

CAN THE GOVERNMENT DEPORT IMMIGRANTS USING INFORMATION IT ENCOURAGED THEM TO PROVIDE?

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INTRODUCTION

Federal laws and regulations encourage unauthorized immigrants to identify themselves in return for immigration benefits. Can the Trump Administration use this data to deport them?

That question is of particular concern for so-called “Dreamers”¹—unauthorized immigrants brought to the United States as children. Responding to an Obama Administrative initiative, over 750,000 Dreamers identified themselves to the federal government to obtain a temporary reprieve from removal and work authorization.² Thousands of other unauthorized immigrants have also “outed” themselves by applying for visas for victims of trafficking and other crimes, seeking waivers to bars to admission so that they can adjust status, and simply paying their taxes.³ The federal laws inviting unauthorized immigrants to identify themselves serve goals unrelated to immigration enforcement, such as apprehending criminals, preventing U.S. citizen children from being separated from their parents, and increasing the tax base,⁴ and so the government has never systematically used identifying information gathered under these federal

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1. Dreamers take their name from the Development, Relief, and Education for Minors Act (DREAM Act), which creates a path to citizenship for certain youth who came to the United States under the age of sixteen. The DREAM Act has been frequently introduced in Congress but has yet to be enacted into law. *See, e.g.*, H.R. 1842, 112th Cong. § 1 (2011).

2. U.S. CITIZEN & IMMIGRATION SERV. (USCIS), NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012–2016 (2016), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2016_qtr4.pdf.

3. *See infra* Part I.

4. *See infra* Parts II & III.

programs to speed up removals. Some fear that might change under the Trump Administration.⁵

This Essay describes the legal and policy issues raised by any systematic effort to deport unauthorized immigrants based on information the government invited them to provide. Part I briefly surveys some of the major laws, regulations, and programs that encourage unauthorized immigrants to identify themselves. Part II analyzes the strengths and weaknesses of the statutory and constitutional arguments that immigrants could raise as a defense against deportations based on self-reported data. Part III explains that even if the government's systematic use of such data to deport unauthorized immigrants is legal, doing so would be a poor policy choice for *any* administration, even one that seeks to drastically increase deportations. The federal government has always balanced immigration enforcement against other goals and values, such as deterring crime, protecting wages and working conditions, collecting taxes, and preventing U.S. citizen children from being separated from their parents.⁶ Deporting immigrants based on information provided in the service of these greater goals would elevate immigration enforcement over all other federal policies. Furthermore, doing so would almost immediately render these laws a dead letter, since no rational unauthorized immigrant would apply for visas or pay taxes if doing so were tantamount to self-deportation. Accordingly, any increase in removals from the use of such data is sure to be fleeting, while the damage done to immigrants'—and perhaps all citizens'—trust in the government will be permanent.

5. See, e.g., Serena Marshall, *What Could Happen to DACA Recipients Under Donald Trump*, ABC NEWS (Nov. 16, 2016, 2:28 PM), <http://abcnews.go.com/Politics/happen-daca-recipients-donald-trump/story?id=43546706> (discussing the possibility that Trump could use immigrants' self-reported data to deport them).

6. See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (describing how the federal government uses its discretion when enforcing immigration law to take into account other considerations, such as international relations, civil rights, the noncitizen's connections to the community, whether the noncitizen has U.S. citizen children, and the noncitizen's military service). See also Brief for United States at 32–33, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 U.S. S. Ct. Briefs LEXIS 1130 (“In the [Immigration and Nationality Act] INA, Congress vested the Executive Branch with the authority and the discretion to make sensitive judgments with respect to aliens, balancing the numerous considerations involved: national security, law enforcement, foreign policy, humanitarian considerations, and the rights of law-abiding citizens and aliens.”).

I. LAWS ENCOURAGING UNAUTHORIZED IMMIGRANTS TO IDENTIFY THEMSELVES TO THE FEDERAL GOVERNMENT

Myriad federal statutes, regulations, and initiatives invite unauthorized immigrants to identify themselves to the federal government in return for immigration and other benefits.

Perhaps best known is President Obama's 2012 initiative on behalf of Dreamers. Frustrated by Congress's failure to grant Dreamers legal status, Obama announced a new initiative known as Deferred Action for Childhood Arrivals (DACA).⁷ DACA granted approximately 750,000 Dreamers a temporary reprieve from removal and work authorization,⁸ but only after they had admitted in writing that they were unauthorized and provided their names and addresses to the federal government.⁹ One of DACA's primary goals was to bring Dreamers "out of the shadows" so that they could live and work without fear of removal, which President Obama argued would benefit *all* workers from the degradation of wages and working conditions that results when a subset of the population is easily exploited.¹⁰

In addition to the Dreamers, hundreds of thousands of other unauthorized immigrants have identified themselves to the federal government in the course of applying for immigration benefits and paying their taxes.¹¹ For example, victims of human trafficking and other serious crimes can apply for visas that enable them to remain in the United States

7. President Barack Obama, Remarks by the President on Immigration (Jun. 15, 2012) <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

8. See USCIS, *supra* note 2.

9. Memorandum from Janet Napolitano, Sec'y, Dep't Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs.; and John Morton, Dir., U.S. Immigration & Customs Enf't (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

10. See President Barack Obama, Remarks by the President on Comprehensive Immigration Reform (Jan. 29, 2013), <https://www.whitehouse.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform> (explaining the "wages and working conditions of American workers are threatened" by undocumented workers in the "shadow economy," and that businesses "trying to do the right thing [by] hiring people legally, paying a decent wage, following the rules . . . [also] suffer."). See, e.g., *Sure-Tan v. NLRB*, 467 U.S. 883, 892 (1984) (observing that exploitation of unauthorized immigrants in the workplace will degrade the wages and working conditions of U.S. citizens); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. CIV. RTS.—CIV. LIBERTIES L. REV. 345 (2001).

11. Under federal law, unauthorized immigrants have the same tax obligations as citizens and lawfully present non-citizens.

to assist law enforcement in the investigation and prosecution of those crimes.¹² Another statute permits unauthorized immigrants under the age of twenty-one who have been abused, abandoned, or neglected by one or both parents, and who can show it is in their best interest to remain in the United States, to apply for legal status.¹³ Unauthorized immigrants who are close family members of U.S. citizens or lawful permanent residents, and who are statutorily eligible to adjust status, can apply for a waiver of certain grounds of inadmissibility—for example, for having entered the United States without permission—if they can show that their lawfully present family members would suffer “extreme hardship” if they were deported.¹⁴ And in 1996, the IRS created the Individual Taxpayer Identification Number (ITIN) to enable those not eligible for Social Security Numbers, including unauthorized immigrants, to submit identifying information in order to pay income tax.¹⁵ In short, federal law encourages unauthorized immigrants to “come out” to the government for a variety of purposes.

Although federal immigration officials have never used this data to support deportations in any wide-scale or systematic way, some fear that will change in a Trump Administration. Trump has vowed to “immediately terminate” DACA upon taking office as part of a policy of “zero tolerance” for unauthorized immigrants.¹⁶ As a candidate for

12. See e.g., 8 U.S.C. §§ 1101(a)(15)(S)–(U), 1154 (2012).

13. 8 U.S.C. § 1101(a)(27)(J).

14. *Expansion of Provisional Unlawful Presence Waivers of Inadmissibility*, 81 Fed. Reg. 50244 (Jul. 29, 2016).

15. 26 C.F.R. § 301.6109-1(d)(3)(iii) (2016). See generally Cynthia Blum, *Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform*, 21 GEO. IMMIGR. L.J. 595 (2007) (explaining that unauthorized immigrants are required to pay taxes and explaining the ITIN system that enables them to do so without a social security number); LISA CHRISTENSEN GEE, ET AL., INST. ON TAXATION & ECON. POLICY, UNDOCUMENTED IMMIGRANTS’ STATE & LOCAL TAX CONTRIBUTIONS 1, 2 (2016), <http://www.itep.org/pdf/immigration2016.pdf> (“The best evidence suggests that at least 50 percent of undocumented immigrant households currently file income tax returns using Individual Tax Identification Numbers (ITINs).”); Peter Rousmaniere, *Ten Reasons Why Illegal Immigrants Should File Income Tax Returns*, WORKINGIMMIGRANTS.COM (Apr. 14, 2006, 7:06 AM), http://www.workingimmigrants.com/2006/04/ten_reasons_why_illegal_immigr.html (explaining that in some cases paying taxes can assist an unauthorized immigrant to legalize his status). As of 2012, the IRS had assigned 21 million ITINs, approximately 5.2 million of which are actively used on tax returns. See *Unused ITINS to Expire After Five Years; New Uniform Policy Eases Burden on Taxpayers, Protects ITIN Integrity*, IRS (June 30, 2014), <https://www.irs.gov/uac/newsroom/unused-itins-to-expire-after-five-years-new-uniform-policy-eases-burden-on-taxpayers-protects-itin-integrity>.

16. Julia Preston & Jennifer Medina, *Immigrants Who Came to U.S. as Children Fear*

President, Trump proposed creating a deportation force to remove all of the approximately 11.3 million unauthorized immigrants within two years of coming into office—a nearly impossible task that would cost billions of dollars and disrupt families and communities.¹⁷ Since winning the election, Trump has backed off that initial proposal, suggesting instead that his Administration will seek to remove the “two or three million” unauthorized immigrants that he claims have criminal records.¹⁸ To achieve even this scaled-back goal, the government would have to remove approximately five times the number of immigrants deported under the Obama Administration each year. Arguably, one way to remove more unauthorized immigrants, more quickly, would be to use information that the government already has in its databases to locate and deport immigrants who have admitted to the federal government they have no legal right to stay.¹⁹

Deportation Under Trump, N.Y. TIMES (Nov. 19, 2016), <http://www.nytimes.com/2016/11/20/us/immigrants-donald-trump-daca.html> (describing Trump’s statement that he will “immediately terminate” DACA upon becoming President); Donald Trump, Immigration Speech at Rally in Phoenix, Ariz. (Aug. 31, 2016) (transcript available at <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html>) (describing a policy of “zero tolerance” for unauthorized immigrants).

17. Julia Preston, Alan Rappeport, & Matt Richtel, *What Would It Take for Donald Trump to Deport 11 Million and Build a Wall*, N.Y. TIMES (May 19, 2016), http://www.nytimes.com/2016/05/20/us/politics/donald-trump-immigration.html?_r=1.

18. See Interview by Lesley Stahl with President-Elect Donald Trump, *60 Minutes* (Nov. 13, 2016) (transcript available at <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/>). The number of unauthorized immigrants with a criminal record is contested, and it is not clear where President-Elect Trump got the number of two or three million. The nonpartisan Migration Policy Institute reports that approximately 820,000 unauthorized immigrants have been convicted of crimes. See Haeyoun Park & Troy Riggs, *Could Trump Really Deport Millions of Unauthorized Immigrants?*, N.Y. TIMES (Nov. 29, 2016), <http://www.nytimes.com/interactive/2016/11/29/us/trump-unauthorized-immigrants.html>.

19. See, e.g., Jessica M. Vaughan, *Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population*, CTR. FOR IMMIGRATION STUDIES (Apr. 2006), <http://cis.org/sites/cis.org/files/articles/2006/back406.pdf> (arguing that more vigorous enforcement of immigration law in the interior of the United States will lead to self-deportation, which is a cheaper method of reducing the size of the unauthorized population than mass removals).

II. LEGAL ARGUMENTS AGAINST USING UNAUTHORIZED IMMIGRANTS' SELF-REPORTED DATA TO DEPORT THEM.

A. Textualist Arguments

Although almost every statute, regulation, and policy encouraging unauthorized immigrants to submit identifying information is accompanied by some reference to nondisclosure, the scope of these explicit textual protections is limited.

On its website, the United States Citizenship and Immigration Services (USCIS) states that DACA submissions will not be shared with Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), and that even those applicants who are found ineligible would generally not be placed in removal proceedings.²⁰ But these assurances are of limited value. They are not incorporated into any statutory prohibition against disclosure, nor are they promulgated as a federal regulation. Moreover, USCIS noted that its nondisclosure policy could be “modified, superseded, or rescinded at any time without notice,” and that it does not “create any right or benefit” that can be enforced in a future proceeding.²¹ Similarly, federal regulations permitting immigrants to apply for waivers of various inadmissibility grounds do not contain any express provisions guaranteeing that the data will not be used in removal proceedings.²²

Immigrants seeking special visas for victims of human trafficking (T visas)²³ and certain crimes (U visas)²⁴ are required to disclose their names, addresses, immigration status, and whether they have a criminal record.²⁵

20. See USCIS, *Will the Information I Share in My Request for Consideration of DACA be Used for Immigration Enforcement Purposes?* (last visited Jan. 18, 2017), <https://my.uscis.gov/helpcenter/article/will-the-information-i-share-in-my-request-for-consideration-of-daca-be-used-for-immigration-enforcement-purposes>.

21. *Id.*

22. Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50244, 50259 (Jul. 29, 2016) (rejecting commenters' requests to include a confidentiality provisions barring DHS from placing waiver applicants in removal proceedings on the ground that DHS “already has effective policies” in place against deporting applicants).

23. Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

24. *Id.*

25. See DEP'T OF HOMELAND SEC., FORM I-914, APPLICATION FOR T NONIMMIGRANT STATUS, <https://www.uscis.gov/sites/default/files/files/form/i-914.pdf> (requiring applicant to provide name, address, and immigration status); see also DEP'T OF HOMELAND SEC., FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, <https://www.uscis.gov/i-918>.

According to the U visa application instructions available on USCIS's website, "disclosure of information relating to a pending or approved petition for U nonimmigrant status is prohibited" except in rare circumstances in which law enforcement need to access that information.²⁶ Under current policy, USCIS will generally not deport U visa applicants while their applications are pending,²⁷ or use the data in a U visa application to deport even unsuccessful applicants, but there is no guarantee that these policies will remain in place going forward.²⁸

Unauthorized immigrants who pay their taxes, as required of them under federal law, have stronger statutory protection. Section 6103 of Title 26 generally bars federal officials from disclosing taxpayer returns, including a taxpayer's identity, and the IRS has consistently stated that it will not disclose the information provided in tax filings to immigration enforcement.²⁹ But various exceptions permit disclosure upon personal request by the President, or to certain agencies for terrorism or law enforcement purposes.³⁰ Although these provisions were not intended to

26. DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, https://www.uscis.gov/sites/default/files/files/form/i-918_instr.pdf.

27. See 8 C.F.R. 214.14(d)(2) ("USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list."); Memorandum from Peter S. Vincent, Principal Legal Advisor, to OPLA Attorneys, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sept. 25, 2009), http://www.asistahelp.org/documents/resources/ICE_OPLAUvisa_92509_DFEC7FE4739A8.pdf (instructing immigration officials to "favorably view an alien's request for a stay of removal if USCIS has determined that the alien has established *prima facie* eligibility for a U visa").

28. One legal aid group warns potential applicants, "immigration [officials] could decide to forward your [U visa application] information to another branch of the Department of Homeland Security, including [Immigration and Customs Enforcement] ICE," but then added, "we have not yet seen this happen." IMMIGRANT L. CTR. OF MINN., *Questions and Answers for U Visa Applicants* (last visited Jan. 18, 2016), <https://www.ilcm.org/wp-content/uploads/2016/01/U-visa-client-FAQ-English.pdf>.

29. 26 U.S.C. § 6103 (2012). See also Blum, *supra* note 15, at 598–99 (discussing the IRS's policies). In 2006, Senator Jeff Sessions, Trump's nominee for Attorney General, proposed amending § 6103 to provide for increased disclosure of tax information to immigration enforcement, which suggests he recognized that § 6103 does not currently permit the IRS to do so. See 2006 TAX NOTES TODAY 47 (Mar. 9, 2006).

30. See CTR. FOR ECON. PROGRESS, THE IRS INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER: AN OPERATIONAL GUIDE TO THE ITIN PROGRAM 10–11, n.27 (2004) http://www.issuelab.org/resource/the_irs_individual_taxpayer_identification_number_an_operational_guide_to_the_itin_program; Daisy Hernandez, *Tax Day Puts Illegal Immigrants in a Special Bind*, N.Y. TIMES (Apr. 15, 2003), <http://www.nytimes.com/2003/04/15/nyregion/tax-day-puts->

permit disclosures of large categories of tax returns—such as a request for disclosure of the tax returns of all filers using ITINs (many of whom are unauthorized immigrants)—it also does not clearly prohibit categorical disclosures, or bar immigration authorities from using that data to deport ITIN filers.³¹

In short, the statutes, regulations, and federal policies inviting unauthorized immigrants to submit identifying data all mention the need for confidentiality, but the textual provisions barring disclosure are neither comprehensive nor ironclad.

B. Intentionalist Arguments

Even without an express promise of confidentiality, however, immigrants can argue that federal statutes, regulations, and initiatives encouraging the submission of identifying data must be read to bar systemic use of such data to deport them, because to do otherwise would chill applications, undermining the purpose of these laws.

As courts have long held, statutes must be interpreted in light of Congress's goals in enacting them, because a "fair reading of legislation requires a fair understanding of the legislative plan."³² At times, this principle requires extrapolating from the plain language of a statute's text to ensure that its purpose will be realized. For instance, in *King v. Burwell*, the Supreme Court adopted an interpretation of the Affordable Care Act that was not obvious from the plain text to avoid undermining Congress's goal of providing universal health care. Writing for the six-member majority, Chief Justice Roberts explained: "Congress passed the Affordable Care Act to improve health insurance markets not destroy them," and so "if at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."³³ Likewise, any reasonable construction of laws encouraging immigrants to identify themselves to accomplish goals

illegal-immigrants-in-a-special-bind.html (explaining that the IRS does not routinely disclose tax information to DHS, but would share information if a taxpayer was being checked for connections to terrorism).

31. See *CTR. FOR ECON. PROGRESS*, *supra* note 30, at 11 ("[I]t is important for undocumented immigrants to understand that, while IRS rules do protect their information to some extent, applying for an ITIN and filing a tax return with an ITIN is not risk-free."); see also *id.* at 10 ("§ 6103 contains a long list of exceptions, several of which are significant for ITIN holders and may permit their information to be disclosed"). See also *TAXPAYER INFORMATION: OPTIONS EXIST TO ENABLE DATA SHARING BETWEEN IRS AND USCIS BUT EACH PRESENTS CHALLENGES*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-100, (2005) [hereinafter *GAO Report*].

32. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

33. *Id.*

unrelated to immigration enforcement should include an implied restriction against using that information to deport them *en masse*. To do otherwise would be to interpret these federal laws to contain the seeds of their own destruction.

For example, Congress created special visas for victims of serious crimes to encourage them to report these crimes and assist law enforcement in investigating and prosecuting the perpetrators.³⁴ If the government began systematically using applicants' identifying data to remove them, far fewer unauthorized immigrants would take advantage of these laws, undermining Congress's law enforcement goals. Likewise, if immigration officials used identifying information submitted in applications for Special Immigrant Juvenile Status to deport unsuccessful applicants or their family members, then the number of applications would fall dramatically, undermining Congress's intent to provide a safe haven for children who have no guardian in their home country.

This implied prohibition is particularly strong when it comes to the IRS's collection of identifying information through Individual Taxpayer Identification Numbers (ITINs). The IRS created the ITIN program to collect taxes from unauthorized immigrants and others in the United States who are not eligible for Social Security Numbers.³⁵ In 2010, over three million ITIN holders—not all of whom are undocumented immigrants—paid over \$870 million in income taxes using an ITIN.³⁶ ITIN holders are

34. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, § 1513(a)(2)(A), 114 Stat. 1464 (2000) ("The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens."); USCIS, VICTIMS OF CRIMINAL ACTIVITY: U NONIMMIGRANT STATUS, (Jul. 28, 2016), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> ("The legislation was intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes, while also protecting victims of crimes who have suffered substantial mental or physical abuse due to the crime and are willing to help law enforcement authorities in the investigation or prosecution of the criminal activity.").

35. IRS, INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER (Nov. 16, 2016), <https://www.irs.gov/individuals/individual-taxpayer-identification-number-itin>.

36. AM. IMMIGRATION COUNCIL, THE FACTS ABOUT THE INDIVIDUAL TAX IDENTIFICATION NUMBER (ITIN) (Apr. 5, 2016), <https://www.americanimmigrationcouncil>.

not eligible for Social Security benefits or the Earned Income Tax Credit, and so they contribute more to the Social Security system than they will ever take out.³⁷ The IRS's tax collection policies thus benefit U.S. citizens and legal immigrants in the form of an increased tax base without a corresponding drain on the social security system and other welfare programs. If ITIN holders' tax return information was used to deport them, then millions of ITIN filers would simply stop paying their taxes. As IRS Commissioner Mark Everson explained, using the IRS to assist in immigration enforcement "would have a chilling effect on efforts to bring ITIN holders, and potential ITIN holders, into the U.S. tax system."³⁸

The same interpretive principle applies to data gathered under federal regulations and other policy initiatives. The government did not guarantee confidentiality when it established DACA, or promulgated regulations granting inadmissibility waivers, in part because it recognized that in certain individual cases national security might require acting upon the information. But it is antithetical to the very nature of these initiatives for the government to systematically use the data it invited unauthorized immigrants to submit—ostensibly for their benefit as well as for the benefit of their lawfully-present family members and the larger community—to remove them all.

C. Constitutional Limits

Immigrants could also argue that the Fifth Amendment's Due Process Clause prohibits the government from soliciting information from them under the guise of providing a benefit, only to turn around and use that information to deport them.

Deportation is a civil, not criminal, proceeding, and thus most of the constitutional protections that govern criminal trials—such as the right to a jury of one's peers, government-funded legal counsel, and the prohibition

org/research/facts-about-individual-tax-identification-number-itin.

37. See Stephen Goss, Alice Wade, J. Patrick Skirvin, Michael Morris, K. Mark Bye, & Danielle Huston, *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, SOCIAL SEC. ADMIN. (Apr. 2013), https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf. But see Vaughn, *supra* note 19, at 7 (arguing that the IRS has issued more tax refunds and credits than it has collected from unauthorized immigrants).

38. *Social Security Number and Individual Taxpayer Identification Number Mismatches and Misuse: Hearing Before the Subcomm. on Oversight and Subcomm. on Social Security of the H. Comm. on Ways & Means*, 108th Cong. 12 (2004) (statement of Mark W. Everson, Comm'r, IRS), <http://purl.access.gpo.gov/GPO/LPS64777>; see also GAO Report, *supra* note 31, at 1 ("Privacy protection is an important component of continued voluntary compliance with the internal revenue laws.").

against self-incrimination—do not apply to removal proceedings in immigration court.³⁹ Nonetheless, the proceedings must satisfy due process, which means that the government cannot engage in conduct that “offend[s] the community’s sense of fair play and decency” or is “fundamentally unfair” when seeking to deport noncitizens.⁴⁰

In the past, courts have excluded evidence or terminated proceedings when they have found that the government crossed the line. For example, in *Navia-Duran v. INS*, the First Circuit suppressed incriminating statements made during an interrogation that lasted all night, after officials threatened immediate deportation and failed to inform the immigrant that she had a right to a hearing before being removed from the country.⁴¹ Likewise, in *Singh v. Mukasey*, the Second Circuit excluded an immigrant’s incriminating statements from a deportation proceeding because he was questioned for hours, was not informed of his right to speak with an attorney, and was repeatedly threatened with jail.⁴² In these cases, the courts held that the immigration officials’ threats, intimidation, and misinformation violated due process both because their conduct was outrageous and because these coercive tactics rendered the subsequent confessions inherently unreliable.

Would the government similarly violate due process if it sought to deport noncitizens using the data it had encouraged them to provide under the guise of helping them? Noncitizens could argue that they were manipulated by the government into confessing their unlawful status—something they never would have done if they had known that immigration officials would use their admissions against them. However, enticing noncitizens to provide information in return for a benefit can be

39. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (holding that deportation is not punishment).

40. *INS v. Mendoza-Lopez*, 468 U.S. 1032, 1050-51 (1984) (noting that Court might find that evidence must be excluded from a removal hearing if it was gathered through “egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained”); *Rochin v. California*, 342 U.S. 165, 173 (1952) (excluding evidence gathered through methods that “offend the community’s sense of fair play and decency” even though the evidence was reliable); *Toro*, 17 I. & N. Dec. 340, 343 (BIA 1980) (stating that evidence will be excluded from a removal proceeding if “the manner of seizing [it] is so egregious that to rely on it would offend the fifth amendment’s due process requirement of fundamental fairness”).

41. 568 F.2d 803 (1st Cir. 1977). *See also* *Garcia*, 17 I. & N. Dec. 319, 320 (BIA 1980) (confession suppressed because alien was misinformed about his rights, he was impeded from contacting his lawyer, and he spent substantial time in custody); *Bong Youn Choy v. Barber*, 279 F.2d 643, 647 (9th Cir. 1960) (confession suppressed because alien interrogated overnight for seven hours and threatened with prosecution for perjury).

42. 553 F.3d 207 (2d Cir. 2009).

distinguished from coercing noncitizens into confessing their lack of legal status through threats and intimidation. Moreover, confessions made under threats of immediate deportation in the wee hours of the morning are inherently less reliable than voluntary admissions made by noncitizens in writing in the privacy of their own homes, on forms and in documents mailed to immigration authorities.⁴³

Nonetheless, unauthorized immigrants can credibly argue that the government induced them to document their own unlawful status with false promises of assistance—behavior that is fundamentally unfair in ways that rival the interrogations in *Navia-Duran*⁴⁴ and *Singh*.⁴⁵ While such tactics might be justified when pursuing violent and dangerous criminals, they “offend the community’s sense of fair play and decency” when applied to those who violate immigration law—many of whom have not committed any crime.⁴⁶ Admittedly, however, judges would have to extrapolate from case law involving coercive tactics to conclude that the government’s conduct violated fundamental fairness—a step that some judges might not be willing to make.⁴⁷

III. POLICY ARGUMENTS AGAINST DEPORTATIONS BASED ON GOVERNMENT-SOLICITED DATA

In addition to the potential legal obstacles described in Part II, deporting immigrants based on self-reported data is poor policy, even for an Administration that seeks to vigorously enforce immigration laws and that has little sympathy for unauthorized immigrants.

43. *But see* Rochin, 342 U.S. at 173 (excluding evidence gathered through methods that “offend the community’s sense of fair play and decency” even though the evidence was reliable).

44. 568 F.2d 803.

45. 553 F.3d 207.

46. *See* Rochin, 342 U.S. at 173. *See generally* Lenni B. Benson, *By Hook or By Crook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813 (1994) (discussing the legality of the undercover Immigration and Naturalization Service (INS) operations used to execute removal orders).

47. Professor Zachary Price has argued that using DACA data to deport Dreamers would be a form of entrapment in violation of the Fifth Amendment. *See* Zachary Price, *Could the Trump Administration Entrap Dreamers?* WASH. POST (Nov. 24, 2016), https://www.washingtonpost.com/opinions/entrapping-the-dreamers/2016/11/24/36ac92b0-b19f-11e6-8616-52b15787add0_story.html?utm_term=.e2df8a11a03a. However, because the government did not encourage these immigrants to come to the United States without permission, but only to report that fact to obtain immigration benefits, its conduct likely falls short of unconstitutional entrapment.

First, immigrants who self-reported their own unauthorized status are low priorities for removal in any administration, and thus it is not worth the government's time and resources to deport them. Even if using their admissions against them might initially speed up the removal process, these immigrants still have a right to a hearing before an immigration judge and some will seek cancellation of removal, asylum, and other forms of relief, which means the process of removing them will take years. The unauthorized immigrants who identify themselves to the government are typically productive members of society without serious criminal records who have lived for many years in the United States and have close U.S. citizen family members, and thus should be among the last targeted for removal.⁴⁸ The Trump Administration should recognize that attempting to deport the most deserving unauthorized immigrants by using their compliance with government programs against them is a poor use of limited enforcement resources, and is sure to bring a significant public relations backlash.⁴⁹

Second, even if using immigrants' self-reported data initially increased the pace of removals, it would be short-lived. Unauthorized immigrants would surely move from the addresses they provided to the government once they learned the government was using that data to locate and deport them. Nor would they identify themselves to the government in the future in response to any new initiatives, and immigration lawyers would advise them not to do so. Accordingly, any initial increase in removals would quickly taper off, leaving a permanent distrust of government behind.

Third, and finally, using self-reported data to remove unauthorized immigrants would undermine the benefits of laws intended to help not just those immigrants, but also U.S. citizens and legal immigrants. Special visas for victims of crime are intended to assist the police to apprehend perpetrators and deter future crimes, benefitting everyone in the community.⁵⁰ Laws that provide for waivers to inadmissibility grounds are

48. See *The 45th President*, SIXTY MINUTES, Nov. 13, 2016, <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/> (Trump stated that some unauthorized immigrants were "terrific people" and suggested his Administration might seek to assist them after securing the border and removing criminal aliens); see also Michael Scherer, *2016 Person of the Year Donald Trump*, TIME MAG., <http://time.com/time-person-of-the-year-2016-donald-trump/> (reporting that Trump "made clear he would like to find some future accommodation" for unauthorized immigrants brought to the United States as children, whom he spoke of in sympathetic terms).

49. See, e.g., Fawn Johnson, *How a New Class of Activists is Changing Immigration Politics*, ATLANTIC (Jun. 12, 2014), <http://www.theatlantic.com/politics/archive/2014/06/how-a-new-class-of-activists-is-changing-immigration-politics/431028/>.

50. 8 U.S.C. § 1184 (2016) (stating that the U visas' dual goal was to aid law enforcement in prosecuting crimes and to protect victims of such crimes).

primarily intended to protect U.S. citizen and lawful permanent resident children and spouses of unauthorized immigrants who would suffer “extreme hardship” if a parent or spouse was deported, as well as to protect U.S. taxpayers from being forced to financially support those family members after the family’s breadwinner was deported. The IRS policy permitting unauthorized immigrants to pay taxes using an Individual Taxpayer I.D. Number rather than a Social Security Number allows the federal government to collect hundreds of millions of dollars in additional taxes, which benefits the nation as a whole. Even if the Trump Administration sees no reason to aid unauthorized immigrants and seeks to maximize deportations, it should avoid undermining laws that deter crime and generate taxes—goals that it also supports.

CONCLUSION

This Essay explains why even an Administration that seeks to dramatically increase deportations should choose not to use immigrants’ voluntarily-submitted identifying data against them. The legality of such an unprecedented step is questionable, since it would be at odds with the purpose of the federal laws that encourage unauthorized immigrants to submit identifying data, and arguably is the sort of “fundamentally unfair” conduct that violates due process. Equally as important, the federal government has always balanced immigration enforcement against other goals and values, such as deterring crime, protecting wages and working conditions, collecting taxes, and preventing U.S. citizen children from being separated from their parents. To deport immigrants based on information they were asked to provide in the service of these greater goals would elevate immigration enforcement over all other federal policies. Adopting such a policy would almost immediately render these laws a dead letter, since no rational unauthorized immigrant would apply for visas or pay taxes if doing so were tantamount to self-deportation. Accordingly, any increase in removals from using such data is sure to be short-lived, while the damage done to the people’s trust in the government will be permanent. Only an Administration that cared about enforcing immigration law at the expense of all other public policy goals would use data that the government encouraged immigrants to provide to deport them.