

## IT'S TIME FOR AN IMMIGRATION JURY

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### INTRODUCTION

Immigration law and policy alternates between periods of tolerance for law breaking and heightened law enforcement. The cycles are corrosive in myriad ways. For instance, law is often made in the high-enforcement moments, but the changes tend to be permanent and they make the law more arbitrarily harsh. The high-enforcement moment passes, bad laws stay on the books, and still an undocumented population re-emerges in some form. The cycle<sup>1</sup> should be broken, but breaking it requires a new strategy. Rather than ensure that unlawfully present migrants are all deported, never permitted to arrive, or eventually legalized en masse, we need a robust and individualized method to legalize productive unlawful immigrants on an ongoing basis. If comprehensive immigration reform is to be lasting, values like earned citizenship and forgiveness—not just enforcement—must be institutionalized.

This approach differs from what Congress has in mind at the moment. Comprehensive immigration reform law will emerge—if at all—from the following bargain: conservatives will agree to legalize millions of “illegal” immigrants in exchange for liberals’ agreement to more robust immigration enforcement measures.<sup>2</sup> (The supply of visas for low-wage workers may also expand, but this is less certain.<sup>3</sup>) The bargain has been elusive for so

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<sup>1</sup> Scholars have noticed the pattern, but have yet to come up with a sustainable solution to ameliorate it. See, e.g., Hiroshi Motomura, *What Is “Comprehensive Immigration Reform”? Taking the Long View*, 63 ARK. L. REV. 225, 237 (2010).

<sup>2</sup> See Mark Landler, *Obama Urges Speed on Immigration Plan, but Exposes Conflicts*, N.Y. TIMES (Jan. 29, 2013), <http://www.nytimes.com/2013/01/30/us/politics/obama-issues-call-for-immigration-overhaul.html>. S. 744, the bill produced by the “Gang of Eight” bipartisan Senators working towards a comprehensive immigration reform bill, comports with the Obama administration’s framework for immigration reform in providing for more border enforcement, increased employer enforcement, an expansion in visas, and amnesty for most of the existing undocumented population. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013); Office of the Press Sec’y, *Fact Sheet: Fixing Our Broken Immigration System so Everyone Plays by the Rules*, WHITE HOUSE (Jan. 29, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules> [hereinafter Fact Sheet].

<sup>3</sup> S. 744 contains two different temporary work visa programs for low-wage workers: the “Blue Card” for agricultural workers, and the W visa that applies to a broader range of occupations not requiring a bachelor’s degree. Notably, the W visa program sets a strict limit on how many W visas may be allocated to construction work. The construction industry has a long history of employing recent

many years for typical legislative reasons (it requires each side to compromise core principles and antagonize critical constituencies), and a less common one: it is haunted by the eleven million undocumented people living in the United States. Their presence testifies to the failure of the 1986 reform bill that granted amnesty to about three million.<sup>4</sup> This time, all parties agree that the future should be different. Comprehensive reform must avoid recreating a large population of “illegal” immigrants in subsequent decades.

Yet proposed reforms make this population likely to reappear, in part because the measures designed to ensure a future without “illegal” immigrants cannot easily adapt to dynamic shifts in migration and enforcement patterns over time.<sup>5</sup> The source of immigrants will change, as will the methods used to evade immigration laws. In addition, the level of enforcement will oscillate<sup>6</sup> because the will to stop otherwise law-abiding people from working is challenging to sustain. These factors, coupled with the political difficulty of creating and properly calibrating the number of visas for low-wage workers and ensuring that such visas remain more attractive than the steadily growing underground economy,<sup>7</sup> may eventually facilitate the renewed growth of a large migrant population that lives in the United States outside the law.<sup>8</sup>

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immigrants, and a more recent tradition of employing recent immigrants without legal status. *See* S. 744 §§ 2211, 4701. The members of the House of Representatives who have been working on an immigration reform bill have been unable to reach a consensus on guest workers, underscoring how contentious S. 744’s program may be. *See* Caren Bohan, *Lawmakers Struggle over Guest Workers in Immigration Bill*, REUTERS (May 3, 2013, 3:41 PM), <http://www.reuters.com/article/2013/05/03/us-usa-immigration-congress-idUSBRE9420W920130503>; Julie Hirschfeld Davis & Kathleen Hunter, *Guest-Worker Visas Sticking Point on Immigration Rewrite*, BLOOMBERG (Mar. 22, 2013, 5:45 PM), <http://www.bloomberg.com/news/2013-03-21/guest-worker-visas-sticking-point-on-immigration-rewrite.html>; *see also* Ashley Parker, *In Immigration Bill Talks, House Group Raises Voice*, N.Y. TIMES (May 10, 2013), <http://www.nytimes.com/2013/05/11/us/politics/house-group-works-on-own-version-of-immigration-bill.html>.

<sup>4</sup> *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1179 (5th ed. 2009).

<sup>5</sup> *See, e.g.*, Motomura, *supra* note 1, at 237 (noting that the pattern of ad hoc mass legalizations in the immigration system is in part a response to the fact that “immigration policy choices are very difficult to anticipate in advance”).

<sup>6</sup> Immigration enforcement has roughly tracked the economy’s fluctuations. Current history appears to be no different. As the economy began deflating, enforcement increased. *See* CHERYL SHANKS, IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY, 1890-1990, at 239 (2001); *infra* notes 29–30 and accompanying text.

<sup>7</sup> *See* discussion *infra* notes 22–24 and accompanying text.

<sup>8</sup> For a similar set of predictions and a radically different reform prescription, *see* Eric Posner, *There’s No Such Thing as an Illegal Immigrant*, SLATE (Feb. 4, 2013, 4:04 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/02/immigration\\_reform\\_illegal\\_immigrants\\_are\\_really\\_guest\\_workers.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/02/immigration_reform_illegal_immigrants_are_really_guest_workers.html).

The “Gang of Eight’s” pending comprehensive immigration reform bill makes significant strides in many of these areas, but I and others<sup>9</sup> suspect that this will not be enough to avoid a rerun of the past—at least, in the long term. Indeed, the Congressional Budget Office (CBO) confirmed that the bill passed by the Senate will reduce—but not stanch—the flow of undocumented migrants into the United States.<sup>10</sup>

Perfect immigration enforcement is not practicable, and mismatches between visa supply and demand are inevitable. As a consequence, we will remain vulnerable to the buildup of a large undocumented population until we adopt an ongoing method to correct for these policy imperfections. But how? This Essay proposes a novel, politically moderate solution to this problem: let a jury of citizens decide the fate of future “illegal” immigrants.<sup>11</sup> A jury charged with the ability to legalize long-standing and productive “illegal” aliens on an individual basis would have the sustained democratic legitimacy to correct for the mismatch between enforcement practices, migration flows, and visa demand on an ongoing basis. The jury’s political authority would resist efforts to erode the procedure over time, helping to ensure that America’s “illegal” population stays in check in a manner that respects the interests and contributions of undocumented immigrants.<sup>12</sup> The jury may be the key to breaking the vicious cycle.

Part I offers pragmatic reasons an immigration jury procedure should be adopted in a comprehensive immigration reform package. Part II sketches the basic structure that an immigration jury should have and the criteria it should use to determine who stays and who goes. Part III addresses some obvious objections to this proposal: its effect on incentives to migrate, its cost, and its potential to produce biased decisions or inconsistent outcomes.

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<sup>9</sup> See, e.g., *id.*

<sup>10</sup> The CBO estimated that the Bill will reduce the projected rate of undocumented migration by between 33% and 50%. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Sen. Patrick J. Leahy, Chairman, Comm. on the Judiciary 5 (July 3, 2013), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/s744aspassed.pdf>.

<sup>11</sup> Current law delegates unreviewable discretion to the Attorney General to grant a form of immigration amnesty to deportable immigrants, and this grant has not been found inconsistent with Congress’s ability to delegate its authority. So long as the jury procedure is guided by legal criteria defined by Congress, I do not expect it to pose a nondelegation problem either. Another possible roadblock, the Administrative Procedure Act, does not apply to immigration proceedings. See *Ardestani v. INS*, 502 U.S. 129, 133–34 (1991) (explaining that immigration proceedings are not subject to the Administrative Procedure Act). A full engagement with these issues is beyond the scope of this Essay.

<sup>12</sup> In a companion piece, I use the immigration jury as an example of the kinds of democracy-reinforcing immigration reforms that should be pursued and imagined. See Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49, 52, 75, 77 (2013).

## I. WHY AN IMMIGRATION JURY?

Legislation granting a mass immigration amnesty should avoid the need for another mass amnesty in the future. Mass amnesties, and the large undocumented populations that precede them, are socially, politically, and legally costly. For example, building political support for an amnesty can require blunt and inhumane enforcement efforts in the years preceding its adoption. The Obama Administration's record number of deportations,<sup>13</sup> for instance, set the stage for the serious discussion of comprehensive immigration reform—and amnesty—now underway.

A. *The Current Dilemma*

Politicians promise that amnesty and the large “illegal” populations they erase are a thing of the past, but there are good reasons to be skeptical. As long as wide global disparities in economic opportunities continue to exist, the supply of United States work visas does not consistently match the demand to migrate, enforcement remains imperfect, and the United States continues to confer some modicum of rights to migrants (as we should), we will continue to have a population of undocumented people. If the anticipated immigration reform strategies are put into practice, the population may grow large enough that a mass amnesty is required anew to correct the problem.<sup>14</sup> The reasons for this are complex, but at base they have to do with economics and the challenge of regulating immigration flows in a culture that believes (at least to some degree) that immigration is a good thing and that immigrants are not complete outsiders.<sup>15</sup>

Currently proposed comprehensive reforms deny that history will repeat itself. Reformers claim that future “illegal” migration flows will be stemmed by more forceful and sophisticated immigration enforcement, along with an expansion in the visa supply.<sup>16</sup> Each tactic meets significant difficulties in the long run. Enforcement efforts face a few challenges. First, the wage gap and opportunity differential between nations incentivizes evasion of enforcement efforts and the development of technologies

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<sup>13</sup> See *Obama Administration Sets Deportation Record: 409,849*, USA TODAY (Dec. 21, 2012, 5:27 PM), <http://www.usatoday.com/story/news/nation/2012/12/21/record-2012-deportations/1785725> (noting that “[f]or the fourth year in a row, the Obama administration set a record for the number of people it deported” and that as of the press date, the administration had deported 409,849 people in the year 2012 alone); Molly O’Toole, *Analysis: Obama Deportations Raise Immigration Policy Questions*, REUTERS (Sept. 20, 2011, 8:21 AM), <http://www.reuters.com/article/2011/09/20/us-obama-immigration-idUSTRE78J05720110920> (documenting that the Obama administration has “deported about 1.06 million [people] as of September 12, [2011,] against 1.57 million in [President George W.] Bush’s two full presidential terms”).

<sup>14</sup> See Posner, *supra* note 8.

<sup>15</sup> See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* 12, 91 (2006) (theorizing the in-between legal state that aliens occupy in the United States and describing the consequences of that status).

<sup>16</sup> See sources cited *supra* note 2.

designed to achieve that end.<sup>17</sup> Combating state-of-the-art evasive technologies requires *sustained* political will and resources. Yet the zeal for immigration enforcement is not static over time, and the level of enforcement cannot be permanently fixed by the Congress that signs off on a mass amnesty.<sup>18</sup> Separation of powers and federalism ensure that some significant degree of enforcement discretion remains, no matter how harsh or sophisticated enforcement laws are when consecrated.<sup>19</sup> Future Congresses, less incensed about immigration law evasion than the enacting Congress, may balk at funding enforcement at the level desired by the enacting Congress or at adapting the law to cutting-edge evasive techniques.<sup>20</sup>

Fluctuations in enforcement levels also negatively affect the viability of any guest-worker program. If enforcement falls off, “illegal” migrants might become preferable to guest workers, particularly if the guest-worker program is accompanied by strict labor regulations.<sup>21</sup> Furthermore, in a low-

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<sup>17</sup> It is true that increased enforcement vigilance and technologies raise the price of evasion and that if the price rises enough, evasion will stop. But just as with any technology, we can reasonably assume that the price of evasion will drop over time. Moreover, the use of technology to drive up costs of “illegal” migration can only work effectively if there is a sustained commitment of resources devoted to keeping enforcement technology at the leading edge.

<sup>18</sup> This is a problem that to some degree befalls all laws and policies that rely on discretionary spending. See generally WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 446–51 (4th ed. 2007). Delegation of responsibility to an administrative agency is no solution either. Agency budgets can be cut, or Congress or the President can signal through subsequent legislation or other means a change in course. In our legal system, agencies are simply not independent enough to play the adaptive role that is needed to resolve this problem in the future. See Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 *STAN. J. C.R. & C.L.* 23, 36–41 (2009) (discussing the way in which the administrative state is subservient to Congress and the Executive and showing how this is still more true of agencies charged with immigration tasks).

<sup>19</sup> See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012) (permitting Arizona to require its police officers to check the immigration status of any person lawfully stopped and whom the officer has reasonable suspicion to believe is in the United States unlawfully).

<sup>20</sup> This is rational for the economic reasons that Posner describes. See Posner, *supra* note 8. The propensity for a post-reform decline in immigration enforcement has not been lost on the Gang of Eight. S. 744 contains border enforcement triggers for the bill's amnesty provisions, mandatory electronic employment verification, and enhanced Social Security card security features—methods that are cumulatively intended to tie discretionary actors to the mast. Still, even admitting for the sake of argument that these strategies would be effective at stemming undocumented migration in the long run if implemented as written, I doubt that these strategies will survive intact—de facto or de jure—over the next few decades.

<sup>21</sup> S. 744's guest-worker provisions emerged out of a compromise between the labor and business lobbies. Almost by definition, then, the bill does not match expected business demand for migrant labor. For example, in a concession to labor, construction workers eligible for temporary worker programs have been capped. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 220(h)(5) (2013).

enforcement period, a migrant may prefer to be undocumented, particularly if a guest-worker visa does not allow the worker to change employers.<sup>22</sup>

Indeed, the challenge of employment regulation is broader and more bewildering than reformers maintain. There is evidence that an increasing number of American citizens are choosing to work as undocumented people do—off the books.<sup>23</sup> Social scientists argue that this “gray” economy has been growing steadily over the last two decades as a way to evade taxation and regulation. This general expansion of the informal economy suggests that eliminating the “jobs magnet” that draws undocumented migrants to the United States will be more complex than Congress imagines.<sup>24</sup> It is difficult to improve regulatory compliance or impose new regulations where regulation is evaded altogether.

Another complication: Nearly 45% of the current undocumented population entered legally and overstayed their visas.<sup>25</sup> “Interior” enforcement of immigration rules is a challenge even in high-enforcement periods in part because of deeply held civil-liberties norms—antidiscrimination and due process, for instance.<sup>26</sup> But vindicating those important norms tends to facilitate migration outside the law.

This last point reveals a broader class of issues that undermine the efficacy of enforcement efforts and guest-worker programs in the United States: our system of values and rights. For good reasons we resist treating migrants as full outsiders in the manner of, say, Dubai,<sup>27</sup> but our refusal to do so complicates our ability to minimize “illegal” migration and the development of a sizable “illegal” population.<sup>28</sup>

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<sup>22</sup> See *id.*

<sup>23</sup> See James Surowiecki, *The Underground Recovery*, NEW YORKER (Apr. 29, 2013), [http://www.newyorker.com/talk/financial/2013/04/29/130429ta\\_talk\\_surowiecki](http://www.newyorker.com/talk/financial/2013/04/29/130429ta_talk_surowiecki) (collecting social science evidence showing significant growth in the informal economy prior to and during the Great Recession).

<sup>24</sup> See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744 § 3101(c) (requiring all employers to verify their employees legal right to work in the United States via an electronic database).

<sup>25</sup> See Pew Hispanic Ctr., *Modes of Entry for the Unauthorized Migrant Population*, PEW RESEARCH CENTER (May 22, 2006), <http://pewhispanic.org/files/factsheets/19.pdf>.

<sup>26</sup> For a discussion of the ways that our commitments to certain progressive legal values complicate our ability to perfect immigration enforcement, see Morales, *supra* note 18, at 32, 55–71.

<sup>27</sup> See, e.g., Alisha Ticku, *Dubai Dreams: Exploring National Constructions of “Citizen” and “Migrant-Other” in the UAE*, in DOCUMENTING THE UNDOCUMENTED: REDEFINING REFUGEE STATUS 77, 83 (Veronica P. Fynn ed., 2009) (In Dubai, “[t]his fear of being outnumbered is regulated by increased restrictions of the social and economic impact that migrants may have on the culture of Emirati nationals.” In particular, South Asians who are considered to be “migrant-others” are subjected to “structural racial, class, and gender based violence.”).

<sup>28</sup> See generally *id.*

### B. Proposed Solutions

One answer to all this is what we already do—cycle between periods of tolerance for undocumented migration and periods of restriction. The pattern is established enough that Adam Cox and Eric Posner have dubbed this cycle the “illegal immigration system” and defended it on economic efficiency grounds.<sup>29</sup> In their view, the immigration regime already self-adjusts to meet labor demands: deportations always spike in economic downturns when demand for labor drops, and tolerance for “illegal” presence grows as the economy revives.<sup>30</sup>

Perhaps this is efficient if we consider only the easily quantifiable costs, but doing so omits key data—most prominently, that the growth and existence of a population outside the law is politically, socially, and legally corrosive. For example, because the racial makeup of this “illegal” group is decidedly nonwhite, and mostly Latino, the escalation of enforcement that Cox and Posner praise as efficient self-regulation reinforces the social belief that Latinos are generally “criminals” and “invaders.”<sup>31</sup> Mass deportation stigmatizes all Latinos in the same way that mass incarceration stigmatizes all African-Americans. The law’s validation of this message should be deeply troubling, not least because Latinos are now the largest minority group in the United States and they predominate in many low-status, low-wage industries. The flipside is also problematic. Mass deportation is the pound of flesh extracted in exchange for mass amnesty, but the social meaning of amnesty has a demeaning valence, too. We grant amnesty, because we can’t actually “deport them all”—the mass deportation system has some practical limits.<sup>32</sup> Or we grant amnesty because it is the generous and American thing—the charitable thing—to do. Left underacknowledged is a more socially empowering message: undocumented people *deserve* amnesty. And the prevailing rhetoric also covers up the hard truth that the economy as a whole has benefitted substantially from the labor undocumented workers have provided under exploitative conditions.<sup>33</sup>

Though the defense of “illegal” immigration as a functional, logical, and efficient sub rosa system for managing low-wage labor may have abstract appeal, politicians and other immigration experts are right to want

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<sup>29</sup> Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 813 (2007); see also Posner, *supra* note 8.

<sup>30</sup> See Cox & Posner, *supra* note 29, at 828; Posner, *supra* note 8.

<sup>31</sup> See, e.g., Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1578–79, 1595 (2011).

<sup>32</sup> As the Obama Administration press release making the case for a path to citizenship for undocumented people states, “It is just not practical to deport 11 million undocumented immigrants living within our borders.” Fact Sheet, *supra* note 2.

<sup>33</sup> For a discussion of these aspects of the “illegal immigration system,” see, for example, Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1766–68 (2012).

to manage migration through legal means. The social costs of the status quo are unacceptable.

Though assessing the precise probability that a sizeable undocumented population will amass again is beyond the scope of this Essay, the discussion above presents some reasons why the current aggressive enforcement posture is unlikely to be sustained in the long run, along with reasons to believe that demand to migrate may exceed the supply of legal visas. If these claims hold, and assuming that large undocumented populations and periodic large-scale immigration amnesties are corrosive, any lasting solution requires a permanent method for converting desirable “illegal” migrants to legal migrants at a *rate* that can keep up with the dynamic character and pace of “illegal” migration.

To some extent, current law provides this procedure,<sup>34</sup> but the qualifying criteria are far too restrictive to serve this Essay’s identified purpose. This kind of individualized conversion of “illegal” migrants to legal ones used to be a much more prominent part of our system, but over the course of the twentieth century, such methods have been drastically curtailed. The reasons are political and institutional. The status conversion is now viewed politically as a sop to undesirable law breakers (this is precisely why it has been so difficult to grant a mass amnesty), and thus neither Congress nor the Attorney General, both of which have the authority to grant relief, can be seen doing so at high enough levels, on an ongoing basis.<sup>35</sup>

Enter the jury: A demographically representative jury has a uniquely authoritative brand of political legitimacy in the United States. Tocqueville linked the legitimating force of the jury with universal suffrage, dubbing both “a consequence of the dogma of the sovereignty of the people . . .”<sup>36</sup> A representative jury would thus have more—and more institutionally sustainable—authority to convert “illegal” aliens into legal ones than any

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<sup>34</sup> For discussion, see *infra* notes 43–44 and accompanying text.

<sup>35</sup> The passage of private bills (laws granting visas to particular deportable persons) in substantial numbers by Congress used to facilitate this conversion in the early twentieth century. As suspension and later cancellation of removal took the place of private bills, those remedies were circumscribed when Congress perceived the executive to be too lenient in its grants. See Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175, 190–95 (2010) (detailing the various cancellation procedures and their evolution over the second half of the twentieth century); Elwin Griffith, *Admission and Cancellation of Removal Under the Immigration and Nationality Act*, 2005 MICH. ST. L. REV. 979, 1023–26 (discussing a congressional report that criticized *In re O-J-O* for “holding that the removal of an alien who had become acclimated to the United States would constitute sufficient hardship to justify suspension of deportation”).

<sup>36</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 261 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2000) (1835). More recently Paul Kahn has argued that more than the executive pardon (the implicit logic of locating cancellation of removal in the Attorney General’s discretion), jury nullification is the “closest thing we have today to the [monarch’s] power to create the exception to law . . .” PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 40 (2011).



other existing political body.<sup>37</sup> For example, consider the political difficulty in retracting authority from a jury to grant or deny lawful status to an “illegal” alien once that discretion had been institutionalized.<sup>38</sup> The argument has more force when you consider the desire many small localities have evidenced to take control over undocumented migration.<sup>39</sup> Juries would grant citizens that desired control, but in a sufficiently serious and deliberative setting where we could expect the citizenry to exercise the power judiciously, as they do in other contexts.<sup>40</sup>

In addition, the jury has the potential to increase greatly the capacity of the immigration regime to grant relief. Giving the jury authority could facilitate “plea bargains” to noncitizens with a high likelihood of success, and at times where anti-immigrant animus is at its ebb.<sup>41</sup> In periods of high enforcement, the jury would perhaps be less inclined to grant relief and the government less willing to plea bargain. If the jury was functioning properly during more generous periods, however, the number of potential undocumented people affected by this fact should not be great. Moreover, the greater unwillingness of the jury to grant relief during high-enforcement periods would mark it as responsive to the sentiments of the moment, but the deliberative and individualized character of the jury procedure would help to shield the jury from acting on a generalized hostility, in the way that legislatures sometimes can.<sup>42</sup>

With the authority to legalize “illegal” migrants secured through this powerfully democratic institution, the questions become ones of design: What criteria should govern the jury’s decision to grant or deny relief? What kind of visa should the jury be able to confer? Should an undocumented person be able to petition for status, or should the jury only be able to provide relief from deportation? Should jury decisions be subject to appellate review? What should the jury look like?

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<sup>37</sup> I make this argument in a more thorough and generalized way on behalf of deliberative democratic institutions in another article. *See generally* Morales, *supra* note 18. In that piece I also develop the argument that deliberative democratic institutions, like a jury, have the potential to significantly change political attitudes towards undocumented people over time.

<sup>38</sup> The claim is not that this is impossible, but rather that it is significantly more challenging than removing discretion from the administrative apparatus, as the restriction of cancellation of removal over many years has shown.

<sup>39</sup> *See* Morales, *supra* note 18, at 70 (discussing the psychological need that local immigration enforcement laws satisfy).

<sup>40</sup> *See* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 147–68 (2007) (comparing verdicts of juries and judges in a variety of types of cases).

<sup>41</sup> Just as in other contexts, having a lay jury make a legal determination increases administrative costs and uncertainty. The government may choose to avoid this cost during periods when anti-immigrant animus is low. Of course, the immigrant would also be happy to be granted relief without having to face the uncertainty of the jury.

<sup>42</sup> *See* Arizona v. United States, 132 S. Ct. 2492, 2497–98 (2012); Mary Fan, *Rebellious State Immigration Enforcement and the Foreign Affairs Power*, 89 WASH. U. L. REV. 1269, 1280–82 (2012); Morales, *supra* note 18, at 66.

## II. DESIGNING AN IMMIGRATION JURY

Institutional design choices turn on feasibility constraints, procedural norms, and the designer's ultimate goals. The devil is usually in the details, which would eventually emerge through political negotiation and compromise. This Essay's aim is not to account here for every technicality, but rather to identify a few particularly important design issues and sketch a preferred design, or provide a framework for thinking about what design would be best.

A. *Criteria for Legalization*

Current law permits the Attorney General to cancel removal of an otherwise deportable noncitizen if the noncitizen can prove tenure of long duration (ten years), good moral character, the absence of a significant criminal record, and that removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."<sup>43</sup> This last criterion is the critical hurdle to relief;<sup>44</sup> the question is currently committed to the Attorney General, and it is the judgment I think juries ought to make.

This standard is ill-suited to allow legalization to keep pace with the growth of long-standing "illegal" residents for two reasons: it is unnecessarily restrictive (the duration of residence, for instance, should be lower) and requires decisionmakers to pity the migrant, rather than acknowledge her contribution to the United States. The hardship in deportation criteria can be demeaning because it rewards the migrant with the best ("exceptional and extremely unusual") sob story. This requirement frames the request for permission to remain in the United States as a function of sovereign grace, rather than a recognition that a long-term migrant has earned a place in the polity.<sup>45</sup> The difference between the two is stark: one standard asks the citizenry to forgive a trespass against them because of the pain that deporting an outsider will inflict on one of their own, while the other asks that a trespass be overlooked because the person has, in fact, *become* one of their own—these migrants are "Americans . . .

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<sup>43</sup> 8 U.S.C. § 1229b(b)(1)(D) (2006).

<sup>44</sup> The hardship determination is made at the discretion of the Attorney General, *see id.*, who has delegated the determination to immigration judges. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 4, at 602–05 (discussing immigration court adjudication of cancellation of removal). The hardship determination is not subject to appellate review by Article III courts. *See, e.g.*, Delgado v. Holder, 674 F.3d 759, 765 (7th Cir. 2012) (holding that the court lacks jurisdiction to review hardship determination unless the appellant brings a constitutional or legal challenge).

<sup>45</sup> *See* Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 140 (2011).

in every single way but one: on paper,” as President Obama eloquently put it.<sup>46</sup>

The hardship standard also poses cognitive problems that impede the granting of relief. “Even in the absence of fault, juries tend to attribute some measure of blame to a person who has suffered.”<sup>47</sup> Thus, orienting the proceeding around the fact of suffering would impede the jury’s ability to view the immigrant as worthy of relief. By contrast, a standard that elicits stories of a migrant’s contributions to the United States—working, paying taxes, etc.—permits a jury to see past a migrant’s legal violation to welcome her into our community. A standard like “substantial contribution to the United States” could cover the broad range of potential contributions that juries might wish to recognize and reward.<sup>48</sup>

### B. Composition

The modern petit jury of twelve citizens drawn from a representative cross section of the community is best suited to guard against prejudicial decisionmaking<sup>49</sup> (in juries of at least twelve, the individual biases are usually cancelled out) and provide the strongest possible degree of democratic legitimacy. A less resource-intensive alternative is to have a *petite* jury of three<sup>50</sup> drawn from a large standing pool (of two hundred,

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<sup>46</sup> President Barack Obama, Remarks by the President on Immigration (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>. Concededly, however, granting relief from deportation in a setting that acknowledges the underlying legitimacy of the immigrant’s legal violation and the power to deport necessarily contains an element of political and legal forgiveness. My point is that earned citizenship should take its proper place alongside forgiveness in this setting.

<sup>47</sup> VIDMAR & HANS, *supra* note 40, at 235. See also *id.* at 236 & n.61 (citing studies of jury behavior which find that people impute blameworthiness on people to whom bad things happen).

<sup>48</sup> This basis for cancellation is to some degree already awkwardly embedded in the law of hardship, which recognizes the value of contributory criteria in the so-called *Anderson* factors. These factors determine whether a qualifying relative has experienced exceptional and extremely unusual hardship. The factors include the following:

1. family ties in the United States and abroad;
2. length of residence in the United States;
3. condition of health;
4. conditions in the country to which the alien is returnable—economic and political;
5. financial status—business and occupation;
6. the possibility of other means of adjustment of status;
7. special assistance to the United States or community;
8. immigration history; [and]
9. position in the community.

O-J-O, Int. Dec. #3280, at 383 (Bd. of Immigration Appeals June 14, 1996). But the forms of contribution that are recognized are unduly cabined, excluding, for instance, the possibility that a migrant’s contribution could be raising a child, caring for a sick relative, or simply working hard at a demanding job. Moreover, the contribution criteria cannot on its own support relief under the current standard because a movant has to show hardship to a specified set of U.S. citizens or legal permanent residents.

<sup>49</sup> See VIDMAR & HANS, *supra* note 40, at 74–75 (“Even if jury members have strong biases, diversity [of jurors] ensures a range of biases that could cancel each other out.”).

<sup>50</sup> The feasibility advantages of this smaller jury are readily apparent. Accommodating a jury of three is likely not to require the kind of expensive facilities that a petit jury would, but the smaller jury

perhaps) that receives some antidiscrimination training and whose members are called to serve periodically and at random over the course of a multimonth period of service. To streamline procedures still further while maintaining quality, the pool of jurors might be culled from those who have previously served on a federal jury. These citizens have all been vetted through the adversary system and have a concrete understanding of the serious responsibility that lay adjudication entails.

Antidiscrimination training for these *petite* jurors is critical, as the small size of the juries means that they will often be homogenous. The training need not be extensive, however. Jurors might be required to take an implicit association test that reveals their latent biases, and then be led in a group discussion of the results by trained diversity consultants.<sup>51</sup> The importance of acting in an unbiased manner can be reinforced once jurors are called to serve by having them swear an antidiscrimination oath prior to beginning their deliberations.<sup>52</sup> These procedures are a second-best substitute for the full debiasing impact of a diverse jury of twelve, but the significant benefits of adopting a jury in some form make this alternative to the standard jury configuration worth considering, particularly in this era of constrained resources.

### C. *Procedural Posture and Remedy*

Cancellation of removal is currently offered as a form of relief from deportation that grants the movant permanent legal residence—a green card. Altering the method of application and the kind of visa awarded would facilitate higher grant rates.

Rather than offer cancellation solely as a form of relief from deportation for those caught in the immigration enforcement system, potential applicants should be permitted to apply affirmatively for this form of relief, like adverse possessors of property. As an inducement to emerge

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still preserves to an important degree the jury model of lay decisionmaking and the attendant patina of democratic legitimacy it offers to the stories that emerge from this procedure.

<sup>51</sup> The leading implicit-bias researchers have long collected data on implicit bias through the web. Recently these researchers have started [projectimplicit.com](http://projectimplicit.com), a website devoted to disseminating their research on implicit bias to a broader audience and to helping train people to be less biased. The diversity training protocols at Project Implicit might be a worthy model for the kind of training needed to ensure unbiased decisionmaking by a nondiverse immigration jury.

<sup>52</sup> Psychological research on implicit racial bias supports the proposition that “[c]onscious exertion to be unbiased may—at least temporarily—reduce implicit bias.” Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 438 (2007). Having jurors swear to abide by an antidiscrimination pledge is intended to elicit this temporary debiasing effect. On the other hand, the presence of a person of color in the juror pool is an even stronger deterrent to bias, a reason why petit juries representing a cross section of the population are the ideal form of citizen participation. See VIDMAR & HANS, *supra* note 40, at 75 (“White people worry about being racist when they’re reminded of it, but when it’s all white people, it just doesn’t occur to them to remember their egalitarian values.” (internal quotation marks omitted)).

from the shadows, such applicants should be granted a procedural advantage vis-à-vis those who only move for cancellation once caught in the immigration system. The incentive could be as strong as a presumption that legal status would be granted if the applicant makes a prima facie showing on all of the criteria. If this advantage is thought to excessively incentivize the initial decision to migrate unlawfully, other less substantial inducements might suffice to motivate affirmative applications.<sup>53</sup>

Additionally, rather than have the jury automatically grant the migrant legal permanent resident status, which puts the applicant on a direct path to citizenship, a longer probationary period for citizenship might both give appropriate deference to the law that the migrant broke and reduce the jury's concerns about "making a mistake" on a particular decision.

Lastly, the government should be given the discretion to bargain around the right to face the jury, as in the criminal context. In periods where the public is only mildly concerned about immigration, the government might have the political space to grant applicants legal status without recourse to the jury. In periods where the public is highly concerned, by contrast, applicants may face the jury at higher rates. This cycling should help to preserve the jury's legitimacy over time, giving citizens tangible control over immigration in periods where they are most upset by it, and saving adjudicative resources when the citizenry is less incensed. The administrative efficiency obtained through bargaining in low-concern periods should also help to maintain the undocumented population at an unproblematic level.

#### *D. Verdict Unanimity and Appellate Review*

The jury should be required to reach a unanimous view on the contribution/hardship question. While a juror voting procedure might expedite deliberations, that efficiency would come at the cost of a much less deliberative environment and would likely marginalize minority perspectives, thus nullifying the antibiasing effect of a diverse juror pool. It is important that jurors feel an obligation to think through the decision to grant or deny relief; they are likely to tread more carefully when they have to engage the views of other jurors. The expediency of majority voting is simply not worth the cost to deliberative seriousness.

Appellate review presents a more challenging design question. Appeals serve a valuable error-correcting function and can ensure uniformity in the application of legal standards that permit a significant degree of jury discretion. But appellate review also imposes costs. In particular, high rates of reversal would undermine the democratic authority of the institution and

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<sup>53</sup> One idea might be to have those who apply for relief from deportation in the form of cancellation be granted the Registered Provisional Immigration Status created by S. 744; those who apply affirmatively, on the other hand, could be granted a Green Card, straight away.

its credibility. Both factors could lead to erosion of the jury's political support over time, support that is crucial to the immigration jury's ability to keep future undocumented populations at a low level.

Under current law, Article III courts have no jurisdiction to review the hardship finding, though they may review the other legal findings that are prerequisites to cancellation.<sup>54</sup> The administrative Board of Immigration Appeals, beholden to the Attorney General, has jurisdiction to review grants or denials of cancellation decisions.<sup>55</sup> Discretionary determinations—like hardship—are reviewed *de novo*, but findings of fact are only reviewed for clear error.<sup>56</sup> This jurisdictional structure should be retained, as it would ease concerns regarding inconsistent outcomes without burdening the United States Courts of Appeals. Nevertheless, the standard of review should become significantly more deferential. A suitable standard would be that “the jury verdict should only be overruled where, on the record, no reasonable adjudicator could have denied—or granted—relief to the movant.” Such a standard gives proper respect to the jury's political authority and makes the introduction of this innovation more politically feasible. Part of the jury's appeal is that citizens have a desire to exert control over immigration. The possibility that control will be diminished substantially on appellate review undercuts this interest. Thus, a deferential standard of review is more feasible. Concerns about bias and accuracy would be better addressed *ex ante* by providing more robust training for jurors.

### III. OBJECTIONS

I address below a few of the most prominent objections to an immigration jury.

#### A. *Incentives*

The main objection to giving a jury the power to grant legal status to a lawbreaking migrant is the same as the argument against granting amnesty *en masse*: it will provide an incentive to migrate unlawfully. Perhaps to some degree it will, but it is important to keep in mind how marginal whatever incentive effect exists in relation to the already powerful incentives to migrate provided by wage and opportunity gaps, particularly for low-wage workers.<sup>57</sup> Moreover, there are still substantial incentives to

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<sup>54</sup> See, e.g., *Romero-Torres v. Ashcroft*, 327 F.3d 887, 890 (9th Cir. 2003).

<sup>55</sup> See 8 C.F.R. § 1003.1(b)(3) (2006).

<sup>56</sup> See *id.* § 1003.1(d)(3)(i)–(ii).

<sup>57</sup> See *Motomura*, *supra* note 1, at 233. If S. 744 passes, paths to legal low-wage immigration will broaden significantly, but this does not mean that undocumented migration will be a thing of the past. The low cap on W visas for construction workers suggests that undocumented people will still flow into that immigrant-dominated sector, and the relatively high transaction costs to become a W-visa-approved business means there will still be significant demand for under-the-table migrant labor even in

migrate lawfully, most prominently the ability to live in the open without constant fear of deportation.<sup>58</sup> Weighed against the marginal effect of this procedure on the incentive to migrate are the social, economic, and political benefits of avoiding another mass amnesty, or worse, a large quasi-permanent population of undocumented migrants.

### B. *Consistency and Bias*

How on earth will the jury apply this procedure consistently and fairly? Assume for a moment that the jury cannot reliably distinguish between the deserving and the undeserving. Even if a significant number of immigrants are improperly granted relief, some of the global benefits of a smaller undocumented population described in Part I will still accrue. Note, too, that a substantial amount of error may be more normatively tolerable in this area because the remedy, like pardons, provides relief for an individual who has already been found to be in violation of the law. Furthermore, the immigration system already tolerates wildly divergent, or even random, outcomes in other contexts, such as asylum and the diversity visa lottery.<sup>59</sup> While objections to these practices are largely valid, the practices still denote our degree of tolerance for inconsistency in the immigration adjudication system. The range of variation that juries will create should fall well within current norms.

It is also important to appreciate that the question of who is desirable for admission to the polity is a political question that admits no fixed answer. While some bases for granting or denying a visa will be objectionable because they run against core political or legal values, juries might legitimately adopt seemingly arbitrary distinctions on the strength of their legal authority to generate norms that are entitled to legal and political respect. Say for instance that, all else equal, a jury denies relief to an immigrant who owns a tattoo parlor and grants relief to an applicant who owns an auto repair shop. While we can certainly articulate reasons for the propriety of the distinction, none seem apt to rise to the task of justifying such a radical difference in outcome. But assuming the jury thought that this was a legitimate ground for distinction, respecting their democratic authority means deferring to the decision, despite the arbitrariness of the

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noncapped industries. *See generally* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 4703 (2013).

<sup>58</sup> People who migrate legally also need not pay hefty smuggling fees. *See Securing the Borders and America's Points of Entry: What Remains to Be Done?: Hearing Before the Subcomm. on Immigration, Refugees and Border Sec. of the S. Comm. on the Judiciary*, 111th Cong. 25–27 (2009) (statement of Dr. Douglas Massey, Professor of Sociology and Public Affairs, Princeton University), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg55033/pdf/CHRG-111shrg55033.pdf> (noting that the “militarization of the border increased the costs of border crossing from \$600 to \$2,200”).

<sup>59</sup> *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007). S. 744 § 2303 eliminates the diversity-immigrant visa lottery, reflecting, along with the new merit-based green card provisions, a shift towards rationalizing immigration law and policy.

distinction. This is akin to the deference the judicial system grants to Congress under rational basis review. As a democratic institution passing on a question of democratic membership, the jury here ought to have a similar degree of leeway.

Those caveats aside, we need not be overly concerned about the jury's performance. Studies of jury decisionmaking establish that jurors do at least as well as judges on most counts.<sup>60</sup> And as the immigration jury becomes a more developed institution, we should expect that it will adopt practices that will improve its ability to make "good" decisions.<sup>61</sup>

### C. *The Resource Question*

In a resources-constrained era, is this really the procedure that should be funded when there are so many other problems with the immigration regime?<sup>62</sup> Two responses: First, *vis-à-vis* other reform proposals that have significant traction in the immigration reform community—such as providing counsel in removal proceedings at public expense<sup>63</sup>—this reform is superior. To be sure, providing migrants with lawyers in removal proceedings will increase process legitimacy and fairness (very important values). But doing so does nothing to address the distorting political effects of a large undocumented population, the phenomenon that helped cause the law to become so harsh that legal representation appears essential. Second, this reform both helps increase the likelihood that another mass amnesty will not be necessary and may help to spark a sustained change in attitude towards immigrants, legal and not.<sup>64</sup> If that happens and the citizenry feels more comfortable devoting fewer dollars to enforcing immigration laws that are directed at stemming what is, for the most part, a benign phenomenon, the costs of this proposal will be more than offset by cuts in border security.

## CONCLUSION

Creating an immigration jury has more than utilitarian benefits. At a time when the Supreme Court has noted the irrationality of the nation's

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<sup>60</sup> See VIDMAR & HANS, *supra* note 40, at 147–68.

<sup>61</sup> *But see* Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1156–57 (2002) (urging that coherence, defined as the meting out of equal punishments to similarly culpable individuals, is best preserved by judges rather than juries and that ensuring this kind of coherence ought to be prioritized through institutional design).

<sup>62</sup> Note that S. 744, Title III, Subtitle E provides for a substantial increase in adjudicative resources, adding 225 immigration judges and 90 Board of Immigration Appeals staff in the three years following enactment. The bill justifies this increase in expenditure as a way to eradicate administrative backlogs, but once those backlogs are cleared, more adjudicative resources may be available to help preside over the claims to be decided by the immigration jury. Funds for these increases come out of the Comprehensive Immigration Reform Trust Fund established in Section 6 of S. 744.

<sup>63</sup> See, e.g., Stephen H. Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel*, 31 ST. LOUIS U. PUB. L. REV. 43, 48 (2011).

<sup>64</sup> See Morales, *supra* note 12, at 75.



immigration discourse,<sup>65</sup> adopting this procedure has the potential to contribute to rationalizing the way we talk about immigration issues by making the effects of immigration policy more concrete. Forcing citizens to look migrants in the eye in this deliberative setting allows them to exercise their empathic imagination and then reconcile that imagination to a legal standard that limits its exercise. This is the kind of practice that sound and rational immigration policy can be built upon, even if none of the other benefits described in this Essay come to pass.

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<sup>65</sup> In *Arizona v. United States*, Justice Kennedy exhorted the nation to create immigration law out of “a political will informed by searching, thoughtful, rational civic discourse.” 132 S. Ct. 2492, 2510 (2012).