequences are for violating the law, as

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68. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* 35 (1998).

69. *Id.* at 30.

70. *Id.* at 247.

71. *Id.* at 28.

72. *Id.* at 146.

73. *Id.* at 196.

74. *Id.* at 30.

75. See Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 630 (2015) (“My analysis shows that, contrary to popular assumptions, current and prospective unauthorized immigrants do not simply stand ‘against the law’: rather, they possess a much more complex and multifaceted legal consciousness.”).

“[t]he first prerequisite to deterrence is that people know the law.”<sup>76</sup> Prospective migrants may face multiple barriers which prevent them from understanding U.S. immigration law, such as language or cultural barriers, distrust in sources that share legal knowledge, and inaccurate information from human smugglers.<sup>77</sup>

Even those migrants facing federal criminal charges for immigration violations do not always understand the laws under which they are being prosecuted. For example, during a 2009 study of Operation Streamline by law professor Joanna Lydgate, defense attorneys reported that “criminal prosecution catches many of their clients off guard . . . [and] they do not, at a basic level, understand the concept of bars to reentry or what it means to be charged with a misdemeanor or felony in the United States.”<sup>78</sup> The Criminal Chief of the U.S. Attorney’s Office for the Western District of Texas made the same observations as the defense attorneys and “speculated that few migrants are aware of the ‘collateral consequences’ of a criminal conviction, should they later wish to obtain lawful immigration status in the United States.”<sup>79</sup> Lydgate’s observations were confirmed in a 2015 article in which geographer Jeremy Slack and colleagues analyzed data from interviews with 1,110 individuals deported between 2009 and 2012.<sup>80</sup> According to their research, “only 71 percent of respondents processed through Operation Streamline mentioned that a judge had told them they would face some amount of jail time if they return to the United States after being deported.”<sup>81</sup> Six percent of respondents processed through Operation Streamline indicated “that their lawyers did not tell them anything,” while another 55 respondents indicated that “their lawyer simply informed that they needed to sign their order of removal and plead guilty.”<sup>82</sup>

Research on Operation Streamline is consistent with the results of a study conducted by the National Immigrant Justice Center in 2019 and 2020, where researchers interviewed 54 individuals facing criminal charges for unauthorized entry or reentry.<sup>83</sup> Of those interviewed, almost 70% did not know whether they were in a criminal or immigration court proceeding.<sup>84</sup> Only 44% of those

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76. See Ryo, *supra* note 29, at 241.

77. *Id.* at 242-43.

78. Lydgate, *supra* note 21, at 519.

79. *Id.*

80. Jeremy Slack, Daniel E. Martínez, Scott Whiteford & Emily Peiffer, *In Harm’s Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border*, 3 J. ON MIGRATION & HUM. SEC. 109, 111 (2015).

81. *Id.* at 117.

82. *Id.*

83. JESSE FRANZBLAU, NAT’L IMMIGRANT JUST. CTR., A LEGACY OF INJUSTICE: THE U.S. CRIMINALIZATION OF MIGRATION 18 (2020), [https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-07/NIJC-Legacy-of-Injustice-executive-summary\\_2020-07-22\\_FINAL.pdf](https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-07/NIJC-Legacy-of-Injustice-executive-summary_2020-07-22_FINAL.pdf) [<https://perma.cc/NK8B-TZZA>].

84. *Id.* at 9.

interviewed understood the purpose of the criminal prosecution, and only 63% said they understood the next steps in the legal process.<sup>85</sup>

While a migrant's legal knowledge can influence their decision-making process, there is limited research on what information migrants actually have prior to migrating. Further research is needed to determine what type of legal information, either about actual or potential legal consequences, influences migration decisions. For example, more research is needed to determine if migrants' knowledge of procedural rights affects future migration decisions regarding unauthorized reentry. Certain aspects of legal knowledge (such as mandatory detention) may be more influential in long-term migration decision-making than other aspects (such as knowing the immediate next step in one's current legal process).

This Article instead considers the legal knowledge of those who decided to migrate and were apprehended. Individuals who have been apprehended may have more legal knowledge than the general immigrant population as a result of their interactions with the criminal legal and immigration systems. Therefore, if this subset of the migrant population has limited amounts of legal knowledge, it raises doubts about whether other migrant populations have a sufficient understanding of U.S. immigration law for the law to act as a deterrent. Even among migrant populations with higher levels of awareness about the U.S. immigration context and the difficulties unauthorized migrants face, researchers have not found a strong deterrent effect.

For example, political scientist Jonathan T. Hiskey and colleagues conducted research in Honduras in 2014 following a CBP public information campaign, and found that this campaign did not affect the outcome of migration decisions.<sup>86</sup> The "Dangers Awareness Campaign" involved over 6,000 public service announcements, hundreds of billboards, and outreach by churches, local governments, and NGOs across northern Central America.<sup>87</sup> Based on a survey of 3,024 individuals in Honduras, the researchers found "a high degree of consensus...that the trip to the United States was more difficult, less safe, and one with a higher probability of deportation and worse treatment of migrants within the United States than in the previous year."<sup>88</sup> Despite the prevalence of these beliefs, the researchers concluded that "perceptions of the U.S. immigration context" had "no significant impact on the emigration decision" of Hondurans.<sup>89</sup> Political scientists Wayne A. Cornelius and Idean Salehyan similarly studied the relationship between perceptions of the U.S. immigration context and migration decisions in their research on Mexican migrants.<sup>90</sup> They focused on migrant perceptions because "[a] show of force at the border can only be effective if people are aware of heightened

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85. *Id.*

86. Hiskey, Córdova, Malone & Orcés, *supra* note 50, at 441.

87. *Id.* at 438.

88. *Id.* at 439.

89. *Id.* at 442.

90. Cornelius & Salehyan, *supra* note 17, 139–40.

restrictions and that they perceive and/or have actually experienced that such policies make crossing much more difficult.”<sup>91</sup> Through interviews with 603 returned migrants and potential first-time migrants in Mexico in 2005, they found that, despite migrants being “well informed about Border Patrol efforts, . . . perceptions of the danger and difficulty involved in clandestine crossings have not discouraged migrants from attempting them.”<sup>92</sup>

This discussion requires a caveat that migrants do not need to have specific legal knowledge to understand the role U.S. immigration law plays in their lives, and to form perceptions about the risks of unauthorized entry. U.S. immigration law permeates all aspects of the migratory process, including the very language used to describe it. In the words of Kitty Calavita, a professor at the University of California, Irvine in the Department of Criminology, Law, and Society, “The ability of the law to create social realities that appear natural by inventing many of the concepts and categories we think with, means that it insinuates itself invisibly into our everyday worlds and wields extraordinary power.”<sup>93</sup>

#### IV.

#### MANY UNAUTHORIZED MIGRANTS SEE THE U.S. IMMIGRATION SYSTEM AS ILLEGITIMATE

Determining whether prospective unauthorized migrants view the U.S. immigration system as legitimate is important to understanding migratory decision-making because judgments about legitimacy reflect migrants’ moral priorities. Law-abiding behavior is often dependent on the individual’s values being consistent with the law and a belief in the legitimacy of the legal authority.<sup>94</sup>

Research by Professor Emily Ryo demonstrates that many unauthorized migrants view U.S. immigration law as illegitimate due to the U.S. government’s use of immigration detention and the perceived unfairness of the immigration system.<sup>95</sup> Ryo’s analysis of a nationally representative survey conducted in El Salvador, Guatemala, Honduras, and Mexico in 2018 and 2019 found that “heightened awareness about the widespread use of immigration detention may foster delegitimizing beliefs about the US immigration system.”<sup>96</sup> Specifically, after looking at surveys from 6,134 individuals, Ryo determined that awareness of U.S. immigration detention “negatively impact[ed] individuals’ assessment about the procedural and outcome fairness of the U.S. immigration system.”<sup>97</sup>

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91. *Id.* at 144.

92. *Id.* at 145, 149.

93. KITTY CALAVITA, INVITATION TO LAW & SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW 44 (2nd ed. 2016).

94. Ryo, *supra* note 7, at 590.

95. Emily Ryo, *The Unintended Consequences of US Immigration Enforcement Policies*, 118 PROC. NAT’L ACAD. SCI. 1 (2021).

96. *Id.* at 5.

97. *Id.*

Ryo's research on unauthorized Mexican migrants confirms that "perceptions of procedural justice are positively related to views about the legitimacy of legal authority."<sup>98</sup> Through a 2007 and 2008 survey with an effective sample size of 1,353 individuals, Ryo found that those who believe the U.S. immigration service treats Mexicans fairly are less likely to believe that the United States has no right to limit immigration.<sup>99</sup> In contrast, those who believe that the U.S. immigration service "treats lighter-skinned immigrants better than darker-skinned immigrants" are almost three times more likely to believe that the United States has no right to limit immigration.<sup>100</sup>

Through her interviews with 64 current and prospective unauthorized migrants from Mexico, Honduras, Guatemala, El Salvador, and Peru in 2006, Ryo identified three reasons that unauthorized migrants viewed the U.S. immigration system unfair: class bias, racial bias, and the arbitrary nature of the system.<sup>101</sup> The individuals that Ryo interviewed vividly described the experiences that led them to these conclusions. For example, one migrant said, "I know that it was very hard to get a visa. But there must be people who won it, just like people win the lottery . . . . The visa is for the rich, for the tourist; for poor people there is no such thing."<sup>102</sup> Another interviewee observed, "[t]here are many Canadians that are working here illegally and nothing is ever said to them . . . . They can mix with Americans. A dark person will always be discriminated [against]."<sup>103</sup> Ryo concluded that many unauthorized migrants do not see U.S. immigration policy as consistent with their moral values nor as legitimate.<sup>104</sup>

Ryo argues that these immigrants who are challenging the legitimacy of the U.S. immigration system are exhibiting a legal consciousness very similar to the "against the law" legal consciousness described by Ewick and Silbey.<sup>105</sup> Migrants facing an unfair and arbitrary immigration system do not have the faith in procedural fairness associated with a legal consciousness of "with the law."<sup>106</sup> In other words, individuals are only willing to engage "with the law" if the outcome is not seen as predetermined or biased,<sup>107</sup> such as when the immigration system is perceived as fair. Ewick and Silbey also note that individuals from historically marginalized race, gender, and class backgrounds are associated with a legal consciousness of "against the law."<sup>108</sup> However, as discussed below, unauthorized

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98. Ryo, *supra* note 7, at 590.

99. *Id.*

100. *Id.*

101. Ryo, *supra* note 75, at 642, 656.

102. *Id.* at 658.

103. *Id.* at 660.

104. *Id.* at 629.

105. *Id.* at 663.

106. See EWICK & SILBEY, *supra* note 68, at 146–47.

107. *Id.* at 147.

108. *Id.* at 235.



migrants are making complex choices that go beyond resisting and being “against the law.”

Similarly, based on interviews conducted between January 2018 and March 2020 with 171 men who had experienced deportation,<sup>109</sup> social scientist Abigail Andrews argues that most men in immigration detention do not see their detention as “just.”<sup>110</sup> Instead, these men “condemned U.S. carceral practices as violations of human dignity—unfair by even the state’s own standards of treatment.”<sup>111</sup> Andrews found that “[a]fter more time locked up, most men grew resigned to removal . . . . Many believed officials wanted to break them emotionally as a form of deterrence. Disorientation, despair, and the threat of indefinite confinement eroded their will to continue pursuing their cases.”<sup>112</sup> The migrants interviewed by Andrews and her colleagues experienced immigration detention as a dehumanizing form of deterrence, rather than a neutral process meant to aid in orderly removal proceedings.<sup>113</sup>

## V.

### PROSPECTIVE UNAUTHORIZED MIGRANTS ENGAGE IN COMPLEX DECISION-MAKING

Migration decisions for prospective unauthorized migrants involve complicated choices and competing values. Through their research with 330 focus group participants in Jamaica, political scientist Cassilde Schwartz and colleagues provide an example of how prospective migrants make decisions regarding unauthorized migration and migration strategies.<sup>114</sup> Though this research is not focused on the United States as a destination country, the general insights offered by the paper are relevant. This research compares, in the authors’ words, “semi-legal” and “fully illegal” migration strategies to better understand “how rational considerations of risks and costs, and moral considerations of right and wrong come to bear on migrant decision-making.”<sup>115</sup> The authors categorize overstaying a visa or working under the table as “semi-legal” strategies, since they “involve some lawful engagement with state institutions.”<sup>116</sup> “Fully illegal” strategies include unauthorized border crossing, document fraud, and other activities “where the laws are circumvented entirely.”<sup>117</sup>

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109. ANDREWS, *supra* note 41, at 10.

110. *Id.* at 39.

111. *Id.*

112. *Id.* at 50.

113. *See id.*

114. Cassilde Schwartz, Miranda Simon, David Hudson & Shane D. Johnson, *Law Breaking and Law Bending: How International Migrants Negotiate with State Borders*, 65 INT’L STUD. Q. 184, 185, 188 (2021).

115. *Id.* at 185.

116. *Id.*

117. *Id.*

Schwartz and colleagues found that individuals considering “fully illegal” strategies were more likely to “rely on strong moral justifications,” rather than “considerations of risks and costs associated with enforcement.”<sup>118</sup> These moral justifications included the belief that individuals should prioritize caring for their families over following the law.<sup>119</sup> In contrast, migrants considering “semi-legal” strategies were more likely to weigh the possible risks associated with immigration enforcement policies.<sup>120</sup> This suggests that some migrants make different moral calculations when faced with different migration strategies.

Ryo also researched the role of moral values in migration decision-making.<sup>121</sup> In her interviews with current and prospective unauthorized migrants in Latin America, Ryo noted how individuals self-identified as “law-abiding.”<sup>122</sup> For example, interviewees made frequent references to God and distinguished themselves from “delinquents” and “criminals.”<sup>123</sup> During the interviews, migrants also “expressed both a respect for the purported sanctity of national borders and a belief that sovereign nations have a fundamental prerogative to control their borders.”<sup>124</sup>

This raises the question of how individuals can see their decision to enter the United States without authorization as consistent with their self-perception as law-abiding. Migrants resolve this apparent tension through multiple strategies. In Ryo’s interviews, migrants contrasted their deeply held responsibility to provide for their families with their lack of blameworthiness for the structural forces that created their circumstances.<sup>125</sup> Migrants also believed that their migration decisions were moral because they saw immigration violations as victimless crimes.<sup>126</sup> Migrants emphasized the lack of harm caused by their immigration violations by comparing their actions to crimes that cause injury to third parties.<sup>127</sup> Ryo believes that this distinction is similar to the distinction in Anglo-American law between an act that is *mala in se* and an act that is *mala prohibita*.<sup>128</sup> One migrant captured this distinction by saying, “[w]e know well and beforehand that we are violating the law in crossing over here without papers. But in our conscience, it’s not bad because it’s not a crime that we are committing.”<sup>129</sup> Another migrant explained, “[i]mmigration law is different from other laws. Immigrants who come to work

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118. *Id.*

119. *Id.* at 191.

120. *Id.* at 184.

121. Ryo, *supra* note 75, at 630.

122. *Id.* at 630.

123. *Id.* at 647.

124. *Id.*

125. *Id.* at 651.

126. *Id.* at 656.

127. *Id.* at 654.

128. *Id.*

129. *Id.* at 656.

should not be compared to those who kill or those who steal.”<sup>130</sup> This distinction is highlighted by the fact that, while migrants said necessity could justify unauthorized entry into the United States, “they were unwavering in their view that crimes and other types of violations that might involve injury to third parties could not be justified even in situations of dire poverty or familial need.”<sup>131</sup>

The judgments required for a migration decision extend beyond assessing the morality of legal noncompliance. Prospective migrants, in viewing the U.S. immigration system as illegitimate,<sup>132</sup> are also making a moral judgment. Migrants’ moral judgments about the U.S. immigration system and about their own potential behavior coalesce into their eventual decision to migrate. According to Ryo, “Together with immigrants’ expressed moral values undergirding their decisions to migrate, these beliefs about the lack of system legitimacy form a powerful normative account that might enable otherwise law-abiding individuals to violate U.S. immigration laws.”<sup>133</sup> This complex and layered moral process demonstrates that, although migrants are aware that they are violating U.S. immigration law, their legal consciousness is not just “against the law.”<sup>134</sup> Instead, they are resisting immigration law while viewing their behavior as consistent with other laws and their own personal morality.

## VI.

### WHICH FACTORS ARE MOST INFLUENTIAL IN MIGRATION DECISIONS?

When deciding whether to migrate without authorization, individuals balance a variety of factors, including the perceived risks of remaining in their country of origin, the perceived risks of the journey to the United States, and their perceived likelihood of success in crossing the border without detection. Normative values—including the perceived legitimacy of the U.S. government’s immigration laws—also influence an individual’s migration decision.

Physical safety and family unity are among the most powerful factors migrants consider. Hiskey and colleagues evaluated “the relative weight crime victimization has on the migration decision.”<sup>135</sup> Through a survey conducted in El Salvador, Guatemala, and Honduras, they found that “individuals suffering multiple incidents of crime victimization within a year emerge in our analysis as those most likely to flee.”<sup>136</sup> The researchers concluded that “[t]he desire to flee from violence appears to overshadow considerations about any future risks they might face” if they choose to migrate.<sup>137</sup>

130. *Id.* at 654.

131. *Id.* at 653.

132. *See supra* Part IV.

133. Ryo, *supra* note 75, at 629.

134. *Id.* at 630.

135. Hiskey, Córdova, Malone & Orcés, *supra* note 50, at 430.

136. *Id.* at 430, 442.

137. *Id.* at 442.

Research also demonstrates that migrants who consider the United States as their home, including those who have children in the United States, are strongly motivated to return to the country even after facing deportation. For example, survey data collected between 2008 and 2013 of 25,092 Guatemalan, Honduran, and Salvadoran individuals who were deported indicated “that parents who are separated from their children are more likely to indicate the intention to remigrate [within the next 30 days] than are other parents and nonparents.”<sup>138</sup> Specifically, the researchers found that 26% of parents separated from their young children by deportation intended to attempt an unauthorized entry into the United States within the next month, compared to 12% for parents not separated from young children and 18% for nonparents.<sup>139</sup> In the long-term, 66% of deported parents separated from young children intended to return to the United States at some point in the future, compared to approximately 54% of deported parents not separated from young children and nonparents.<sup>140</sup> In the same study, researchers found that individuals with “greater attachment to the United States,” as indicated by number of prior border crossings and length of time in the United States, were more likely to intend to return to the United States than those with fewer attachments.<sup>141</sup> This research echoes what the Supreme Court has twice observed: deportation may lead to the loss “of all that makes life worth living.”<sup>142</sup>

Sociologist Daniel E. Martinez and colleagues also found that Mexican migrants with strong ties to the United States are more likely to intend to attempt another unauthorized entry, even after controlling for the mode of removal.<sup>143</sup> After analyzing data from 2010–2012 post-deportation surveys of 1,109 Mexican migrants, they found that “the social ties migrants have to the United States largely negate the deterrent effects of punitive approaches to immigration enforcement.”<sup>144</sup> As a result, they conclude that “[o]ur findings highlight the inevitable failure of immigration policy and enforcement programs when placed against the powerful pull of family and home.”<sup>145</sup> As the data indicates, U.S. immigration law and policy does not deter all prospective migrants.

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138. Amuedo-Dorantes, Pozo & Puttitanun, *supra* note 49, at 1843.

139. *Id.* at 1833.

140. *Id.* at 1833–34.

141. *Id.* at 1843.

142. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945).

143. Martinez, Slack & Martinez-Schuldt, *supra* note 26, at 1186.

144. *Id.* at 1210.

145. *Id.* at 1186.

## VII.

## LEGAL REFORM RECOMMENDATIONS

U.S. immigration laws and policies are mired in ethical and constitutional concerns.<sup>146</sup> Those ethical violations range from family separation policies “deliberately inflicting mental suffering on children” to the use of solitary confinement in immigration detention.<sup>147</sup> Migrants facing criminal prosecution for immigration violations may receive constitutionally inadequate due process protections and ineffective assistance of counsel.<sup>148</sup> For many migrants, their families, and their communities, these policies are the source of terrible suffering.<sup>149</sup> Beyond that, existing research shows that immigration law does not have a substantial deterrent effect.<sup>150</sup> If current immigration policy has such heavy costs, yet does not provide what proponents of deterrence promise, why does deterrence remain the primary paradigm? In the words of journalist Adam Serwer, “the cruelty is the point.”<sup>151</sup>

As Abigail Andrews argues, “a logic of deterrence legitimates terrifically brutal treatment. Across the deportation system, men felt reduced to animals and robbed of their loved ones and lives . . . . Only the most racist and inhumane observers would argue that such techniques are worth it, simply to drive people out of the United States.”<sup>152</sup> By using research demonstrating that immigration law does not have a significant deterrent effect, scholars and activists can challenge the use of deterrence logic as a façade to legitimate cruelty to migrants and their families.

According to Alina Das, “racism has been a driving force behind punitive immigration laws from the beginning . . . . Man made borders on this earth for political reasons, and in the United States, those reasons include the preservation of the nation’s racial hierarchy.”<sup>153</sup> The goal of immigration deterrence provides a seemingly race-neutral pretext for immigration laws and policies that are intended to cause suffering to non-white immigrants.

146. See, e.g., Adam Cox & Ryan Goodman, *Detention of Migrant Families as “Deterrence”*, JUST SECURITY (Jun. 22, 2018), <https://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts/> [<https://perma.cc/Q5S6-WELR>]; Lydgate, *supra* note 21, at 532–539.

147. Cox, *supra* note 146; see, e.g., Hannah Rapple, Andrew W. Lehen, Spencer Woodman, Vanessa Swales & Maryam Saleh, *Thousands of Immigrants Suffer in Solitary Confinement in U.S. Detention Centers*, NBC NEWS (May 21, 2019), <https://www.nbcnews.com/politics/immigration/thousands-immigrants-suffer-solitary-confinement-u-s-detention-centers-n1007881> [<https://perma.cc/S9MS-9M9K>].

148. See, e.g., Lydgate, *supra* note 21, at 532–535.

149. See, e.g., *id.* at 526; Rapple, *supra* note 147.

150. See *supra* Part II.A.

151. Adam Serwer, *The Cruelty Is the Point*, THE ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/> [<https://perma.cc/34L7-GN3J>].

152. ANDREWS, *supra* note 41, at 58.

153. DAS, *supra* note 19, at 31–32.

Even if immigration laws and policies aimed at deterrence stop some migrants from attempting unauthorized entry, those who are not deterred will generally be the ones fleeing the most extreme physical violence and hence would be most entitled to asylum under international law. Law professors Adam Cox and Ryan Goodman demonstrated this concept in the context of the Trump administration's family separation policy:

"What's not so obvious is that if the Trump policy actually worked to deter migration, the policy would end up punishing the most legitimate asylum seekers, the people fleeing the most horror. That's because they would be the ones least likely to be deterred by detention, criminal prosecution, or family separation, and thus the ones most likely to still come to the United States and end up with the pain and suffering of Trump's gruesome detention policy."<sup>154</sup>

When politicians and government officials enact and perpetuate immigration deterrence policies knowing that they are unlikely to deter those who are unable to remain in their countries of origin, they are choosing to inflict further suffering on a group of migrants whose resistance to deterrence is created by their experiences surviving extreme violence and deprivation.

Addressing the crises caused by U.S. immigration law will require more than just implementing policy based on evidence. True change will require recognizing the dignity and humanity of unauthorized migrants, which includes centering their unique experiences, needs, and voices in our scholarship and beyond. This Article is one example of how research based on the expertise and experience of migrants can undermine fundamental assumptions about the way U.S. immigration law operates in people's lives. Prospective migrants engage in a complex decision-making process when making choices regarding unauthorized migration. U.S. immigration law is not determinative in this decision-making process. Instead, U.S. immigration laws aimed at deterrence are likely to have the opposite effect by delegitimizing the U.S. immigration system in the eyes of migrants.<sup>155</sup>

In light of these urgent concerns, change is desperately needed. The legal reforms suggested in this paper are not sufficient to address all the flaws of the U.S. immigration system. Significant change is needed to fix the structural racism<sup>156</sup> and inequities present in the U.S. immigration system. However, the following reforms are important first steps in addressing the most pressing concerns raised in this Article.

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154. Cox & Goodman, *supra* note 146.

155. See *supra* Part IV.

156. See, e.g., Charles Kamasaki, *US Immigration Policy: A Classic, Unappreciated Example of Structural Racism*, BROOKINGS INST. (Mar. 26, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/03/26/us-immigration-policy-a-classic-unappreciated-example-of-structural-racism/> [<https://perma.cc/7SVG-FNF4>].

*A. Ending Criminal Sanctions for Unauthorized Entry and Reentry*

Congress should repeal 8 U.S.C. § 1325 and 8 U.S.C. § 1326 and end criminal penalties for unauthorized entry and reentry. This Article is not the first to suggest decriminalizing unauthorized entry and reentry.<sup>157</sup> Among those calling for a repeal of 8 U.S.C. § 1325 and 8 U.S.C. § 1326 is Alina Das, who writes that “[c]riminalizing migration was racist ... when it was initially placed on the books. It remains racist today.”<sup>158</sup> Decriminalizing unauthorized entry and reentry is consistent with this Article’s findings regarding unauthorized migrants’ complex decision-making. As this Article demonstrates above, the criminalization of unauthorized entry and reentry does not deter migration to the extent promised by advocates of deterrence logic. Many migrants lack the legal knowledge necessary for the laws to have a deterrent effect, while others view the laws as illegitimate given their moral priorities. Research and years of experience have illustrated the harms caused by the criminalization of unauthorized entry and reentry. Choosing to maintain the status quo by not repealing 8 U.S.C. § 1325 and 8 U.S.C. § 1326 is choosing to harm migrant communities in the name of deterrence despite knowledge that deterrence will never be accomplished.

*B. Ending Civil Immigration Detention*

All civil immigration detention should be ended. Civil immigration detention is inhumane and cruel. Deterrence logic is used as a veneer to make harsh policies like civil immigration detention seem more legitimate and justifiable. However, research demonstrates that civil immigration detention does not deter unauthorized migration to the extent imagined by politicians. Without deterrence logic acting as a façade, the cruelty of immigration detention becomes even more obvious.

This Article joins a chorus of voices in calling for the end of U.S. immigration detention, including the ACLU, Detention Watch Network, Mijente, and United We Dream.<sup>159</sup> Future presidential administrations, Congress, and state legislatures all have the ability to make necessary and meaningful changes consistent with the goal of ending all immigration detention.

The president can, and should, immediately take action to limit immigration detention without congressional involvement.<sup>160</sup> For example, a future presidential administration can terminate existing contracts with private detention companies and state and local governments.<sup>161</sup> A future presidential administration can

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157. See, e.g., Franzblau, *supra* note 83, at 16.

158. DAS, *supra* note 19, at 208.

159. Isra Chaker, *Why We’re Joining the Call to Shut Down ICE Detention Centers*, ACLU (Sept. 23, 2021), <https://www.aclu.org/news/immigrants-rights/why-were-joining-the-call-to-shut-down-ice-detention-centers> [https://perma.cc/9A7L-W4CW].

160. Madhuri Grewal, *Biden Can End the Mass Incarceration of Immigrants*, WASH. POST (Dec. 11, 2020), <https://www.washingtonpost.com/opinions/2020/12/11/biden-end-ice-detention-migrants-mass-incarceration/> [https://perma.cc/87RE-73FH].

161. *Id.*

also push Congress to repeal the law which makes immigration detention mandatory in certain circumstances.<sup>162</sup>

State legislatures can also work to reduce immigration detention within their borders. However, state legislation alone is not guaranteed to decrease immigrant detention. For example, the California State Legislature passed a law, known as AB 32, which would have prohibited the operation of private immigration detention facilities.<sup>163</sup> Between the passage of the law in October 2019 and when it went into effect in January 2020, “ICE accelerated the process and entered into fifteen-year contracts at the remaining private detention centers in California,” leading to a “devastating outcome for immigrant communities.”<sup>164</sup> Additionally, the law was challenged in court by the Trump Administration and GEO Group, a private prison company.<sup>165</sup> After President Biden took office, his administration continued the lawsuit.<sup>166</sup> GEO Group’s and the Biden Administration’s legal challenge was successful, as the Ninth Circuit *en banc* panel held that the law is likely unconstitutional and that GEO Group could seek a preliminary injunction.<sup>167</sup>

Despite the setback in California, the advocacy around and the passage of AB 32 contain important lessons for future organizing. According to anti-detention organizer Silky Shah:

“While the effort to end detention in California via a state-level private prison ban backfired, the strides that immigrant justice groups made there laid the foundation for important wins across the country. Learning from the efforts in California, organizers and advocates in several states . . . have been successful at passing legislation ending detention contracts or preventing new expansion, and others are considering similar legislation.”<sup>168</sup>

Shah highlights Illinois as one success story. Illinois passed a bill banning private immigrant detention in the state, which became law in June 2019.<sup>169</sup> In addition, the Illinois Way Forward Act prohibits law enforcement agencies, law enforcement officials, and any other units of state or local government from entering or renewing contracts with federal immigration enforcement to detain

162. *Id.*; 8 U.S.C. §§ 1226, 1231 (describing in which circumstances detention is mandatory before and after the issuance of an order of removal).

163. Andrea Castillo, *California Bans For-Profit Prisons and Immigrant Detention Facilities*, L.A. TIMES (Oct. 11, 2019), <https://www.latimes.com/california/story/2019-10-11/california-bans-for-profit-prisons-and-immigrant-detention-facilities> [<https://perma.cc/9LL3-UEUK>].

164. SILKY SHAH, UNBUILD WALLS: WHY IMMIGRANT JUSTICE NEEDS ABOLITION 167 (2024).

165. IMMIGRANT LEGAL RES. CTR., AB 32 EN BANC DECISION, AT A GLANCE 1 (2022), [https://www.ilrc.org/sites/default/files/resources/ab-32\\_breakdown\\_-\\_september\\_2022.pdf](https://www.ilrc.org/sites/default/files/resources/ab-32_breakdown_-_september_2022.pdf) [<https://perma.cc/MGB7-KL4K>].

166. *Id.*

167. *Id.*

168. SHAH, *supra* note 164, at 167.

169. *Id.* at 171.



individuals for federal civil immigration violations.<sup>170</sup> The Illinois Way Forward Act also requires existing contracts to be terminated.<sup>171</sup> Legal scholars Yuri Han and Katrina Landeta argue “that while legislation like AB 32 may face legal challenges, such legislation can work in tandem with other advocacy efforts to abolish carceral systems that have profited off the imprisonment of migrants and communities of color.”<sup>172</sup>

Lawyers, directly impacted individuals, and their communities can also work to reduce immigration detention on the local level through advocacy aimed at shutting down local immigration detention centers by ending ICE contracts with local government entities. For example, advocates succeeded in getting Berks County Residential Center, an immigration detention center in Pennsylvania, shut down.<sup>173</sup> The termination of the contract between ICE and Berks County was announced in November 2022 after years of advocacy by the Shut Down Berks Coalition, a group of organizations and individuals who began campaigning against the facility in 2015.<sup>174</sup> The Shut Down Berks Coalition used diverse tactics including civil disobedience; advocacy at the local, state, and federal levels; rallies; and media outreach.<sup>175</sup>

Similarly, in February 2023, advocates in California with the Yuba Liberation Coalition (YLC) succeeded in ending ICE detention at Yuba County Jail.<sup>176</sup> The YLC published a report describing the tactics they used, including community engagement and education, legal/organizing partnerships, and local and federal advocacy.<sup>177</sup> In the report, YLC describes their strategic decisions as well as advice about best practices for advocates engaged in similar work elsewhere.<sup>178</sup> Silky Shah, the executive director of the Detention Watch Network (DWN), “a national coalition building power . . . to abolish immigration detention in the United States,” observed that “[t]he choice to focus on specific facilities, the call for

170. 5 ILL. COMP. STAT. ANN. 805/15 (LexisNexis 2022).

171. *Id.*

172. Yuri Han & Katrina Landeta, *How States Can Play a Role in Abolishing Immigration Prisons*, 38 CHICANX-LATINX L. REV. 125, 133 (2022).

173. Jean Paik & Avalon Hinchman, *A Reverberating Victory: Shut Down Berks and the Fight for Immigrant Liberation*, 34<sup>TH</sup> ST. MAG., (Jan. 20, 2023), <https://www.34st.com/article/2023/01/shut-down-berks-immigrant-prison-detention-center-coalition-migration-ice-facility> [<https://perma.cc/RJ7R-YC5G>].

174. *Id.*

175. *Id.*

176. Laura Duarte Bateman, Deborah Boehm, Minju Cho, Eunice Hernández Chenier & Kristen Perez, *The Last of Its Kind in California: Lessons from the Termination of the ICE Contract at the Yuba County Jail*, YUBA LIBERATION COALITION 4 (2023), [https://www.ccijustice.org/\\_files/ugd/733055\\_826a0220610443b3a5bc3b6cee7269a4.pdf](https://www.ccijustice.org/_files/ugd/733055_826a0220610443b3a5bc3b6cee7269a4.pdf) [<https://perma.cc/GR82-MKFV>].

177. *Id.* at 20–41.

178. *Id.* at 19–24 (describing strategic decisions related to community engagement), 25 (describing best practices for in-person events), 27–29 (describing strategic decisions related to communications), 29–35 (describing strategic decisions related to legal/organizing partnerships and federal advocacy), 36–38 (describing best practices when briefing congressional offices and doing advocacy with D.C. officials), 39–41 (describing strategic decisions related to local advocacy).

shutdown, and the multipronged campaigns incorporating organizing, legal, and advocacy tactics proved to be the most effective strategy and one that has been replicated in localities across the country.”<sup>179</sup>

DWN provides guidance to advocates involved with organizing to shut down local immigration detention centers.<sup>180</sup> DWN advises that “[w]hile winning the shutdown of a detention facility is a feat for the community, we must demand that the closures be conducted justly,” which includes “[p]ressuring ICE to release people upon closure instead of transferring them to another detention center. . . .”<sup>181</sup> DWN highlights the connections between detention in the immigration system and the criminal legal system: “We must work in solidarity to ensure that the closure of a jail, prison, or detention center leads to permanent reduction in local carceral capacity, rather than the recycling of capacity for continued incarceration in other contexts.”<sup>182</sup>

### CONCLUSION

When deciding to attempt an unauthorized entry, prospective migrants are making complex decisions informed by their values and their perceptions of the U.S. immigration system. Despite harsh criminal and civil penalties for unauthorized migration, migrants are not deterred. Understanding the values motivating migration decisions helps explain why U.S. immigration law does not have a large deterrent effect. The fact that U.S. immigration law lacks a deterrent effect, while also being viewed by migrants as illegitimate, provides further impetus to decriminalize unauthorized entry and reentry and end civil immigration detention. Understanding the decision-making processes of unauthorized migrants will help formulate fairer and more just immigration laws and policies.

Further research is necessary to better understand migrant decision-making processes and the effect of U.S. immigration law and policy. Developing a nuanced view of migrant decision-making that goes beyond the paradigm of deterrence requires understanding migrants’ diverse values and social contexts. Additional research on understudied populations is especially vital.<sup>183</sup> Insights from disciplines outside of legal academia will help explain the role the law plays in the lives of migrants. For example, additional research about migrants’ knowledge of

179. DETENTION WATCH NETWORK, *About Detention Watch Network*, <https://www.detention-watchnetwork.org/about> [<https://perma.cc/9ZJR-LUZ7>] (last visited Mar. 20, 2024); SHAH, *supra* note 164, at 162.

180. Gabriela Viera, *If You Build It, ICE Will Fill It: The Link Between Detention Capacity and ICE Arrests*, DETENTION WATCH NETWORK 8–9 (2022), [https://www.detentionwatchnetwork.org/sites/default/files/reports/If%20You%20Build%20It%2C%20ICE%20Will%20Fill%20IT\\_Report\\_2022.pdf](https://www.detentionwatchnetwork.org/sites/default/files/reports/If%20You%20Build%20It%2C%20ICE%20Will%20Fill%20IT_Report_2022.pdf) [<https://perma.cc/K4Z5-P4LK>] (last visited June 23, 2024).

181. *Id.*

182. *Id.*

183. Amuedo-Dorantes, Pozo & Puttitanun, *supra* note 49, at 1845 (arguing that undocumented migrants from Central America and the Caribbean are understudied populations in immigration deterrence research).

U.S. immigration law would be helpful in determining what prospective migrants know in advance of crossing and what types of information are most influential in their ultimate migration decision.

By highlighting research demonstrating that immigration law does not have a significant deterrent effect, scholars and activists can challenge the use of deterrence logic as a façade to legitimate cruelty to migrants, especially as that cruelty disproportionately affects migrants of color. Undermining the legitimacy of the immigration enforcement system, and revealing its underlying goal of harming migrants, clarifies the moral imperative to end criminal prosecutions of those charged with immigration violations and to abolish immigrant detention. Setting aside the confines of a deterrence-based approach to immigration law will give scholars and activists the space necessary to envision how the law can be used to create a future for all migrants consistent with the principles of equality and inherent human dignity.