

12-1-2021

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Deborah M. Weissman

Angelina Godoy

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### Recommended Citation

Weissman, Deborah M.; Godoy, Angelina; and Clark, Havan M. (2021) "The Final Act: Deportation by ICE Air," *Hofstra Law Review*: Vol. 49: Iss. 2, Article 5.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol49/iss2/5>

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## THE FINAL ACT: DEPORTATION BY ICE AIR

*Deborah M. Weissman\**

*Angelina Godoy\*\**

*Havan M. Clark\*\*\**

### I. INTRODUCTION

Immigration enforcement has long served as an indicator of the prevailing visceral fears and loathing toward the Other.<sup>1</sup> The foreign is always suspect. Foreigners in great numbers are especially suspicious. These developments are historically tied to the conventions of colonialism, expanded as a function of foreign policy, and to be sure, ideology.<sup>2</sup> By the mid-2010s, the Global South was characterized as “shithole countries,”<sup>3</sup> populated by people who were terrorists, rapists, murderers, and corrupt drug dealers.<sup>4</sup> According to former President

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\* Deborah M. Weissman is the Reef C. Ivey II Distinguished Professor of Law at the University of North Carolina School of Law. I am grateful to my coauthors for their insights and collaborative endeavors. I am also grateful to Louis A. Pérez, Jr., for his helpful comments and suggestions and to the editorial team of the *Hofstra Law Review* for their helpful review and edits.

\*\* Angelina Godoy is the Helen H. Jackson Chair in Human Rights, and Director of the Center for Human Rights, at the University of Washington in Seattle. I am grateful to my coauthors, my colleagues at the UW Center for Human Rights whose research is shared here, and the editorial team of the *Hofstra Law Review*.

\*\*\* Havan M. Clark is a Law Clerk to the Honorable Donald M. Middlebrooks, United States District Judge for the Southern District of Florida, 2020–2021. J.D., University of North Carolina School of Law, 2020. Thank you to Professor Deborah M. Weissman for her invaluable teaching and support and to Professor Angelina Godoy for her novel empirical contributions to this Article. Thank you also to the editorial team at the *Hofstra Law Review* for their thorough and careful edits.

1. See Molly Ball, *Donald Trump and the Politics of Fear*, ATLANTIC (Sept. 2, 2016), <https://www.theatlantic.com/politics/archive/2016/09/donald-trump-and-the-politics-of-fear/498116>.

2. See *id.*

3. Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html).

4. Clark Mindock, *Trump Attacked Immigrants for ‘Murders, Killings, Murders’ During Most Recent El Paso Visit, Months Ahead of Shooting*, INDEPENDENT (Aug. 7, 2019, 7:23 PM), <https://www.independent.co.uk/news/world/americas/us-politics/trump-el-paso-rally-video-immigrants-murders-killings-texas-a9044526.html>. See generally Deborah Weissman, *The Politics of*

Donald J. Trump, immigrants “aren’t people. The[y] are animals,”<sup>5</sup> further describing them as “bad thugs and gang members.”<sup>6</sup> These representations have shaped a retributive agenda and have served to create a structure with roots in federal policies and branches in localities throughout the country through which to expel noncitizens.<sup>7</sup>

Deportation is a legal concept about which much has been written.<sup>8</sup> But it is more complicated. For noncitizens, forced expulsion is a lived experience occurring in time and space—an act against the body, mostly black and brown bodies.<sup>9</sup> In this Article, we part ways with the well-established narratives of deportation and the punishment/non-punishment paradigm to conceive of deportation not only as a legal concept, but as a physical act—the *final act*—that is, the culmination of the immigration enforcement dragnet.<sup>10</sup> The physical removal of persons from the United States requires a complex system comprised of aviation networks and their various components, airports and airplanes, hangars and flight crews, and an array of physical restraints to intimidate, punish, or subdue deportees.<sup>11</sup> We examine this

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*Narrative: Law and the Representation of Mexican Criminality*, 38 FORDHAM INT’L L.J. 141 (2015) (describing narratives surrounding individuals from the Global South).

5. Linda Qiu, *The Context Behind Trump’s ‘Animals’ Comment*, N.Y. TIMES (May 18, 2018), <https://www.nytimes.com/2018/05/18/us/politics/fact-check-trump-animals-immigration-ms13-sanctuary-cities.html>.

6. Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 771 (2019) (quoting President Trump’s tweets).

7. See, e.g., Ball, *supra* note 1.

8. See, e.g., Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799 (2010); Daniel Kanstroom, *Deportation as a Global Phenomenon: Reflections on the ILC Draft Articles on the Expulsion of Aliens*, 30 HARV. HUM. RTS. J. 49 (2017); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000).

9. Angélica Cházaro, *The End of Deportation*, UCLA L. REV. (forthcoming 2021) (manuscript at 39-40), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3415707](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415707); see also Yolanda Vázquez, *Enforcing the Politics of Race and Identity in Migration and Crime Control Policies*, in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING (Mary Bosworth, Alpa Parmar & Yolanda Vázquez eds., 2018) (examining the racialization of the “criminal alien” as Latinx and its role in the development of immigration and criminal laws and policies). In fiscal year 2019, of the over 267,000 individuals that Immigration and Customs Enforcement (“ICE”) deported, over ninety percent were from Mexico, Guatemala, Honduras, and El Salvador. U.S. IMMIGR. & CUSTOMS ENF’T, FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 27-32 (2019), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>.

10. See *infra* Part II.A–B.

11. ENF’T & REMOVAL OPERATIONS (ERO) REPATRIATION DIV., IMMIGR. & CUSTOMS ENF’T AIR OPERATIONS (IAO), IAO CHARTER TASK ORDER STATEMENT OF WORK (TOSOW) 1-3, <https://govtribe.com/opportunity/federal-contract-opportunity/request-for-information-ice-air-operations-consolidated-contract-rficeoq2015flights> (enumerating the terms under which ICE’s subcontractors must perform deportation flight operations, including providing “metal passenger

infrastructure to illuminate the circumstances of expulsion and the egregious rights violations often suffered by deportees—violations that are almost always hidden from public view.<sup>12</sup>

Part II examines the full dimensions of deportation as a legal concept whereby courts readily admit the harms of expulsion while simultaneously deny its character as a form of punishment.<sup>13</sup> The courts' construction of deportation as a nonpunitive sanction to which a range of constitutional procedural safeguards are not applicable serves to conceal the violence that occurs and distracts from the physical abuse and maltreatment associated with the final act.<sup>14</sup> The legal treatment of deportation elides what, as Jacqueline Rose has written, is conveyed by "the technical term for the returning of migrants to their country of origin [that] is 'refoulement' (to push back or repulse) which also happens to be the French word for the psychoanalytic concept of repression."<sup>15</sup> Part II then describes deportation as an act by which the body is seized and ultimately transported to airports and boarded onto airplanes<sup>16</sup>—sites previously not considered in the scheme of the immigration removal system's apparatus.<sup>17</sup> It describes the heretofore hidden machinery of the Immigration and Customs Enforcement ("ICE") Air's network of mass deportation and further describes the perils upon removal occasioned by ICE flights.<sup>18</sup>

Part III examines the "legal" trajectories of forced expulsion.<sup>19</sup> It demonstrates how hostility toward immigrants has given rise to an ever-expanding deportation apparatus by which growing numbers of immigrants, including those seeking shelter from persecution, are

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restraints (handcuffs, waist/belly chain, and leg irons)"); see also Nick Miroff, *ICE Air: Shackled Deportees, Air Freshener and Cheers. America's One-Way Trip Out*, WASH. POST (Aug. 10, 2019, 5:55 PM), [https://www.washingtonpost.com/national/ice-air-shackled-deportees-air-freshener-and-cheers-americas-one-way-trip-out/2019/08/10/bc5d2d36-babe-11e9-aeb2-a101a1fb27a7\\_story.html](https://www.washingtonpost.com/national/ice-air-shackled-deportees-air-freshener-and-cheers-americas-one-way-trip-out/2019/08/10/bc5d2d36-babe-11e9-aeb2-a101a1fb27a7_story.html).

12. See *infra* Part II.C–D.

13. See *infra* Part II.A.

14. See *infra* Part II.A.

15. Jacqueline Rose, *Agents of Their Own Abuse*, LONDON REV. BOOKS, Oct. 10, 2019.

16. See *infra* Part II.C. We note that some individuals are deported via land, being bussed or sometimes walked across the United States-Mexico border. While the use of land expulsion varies over time, most deportations involve the use of airplanes. See *ICE Air Is a Real Airline that the Government Uses to Deport Thousands of Migrants Every Day*, CLEARVOICE (Aug. 13, 2019, 9:25 AM), <https://wearemitu.com/things-that-matter/ice-air-is-a-real-airline-that-the-government-uses-to-deport-thousands-of-migrants-every-day>.

17. See *infra* Part II.B.

18. See *infra* Part II.C–D; *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, U. WASH. CTR. FOR HUM. RTS. (Apr. 23, 2019), [https://jsis.washington.edu/humanrights/2019/04/23/ice-air/#\\_ftn34](https://jsis.washington.edu/humanrights/2019/04/23/ice-air/#_ftn34).

19. See *infra* Part III.

stripped of legal protections.<sup>20</sup> It chronicles the subversion of legal processes that result in a heightened risk of wrongful deportation and thus by which immigrants reach the point of the final act of removal.<sup>21</sup> It also illuminates how the ICE Air machinery, which executes deportation orders arising within an unfair system, is complicit in the various legal violations by giving effect to such orders and further curtailing whatever rights remain at the moment of the final act of deportation.<sup>22</sup>

Part IV takes up concerns largely unaddressed in legal scholarship: the detailing of human rights abuses on airplanes and airports—sites that function as the terminal instrumentalities of banishment.<sup>23</sup> It describes the physical and psychological abuses that deportees experience during the final act of removal to demonstrate the urgency of immigrant rights advocacy at these sites.<sup>24</sup> It then identifies the violations of international human rights treaties committed by the United States.<sup>25</sup> We do so mindful that invoking human rights law in an effort to reframe the discourse occurs at a time when the question of whether these norms have any relevancy in the United States is very much at issue.<sup>26</sup> The issue of the relevancy of human rights—or lack thereof—is not a new concern, to be sure. As Jack Goldsmith stated over two decades ago, “We can now better understand how and why the United States perpetuates the double standard. The explanation is not subtle. The United States declines to embrace international human rights law because it can.”<sup>27</sup> However, as Part IV argues, immigrants’ rights advocates have nonetheless seized on international norms that apply locally and globally to realize an expanded vision of justice when addressing the harms wrought by ICE Air’s deportation machinery.<sup>28</sup> The need to call attention to U.S. exceptionalism with regard to human rights requires that scholars and activists seek their implementation as a

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20. See *infra* Part III.A.

21. See *infra* Part III. This Article does not consider policies that deter or prevent immigrants from reaching the border. For a review of these issues, see *Immigration in the Time of Trump*, PENN STATE L., <https://pennstatelaw.psu.edu/immigration-time-of-trump>; Marouf, *supra* note 6, at 760-68.

22. See *infra* Part III.B.

23. See *infra* Part IV.

24. See *infra* Part IV.A.

25. See *infra* Part IV.B.

26. See, e.g., *Do [Human] Rights Matter Here?*, LAW PROFESSORS BLOG NETWORK: HUM. RTS. AT HOME BLOG (July 26, 2020), [https://lawprofessors.typepad.com/human\\_rights/2020/07/do-human-rights-matter-here.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+HumanRightsAtHome+%28Human+Rights+at+Home+Blog%29](https://lawprofessors.typepad.com/human_rights/2020/07/do-human-rights-matter-here.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+HumanRightsAtHome+%28Human+Rights+at+Home+Blog%29).

27. Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2D 365, 371 (1998).

28. See *infra* Part IV.B.

means to encourage a discourse of hope and an expectation of realization. Stated otherwise, “all theory must end in practice or come to nothing as theory.”<sup>29</sup>

Part V examines airports and airplanes as sites of resistance in the context of immigration federalism debates.<sup>30</sup> We build on the literature that has called attention to the importance of political geography and immigration devolution policies to underscore the importance of new forms of local activism as a means to assert immigrant rights.<sup>31</sup> Even as growing numbers of localities craft policies to protect immigrants, forming a first wave of resistance to federal anti-immigrant policies, a second wave of subnational advocacy is emerging, seeking to contest both the mechanisms by which people are drawn into the system of immigration enforcement and the institutions which detain them.<sup>32</sup> It is in this context that we identify the campaigns to disrupt the aviation deportation machinery, and the importance of focusing on the local as a means to ensure accountability for individuals whose human rights have been violated.<sup>33</sup>

Deportation is a term frequently associated with nativist sentiment and revulsion for those who appear foreign, as well as a type of “cleansing” as consequence of aggressive annexation of territory.<sup>34</sup> The

29. Lisandro Otero, *Utopia Revisted*, 96 S. ATL. Q. 17, 28 (1997).

30. See *infra* Part V.

31. See *infra* Part V; see also Deborah M. Weissman et al., *The Politics of Immigrant Rights: Between Political Geography and Transnational Interventions*, 2018 MICH. STATE L. REV. 117, 132-36, 144-58 (2018).

32. Some advocates seek change through federal legislation; others pursue legal efforts to release specific detainees and to regulate labor practices within detention facilities. See, e.g., Weissman et al., *supra* note 31, at 167-68. Community groups assert demands to shut down detention facilities entirely. Rebecca Chowdhury, *Advocates Debate Fate of NJ Detention Center*, INDYPENDENT (Oct. 18, 2018), <https://indypendent.org/2018/10/shut-it-down-or-keep-it-open-immigrant-advocates-debate-fate-of-nj-detention-center>. At least five facilities have been targets of multi-year shutdown campaigns; others target multiple facilities in specific states. #CommunitiesNotCages Campaign Explainer, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/sites/default/files/Communities%20Not%20Cages%20Campaign%20Explainer.pdf> (last visited Feb. 8, 2021); Nancy Montoya, *Rights Groups: Close Private Immigrant Detention Centers*, AZPM (Sept. 15, 2016, 7:06 AM), <https://news.azpm.org/s/41937-human-rights-groups-say-close-immigrant-private-prisons-in-arizona>. Some campaigns have achieved significant success, driving the closure of multiple facilities since 2018 and the 2019 passage of Assembly Bill 32, California’s bill to ban private detention. Andrea Castillo, *California Bans For-Profit Prisons and Immigrant Detention Facilities*, L.A. TIMES (Oct. 11, 2019, 12:53 PM), <https://www.latimes.com/california/story/2019-10-11/california-bans-for-profit-prisons-and-immigrant-detention-facilities>; see, e.g., Kristin Kumpf, *What It Means that We Shut Down Homestead Detention Center*, AM. FRIENDS SERV. COMM. (Nov. 1, 2019), <https://www.afsc.org/blogs/news-and-commentary/what-it-means-we-shut-down-homestead-detention-center>.

33. See *infra* Part V.

34. One author surveyed the London Review of Books’ references to “deportation.” See

efforts to accelerate the removal of noncitizens from the United States has reconfigured the historic narrative about the nation's relationship with immigration and immigrants. Concerns for the humanity of immigrants requires attention to all facets of the injustices of deportation, including the sites of the final act of removal. As we demonstrate, this may be accomplished through a variety of political and legal strategies designed to call attention to the ways that deportation violates the protection of rights that exist at the very local to the very global levels of law.<sup>35</sup> Notwithstanding our descriptions and analyses of innovative and important anti-deportation campaigns to mitigate the deliberate infliction of human suffering on immigrants, we do not suggest that these strategies ensure success. In the face of the deportation dragnet machine and the aviation networks that are hidden from the public, it would be presumptuous to suggest victory. What this Article offers is a way of understanding and modeling new forms of resistance at sites previously overlooked—resistance that must stand in for the protection of rights until the structures of immigration laws and processes can be humanely reset.<sup>36</sup>

## II. THE “FINAL ACT”—REMOVAL

### A. *Deportation as a Legal Concept*

Deportation, as a legal concept, has traditionally been characterized as the non-punitive outcome of an administrative proceeding in which an adjudicator finds an individual's presence in her non-birth country unauthorized.<sup>37</sup> For over a century, the United States Supreme Court has resisted the notion that deportation is a form of punishment, maintaining, instead, that it is merely the culmination of a civil process.<sup>38</sup> The Court's

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Robert Fisk, *Poor Khaled*, LONDON REV. BOOKS, Dec. 1992; Malcolm Bull, *Ultimate Choice*, LONDON REV. BOOKS, Feb. 2006; Isabel Hull, *Except for His Father*, LONDON REV. BOOKS, June 2016.

35. See *infra* Part V.A–C.

36. See *infra* Part V.

37. See *Fong Yue Ting v. United States*, 149 U.S. 698, 708–09 (1893). As the Court explained in *Fong Yue Ting*:

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of a [noncitizen] who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.

*Id.* at 730.

38. *Id.* at 709 (defining deportation as “the removal of a [noncitizen] out of the country,

longstanding unwillingness to recognize deportation as legally cognizable, state-sanctioned punishment, however, did not prevent it from acknowledging that deportation causes, or has the potential to cause, harm.<sup>39</sup> Resulting in the “loss of both property and life[,] or of all that makes life worth living,”<sup>40</sup> the Court has described the stakes of deportation as “indeed high and momentous for the [noncitizen] who has acquired his residence here.”<sup>41</sup>

In the Court’s most recent framing in its groundbreaking 2010 *Padilla v. Kentucky*<sup>42</sup> decision, it equated deportation with “banishment or exile” and stated that “[t]he severity of deportation . . . only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.”<sup>43</sup> In discussing a criminal defense attorney’s duty to advise her noncitizen, criminal defendant client of the potential immigration consequences of a guilty plea, the Court remarked that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>44</sup>

Notwithstanding the Court’s acknowledgment of the ways in which deportation is harmful, its position that deportation is not punishment persists. The case law’s maintenance of this status quo, in turn, has blocked the import of certain criminal procedural protections into the realm of deportation proceedings.<sup>45</sup> The argument goes as follows: individuals facing the possibility of a recognized punishment by the state (e.g., incarceration for a criminal offense) are entitled to a range of constitutional procedural safeguards, such as the Sixth Amendment right to appointed counsel and the Eighth Amendment protection against cruel and unusual punishment; however, when the state seeks to impose a

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simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken”). With the federal courts “declin[ing] every opportunity and urging to reexamine the nature of removal proceedings” between 1893 and 2010, *Fong Yue Ting* stood as the lone Supreme Court decision to deliberately consider their nature as either civil or criminal. Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1305 & n.27 (2011).

39. See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

40. *Ng Fung Ho*, 259 U.S. at 284.

41. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

42. 559 U.S. 356 (2010).

43. *Id.* at 373-74 (internal citation and quotation marks omitted).

44. *Id.* at 364.

45. See Stephen H. Legomsky, *A New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 518 (2007) (employing the term “asymmetric incorporation” to refer to immigration law’s absorption of the criminal enforcement model and its simultaneous rejection of criminal procedural safeguards).



consequence that is less than punishment (e.g., deportation), such due process protections do not apply.<sup>46</sup> The legal language that serves to deny the punitive nature of deportation obscures the harms that occur down the line when deportation orders are translated into force against the bodies of immigrants.

### *B. Deportation as an Act Against the Body*

Along the above-mentioned lines, legal scholars have considered rather extensively whether deportation constitutes punishment.<sup>47</sup> And while this inquiry meaningfully pushes the needle forward by illuminating how such a characterization produces dramatically different results in terms of the process due, debating where deportation falls on the civil/criminal divide distances courts and commentators from conceptualizing the physical act of deportation itself.

The act of removal has two distinguishing features from other enforcement actions: when and where it takes place. Temporally, the act of deportation is the final enforcement mechanism following a litany of preceding enforcement actions—or, put differently, “the tip of a much larger enforcement pyramid” or “iceberg.”<sup>48</sup> That is, before ICE forcibly loads deportees onto airplanes, it will have already subjected those individuals to the permeating reach of its enforcement regime.<sup>49</sup> This system begins with an arrest, executed either by ICE agents or state and local law enforcement officers.<sup>50</sup> Then, there is detention, which may be

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46. *Id.* at 515-18 (chronicling rights available in criminal adjudications that have been rejected in removal proceedings based on the premise that deportation does not constitute punishment).

47. See, e.g., Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999); Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000); Legomsky, *supra* note 45; Pauw, *supra* note 8.

48. Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1472-74 (2019) (refocusing the immigration enforcement debate from one that is “deportation-centric” to one that conceptualizes deportation as “not synonymous with immigration enforcement,” but rather the top of the immigration “enforcement pyramid”).

49. For an overview of border enforcement policies under the Trump Administration not covered here, see generally Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967 (2020) (laying out and analyzing former President Trump’s border enforcement policies).

50. Jain, *supra* note 48, at 1475 (describing arrest as “the first step on the path toward deportation”); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826-27 (2015) (arguing that arrests by local law enforcement officers function as regulatory “immigration-screening device[s],” useful to immigration agents as an easily obtained source of valued information).

“mandatory” until expulsion<sup>51</sup> and/or involve multiple transfers to facilities across the country.<sup>52</sup> In the event of release from detention on bond or parole,<sup>53</sup> ICE’s enforcement mechanism continues as it monitors and surveils those who remain in removal proceedings.<sup>54</sup> Violation of the conditions of release—or for any other reason the Attorney General deems appropriate—results in rearrest and incarceration.<sup>55</sup> In the end, if the immigration judge issues an order of removal, and the individual does not appeal her case to the Board of Immigration Appeals (“BIA”), or thereafter to a federal circuit court of appeals, or loses such appeals,<sup>56</sup> ICE’s Enforcement and Removal Operations division will orchestrate and implement the ultimate link in the immigration enforcement chain—deportation.<sup>57</sup> Thus, while deportation is by no means the first or only

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51. Immigration and Nationality Act, 8 U.S.C. § 1226(c)(1) (“The Attorney General shall take into custody any alien who [is inadmissible or deportable] when the alien is released.”). Several crimes-based grounds of inadmissibility or deportability trigger mandatory detention, including conviction of “a crime involving moral turpitude,” § 1182(a)(2)(A)(i), or conviction of “an aggravated felony.” § 1227(a)(2)(A)(iii).

52. See EMILY RYO & IAN PEACOCK, AM. IMMIGR. COUNCIL, *THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES* 3 (2018), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_landscape\\_of\\_immigration\\_detention\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf) (finding that, in fiscal year 2015, sixty percent of detained adults experienced at least one interfacility transfer); see also Adrienne Pon, Note, *Identifying Limits to Immigration Detention Transfers and Venue*, 71 STAN. L. REV. 747, 756-58 (2019) (providing an overview of the scope of ICE’s transfer practices).

53. § 1226(a) (“[T]he Attorney General may release the alien on bond of at least \$1,500 . . . or conditional parole.”); 8 C.F.R. §§ 236.1(c) (2019); see also U.S. Immigr. and Customs Enf’t, Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf) [hereinafter Directive 11002.1] (directing ICE personnel to “consider the parole of arriving aliens processed under [§ 235 of the Immigration and Nationality Act (“INA”)] who have been found to have a ‘credible fear’ of persecution”). Subsequent guidance affirms that individuals with positive credible fear determinations remain parole eligible. See Memorandum from John Kelly, Sec’y, U.S. Dep’t Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

54. See, e.g., Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. (forthcoming 2021) (manuscript at 40-46) (describing ICE’s current “technological ‘alternatives’ to detention,” including GPS monitoring, voice-recognition software, and cellphone applications with biometric scanning capabilities).

55. See 8 U.S.C. § 1226(b) (“The Attorney General *at any time* may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.” (emphasis added)).

56. See *infra* Part III.B.2.b.

57. *Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/ero> (last visited Feb. 8, 2021) (“ERO manages all aspects of the immigration enforcement process, including identification and arrest, domestic transportation, detention, bond management, and supervised release, including alternatives to detention.”).

system interaction an individual who has become ensnared in the deportation pipeline experiences,<sup>58</sup> the act of removal's significance derives, at least in part, from its position in the enforcement timeline as the final act—that is, the point at which virtually no recourse for relief remains.<sup>59</sup>

Deportation's significance also derives from the place where it often occurs: in airports and on airplanes. When considering the loci of immigration enforcement, however, detention facilities are the most common focal point of discussion,<sup>60</sup> and for legitimate reasons. Egregious and often prolonged rights violations fester in these spaces, including inadequate, and sometimes dangerous, medical care; excessive use of solitary confinement; and exploitative labor practices.<sup>61</sup> Deaths and suicides occurring within these facilities' walls have also drawn warranted attention to the inhumane conditions many immigrant detainees face.<sup>62</sup> Although access to detainees in ICE immigration prisons continues to be a pressing concern,<sup>63</sup> the abuses that transpire in these places at least have the opportunity to come to light due to detainees' continued presence in the United States and the chance that

58. For analyses of prosecutors' and private employers' immigration enforcement involvement, respectively, see generally Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553 (2013) (laying out prosecutors' immigration enforcement involvement); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009) (laying out private employers' immigration enforcement involvement).

59. See *Deportation*, USA.GOV, <https://www.usa.gov/deportation> (Jan. 28, 2021) (providing that, after deportation, a deportee's options are to either appeal their deportation order or apply for readmission to the country).

60. See generally, e.g., Pon, *supra* note 52 (highlighting issues in the system of detention centers across the United States); Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1 (2018) (providing an empirical study on countrywide detention facilities).

61. S. POVERTY L. CTR. ET AL., SHADOW PRISONS: IMMIGRANT DETENTION IN THE SOUTH 6-7 (2016), [https://www.splcenter.org/sites/default/files/ijp\\_shadow\\_prisons\\_immigrant\\_detention\\_report.pdf](https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf) [hereinafter SHADOW PRISONS]; see also Complaint for Declaratory and Injunctive Relief and Damages, Class Action, Jury Demand at 1-2, 9-11, *Barrientos v. CoreCivic, Inc.*, No. 4:18-cv-00070-CDL (M.D. Ga. Apr. 17, 2018) (alleging that the billion-dollar private prison corporation that operates Stewart Detention Center, CoreCivic, coerces detainees into working for between \$1 and \$4 per day to provide the sanitation and cooking services for the facility's nearly 2,000 individuals).

62. See Alex Nowrasteh, *8 People Died in Immigration Detention in 2019, 193 Since 2004*, CATO INST. (Jan. 8, 2020, 3:05 PM), <https://www.cato.org/blog/8-people-died-immigration-detention-2019-193-2004>; see also Megan Granski et al., *Death Rates Among Detained Immigrants in the United States*, 12 INT'L J. ENV'T RSCH. & PUB. HEALTH 14414, 14416 (2015) (finding that, from 2003 to 2015, the most common causes of death while in ICE custody were cardiovascular-related illness, cancer, and suicide).

63. See, e.g., Complaint at 24-29, *S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec.*, No. 1:18-v-00760 (D.D.C. Apr. 4, 2018) (identifying barriers to providing competent representation to detained clients at three detention centers in the Southeast, including up to four-hour wait times to meet with a single client).

they will communicate with attorneys, activists, or the press while incarcerated or in the event of release. A (deeply flawed) grievance system also exists through which detainees may lodge complaints related to their treatment while in detention, and Congress recently created the Office of the Immigration Detention Ombudsman to address allegations of official misconduct in detention centers independent from ICE or Customs and Border Patrol (“CBP”) oversight.<sup>64</sup> Surely, these measures come nowhere near sufficient, criticized for being laden in bureaucratic ineptitude and partisan agendas;<sup>65</sup> the point merely is that they exist.

Airports and airplanes, in contrast, often go overlooked as sites of rights violations within the immigration enforcement apparatus. But why is this so? It is likely not because an insignificant number of people are affected by them; in fact, there were 1.73 million records of passengers transported on more than 15,000 ICE Air flights from October 2010 to December 2018.<sup>66</sup> One reason may be, then, that ICE Air’s complex, opaque, and, at times, disorganized web of operations shrouds the rights abuses that occur on their flights and in the airports they utilize.<sup>67</sup> In addition, the relatively transient nature of the time spent in these locales—coupled with the reality that once a deportation flight has landed at its destination, deportees have no formal channel for reporting any mistreatment that occurred during the execution of the deportation<sup>68</sup>—foreclose the possibility that outsiders will ever learn of what actually happens during the course of most ICE Air deportations.

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64. U.S. IMMIGR. & CUSTOMS ENF’T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 415-20 (rev. ed. 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf> [hereinafter PERFORMANCE-BASED NATIONAL DETENTION STANDARDS] (setting forth grievance procedures); 6 U.S.C. § 205.

65. See SHADOW PRISONS, *supra* note 61, at 17, 42, 48, 59, 66; Esther Yu Hsi Lee, *Chances Are High that if You’re Abused in Immigration Detention, No One Will Care*, THINKPROGRESS (Apr. 12, 2017, 12:01 PM), <https://thinkprogress.org/dhs-33000-complaints-abuse-civ-cf154614c006> (reporting that, between January 2010 and July 2016, the DHS Office of the Inspector General opened investigations into only “247 of [the] 33,126 complaints lodged against its component agencies”); Hamed Aleaziz, *The Ex-Leader of an Anti-Immigration Group Is Creating the Office in Charge of Fielding Civil Rights Complaints from Detainees*, BUZZFEED NEWS (Jan. 30, 2020, 1:45 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/immigration-hardliner-detention-ombudsman>.

66. See *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

67. See *infra* Part IV.

68. The grievance procedure in the *Performance-Based National Detention Standards* (“PBNDs”) is available to detainees. See *supra* note 64 and accompanying text. Once individuals deplane in their respective nations, they are no longer in ICE custody, and thus the PBNDs grievance system would seem inapplicable. Moreover, Congress tasked the newly created Office of the Immigration Detention Ombudsman with “[e]stablish[ing] an accessible and standardized process regarding complaints . . . for violations of law, standards of professional conduct, contract terms, or policy related to *immigration detention*.” 6 U.S.C. § 205(b)(2) (emphasis added).

Thus, unlike ICE detention centers, which have become infamously known as hotbeds of civil and human rights abuses,<sup>69</sup> ICE Air flights and the airports they patronize are rarely conceived of as similarly heinous sites of rights violations. However, as we explore below, these spaces—these mobile detainment and expulsion facilities—deserve examination.<sup>70</sup> To that end, we begin with a description of ICE Air’s deportation machine,<sup>71</sup> followed by an explanation of the stakes and fallout that result from the final act of deportation.<sup>72</sup>

### C. ICE Flights: The Machinery of Mass Deportation

In fiscal year 2019, ICE deported more than 267,000 individuals to 192 countries, figures the agency touts as among last year’s “achievements.”<sup>73</sup> These officially reported numbers alone, however, do little to illuminate the “black box” that is the final act of removal itself—an act that occurs largely out of sight and on airplanes.<sup>74</sup> To pull back the veil on ICE’s deportation flights, the University of Washington Center for Human Rights (“UWCHR”) obtained and analyzed an ICE Air Operations dataset that chronicles flights from October 2010 to December 2018.<sup>75</sup> The dataset, which contains a total of 1.73 million passenger records, revealed that, over the eight-year period examined, more than 15,000 ICE Air flights transported people either abroad or between detention centers in the United States prior to deportation.<sup>76</sup>

The global expulsion of hundreds of thousands of people out of the United States annually is no straightforward task. Just as the detention of migrants has grown exponentially in recent years, particularly in private facilities, the network of institutions involved in the deportation of migrants by air has mushroomed into a large, complex, and increasingly privatized labyrinth of public and private institutions, including air brokers, aviation subcontractors, and airports.<sup>77</sup> While the Justice Prisoner and Alien Transportation System was created in 1995 as a

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69. See generally SHADOW PRISONS, *supra* note 61 (detailing instances of civil and human rights abuses in ICE detention centers).

70. See *infra* Part II.C–D.

71. See *infra* Part II.C.

72. See *infra* Part II.D.

73. U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 9, at 19, 27–32; ERO FY 2019 Achievements, ICE (Feb. 10, 2021), <https://www.ice.gov/features/ERO-2019>.

74. While some deportations of Mexicans from detention centers near the United States’ southern border take place by bus, most involve at least one flight. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

75. *Id.*

76. *Id.*

77. See *id.*

merger between the United States Marshals' air fleet and ICE, intended as "the only government-operated, regularly scheduled passenger airline in the nation,"<sup>78</sup> by 2010, the Marshals were no longer conducting deportation flights.<sup>79</sup> The task was effectively outsourced to a network of private charter operators, which, since 2018, has been coordinated by a single broker, former CIA subcontractor Classic Air Charter ("CAC").<sup>80</sup> CAC does not operate the flights itself, but instead subcontracts with other private charter companies, which themselves often employ further subcontractors.<sup>81</sup> Swift Air, which was purchased by iAero in December 2018, and World Atlantic Airlines, also known as Caribbean Sun Airlines, are the two most frequently used airlines, but smaller companies also fly deportation flights—sometimes subcontracted by Swift or World Atlantic, sometimes as competitors for subcontracts from CAC, sometimes under direct contract with ICE.<sup>82</sup> For example, ICE's flights to Havana, Cuba are often operated under a direct contract between ICE and Zephyr Aviation, and Omni Air International, "a Department of Defense contractor whose contract with the [Department of Homeland Security ("DHS")] has not been publicly disclosed," appears to operate most flights to Asia, including many that, according to documents received by UWCHR, routinely cost over \$1 million per flight.<sup>83</sup>

In turn, these aviation subcontractors must contract with Fixed Base Operators ("FBO"), private businesses that lease space at airports, often generating significant proportions of airports' revenue base.<sup>84</sup> FBOs coordinate the charter flights' arrival, departure and fueling logistics while paying fees to the host airports.<sup>85</sup> Deportation flights cannot land

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78. *JPATS Celebrates 30 Years of Owned Aircraft Operations*, U.S. MARSHALS SERV., <https://www.usmarshals.gov/jpats> (last visited Feb. 8, 2021).

79. See WILLIAM E. BORDLEY, U.S. MARSHALS SERV., *PRIVACY IMPACT ASSESSMENT FOR THE JUSTICE PRISONER AND ALIEN TRANSPORTATION SYSTEM (JPATS): JPATS MANAGEMENT INFORMATION SYSTEM (JMIS) 2* (2013), <https://www.justice.gov/opcl/docs/pia-jmis-may2013-aug-opcl.pdf>.

80. Max Siegelbaum, *Former CIA Subcontractor Depports Immigrants for ICE*, DOCUMENTED (July 13, 2018, 2:50 PM), <https://documentedny.com/2018/07/13/former-cia-subcontractor-deports-immigrants-for-ice>; *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

81. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

82. *Id.*

83. *Id.*; *Contract Summary*, USASPENDING.GOV, <https://www.usaspending.gov/#/award/23820160> (last visited Feb. 8, 2021).

84. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

85. See *Hidden in Plain Sight: King County Collaboration with ICE Air Deportation Flights at Boeing Field*, U. WASH. CTR. FOR HUM. RTS. (Apr. 23, 2019), <https://jsis.washington.edu/humanrights/2019/04/23/ice-air-king-county> [hereinafter *Hidden in Plain Sight: King County Collaboration*].

or take off without FBOs, and FBOs cannot operate without contracts with local airports who nominally oversee their operations, though such “oversight” may often amount to very little.<sup>86</sup>

As a result of the privatization of deportation flights it is difficult to obtain information about ICE Air’s operations. The 2018 release of the Alien Repatriation Tracking System database to the UWCHR was the first public disclosure of the network’s reach and scope.<sup>87</sup> And much remains unknown, even about the data released. For example, the dataset accounts for only about half of the number of deportations ICE reported in fiscal years 2011–2018, suggesting that a significant portion of flights remains undisclosed.<sup>88</sup> Some, but not all, of this may be due to the concurrent use of major commercial airlines, which do not appear in the database.<sup>89</sup> A March 11, 2019 report by the DHS Office of the Inspector General noted that in fiscal year 2017, “ICE Air coordinated the removal of 8,288 aliens via commercial flights and the removal or transfer of 181,317 aliens via charter flights,”<sup>90</sup> suggesting that the relative proportion of commercial vs. charter flights was small. More recent agency publications suggest that the use of commercial flights may be on the rise,<sup>91</sup> yet this cannot explain the significant gap from 2011 to 2018. Flights on which known problems occurred, including the botched December 2017 deportation to Somalia,<sup>92</sup> are also inexplicably absent from the database. ICE has not provided any explanation about this gap in the data disclosed.

Attempts to obtain additional documentation to clarify the business of deportations have been stymied, though it is not clear whether this stems from byzantine/inept recordkeeping or active stonewalling. For example, UWCHR researchers requested copies of Quarterly Operational Summary Safety Reports and annual safety reports, which

86. *Id.*

87. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

88. *Id.*

89. Chantal Da Silva, *United, Delta and American Airlines Used for More Than 1,000 Deportation Flights to Central America in 2019*, NEWSWEEK (Jan. 31, 2020, 8:02 AM), <https://www.newsweek.com/united-delta-american-airlines-deportation-flights-central-america-1484940>.

90. OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-19-28, ICE FACES BARRIERS IN TIMELY REPATRIATION OF DETAINED ALIENS 17 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-28-Mar19.pdf>.

91. U.S. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2020, at 26 (2020), [https://www.dhs.gov/sites/default/files/publications/19\\_0318\\_MGMT\\_FY-2020-Budget-In-Brief.pdf](https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_FY-2020-Budget-In-Brief.pdf) (noting that from fiscal year 2017 to fiscal year 2018, the use of commercial aircraft for deportations jumped twenty-three percent).

92. See Jacey Fortin, *U.S. Put 92 Somalis on a Deportation Flight, Then Brought Them Back*, N.Y. TIMES (Dec. 9, 2017), <https://www.nytimes.com/2017/12/09/us/somalia-deportation-flight.html>.

are required under the contracts for ICE Air Operations, and were told no such documents existed.<sup>93</sup> Relatedly, UWCHR researchers requested copies of Alien Travel Case Files, a set of documents whose existence is publicly documented by ICE submissions to the National Archives, and were told these constituted “law enforcement records” privileged from public release.<sup>94</sup> In other cases, UWCHR researchers requested information about deportation flights from local governments who administer airports, and were told that the flights in question were private business operations not subject to public records laws.<sup>95</sup> Lastly, within days of the UWCHR’s publication of its initial findings in April 2019, ICE Air ceased operating its deportation flights under the recognizable callsign RPN (for “repatriation”), instead having flights use callsigns particular to the private company operating them,<sup>96</sup> thus rendering them indistinguishable from other charter flights operated by the same businesses. The timing of this abrupt change suggests a deliberate decision to conceal deportation flights from the general public.

#### *D. The Stakes and Secondary Effects of the Final Act of Deportation*

The sheer volume of flights and the lack of transparency about the proliferation of ICE Air’s machinery of mass deportation sets in relief the ease with which countless numbers of immigrants are removed, often in error, and without the opportunity to utilize legal protections.<sup>97</sup> The “final act” of expulsion from the United States is just the beginning of a new set of grave and permanent harms for many deportees. To conclude this Part, we describe the perils upon removal occasioned by ICE Air flights.

The stakes are undoubtedly high for every person facing imminent deportation.<sup>98</sup> And they are especially grave for rejected asylum seekers,

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93. Letter from Catrina M. Pavlik-Keenan, FOIA Officer, U.S. Immigr. and Customs Enf’t, to Angelina Godoy, Univ. of Wash. Ctr. for Hum. Rts. (Oct. 4, 2019) (on file with authors).

94. See Letter from Catrina M. Pavlik-Keenan, FOIA Officer, U.S. Immigr. and Customs Enf’t, to Angelina Godoy, Univ. of Wash. Ctr. for Human Rts. (Apr. 15, 2019) (on file with authors).

95. *Hidden in Plain Sight: King County Collaboration*, *supra* note 85.

96. See *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

97. See *infra* Part III.B.

98. See Daniel Kanstroom, *Deportation as a Global Phenomenon: Reflections on the ILC Draft Articles on the Expulsion of Aliens*, 30 HARV. HUM. RTS. J. 49, 50 (2017) (“Deportation may be functionally defined as: a powerful government assertion of high stakes sanctions including detention, forced movement, and exclusion in low formality settings aimed at noncitizens who are often the most powerless and marginalized members of society.”).



who run the risk of serious bodily harm or even death upon return to their countries of origin.<sup>99</sup> As one immigration judge put it, deciding whether to expel an asylum seeker to potential persecution or torture in the immigration court context likens to hearing “death penalty cases . . . in traffic court settings.”<sup>100</sup> For long-term residents—regardless of legal status—deportation also functions as a particularly acute reality, often manifesting in the separation from family, the loss of property and employment,<sup>101</sup> and forcible return to countries where they may no longer have ties.<sup>102</sup>

At the individual level, depending on a variety of factors in the receiving country, a deportee may experience responses to return that range from welcome to criminal prosecution.<sup>103</sup> For instance, some deportees face fines and imprisonment in their home countries if they departed without travel documents or with fraudulent ones, which significantly interferes with their ability to smoothly reintegrate into that society.<sup>104</sup> Some deportees experience targeted harassment and extortion by gangs or law enforcement, who perceive the returnees as having means earned abroad based on their attire or speech.<sup>105</sup> Deportees from the United States must also often endure stigmatization as criminals by the state and community to which they are returned<sup>106</sup> and are subject to bars on their reentry into the United States that range anywhere from five years to life.<sup>107</sup> Moreover, deportation causes a disruption in migrants’ resource accumulation processes and can have negative effects on deportees’ economic and employment prospects in the receiving

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99. See, e.g., *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (“Deportation is always a harsh measure; it is all the more replete with danger when the [noncitizen] makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.”); Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence>.

100. Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html>.

101. See Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2405 (2013) (“[L]ong-term lawful permanent residents are more likely than other categories of noncitizens to possess deep community ties in this country.”).

102. Erwin Chemerinsky, *Chemerinsky: The Stakes Are Enormous for Immigrants in Upcoming DACA Cases*, A.B.A. J. (Oct. 31, 2019, 6:00 AM), <https://www.abajournal.com/news/article/chemerinsky-enormous-stakes-for-immigrants-in-upcoming-daca-cases> (describing the circumstances of DACA recipients).

103. See Jacqueline Maria Hagan & Joshua Thomas Wassink, *Return Migration Around the World: An Integrated Agenda for Future Research*, 46 ANN. REV. SOCIO. 533, 541-42 (2020).

104. *Id.* at 541.

105. See *id.* at 541-42.

106. *Id.* at 543.

107. See Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a).

nation.<sup>108</sup> For many deportees, the act of removal and its aftermath of dislocation engender a toxic concoction of shame, depression, anxiety, and hopelessness.<sup>109</sup>

The shock of deportation reverberates far beyond the individual who experiences it firsthand.<sup>110</sup> A sizeable and growing literature examines the myriad psychological, social, and economic effects on families and communities left behind.<sup>111</sup> Studies have shown that U.S.-born children with deported parents suffer adverse effects, such as “psychological trauma, material hardship, residential instability, family dissolution, increased use of public benefits, and, among boys, aggression.”<sup>112</sup> Forced separation from spouses, on top of the obvious emotional strain, causes economic distress that can plummet families into cycles of poverty.<sup>113</sup> Industries often struggle to maintain profit margins and productivity when their employees are whisked out of the workforce at a moment’s notice.<sup>114</sup> Businesses sustain financial losses when enforcement actions deter immigrants from shopping for non-essential items, opting instead to hunker down at home and only leave when absolutely necessary.<sup>115</sup>

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108. Anda M. David, *Back to Square One: Socioeconomic Integration of Deported Migrants*, 51 INT’L MIGRATION REV. 127, 140-41 (2017). But see Jacqueline Hagan et al., *A Longitudinal Analysis of Resource Mobilisation Among Forced and Voluntary Return Migrants in Mexico*, 45 J. ETHNIC & MIGRATION STUD. 170, 175-76 (2019) (finding that some deportees adapt to economic conditions over time).

109. See generally DEBORAH A. BOEHM, RETURNED: GOING AND COMING IN AN AGE OF DEPORTATION (2016) (describing, through individual accounts, the hardships that deportees have faced when forced to return to their home countries).

110. See Hagan et al., *supra* note 8, at 1816.

111. See, e.g., *id.*; Lisseth Rojas-Flores et al., *Trauma and Psychological Distress in Latino Citizen Children Following Parental Detention and Deportation*, 9 PSYCH. TRAUMA: THEORY, RSCH., PRAC. & POL’Y 352, 358-59 (2017).

112. RANDY CAPPS ET AL., URB. INST. & MIGRATION POL’Y INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES vi, 5-14 (2015), <https://www.migrationpolicy.org/research/implications-immigration-enforcement-activities-well-being-children-immigrant-families> (surveying the literature on the impacts of parental immigration enforcement on children).

113. See, e.g., April M. Schueths, *Not Really Single: The Deportation to Welfare Pathway for U.S. Citizen Mothers in Mixed-Status Marriage*, 45 CRITICAL SOCIO. 1075, 1087-89 (2019) (“[B]y criminalizing immigrant Latino men and placing them in deportation proceedings, citizen women are also disciplined by way of neoliberal paternalism in having to depend on public welfare for their livelihood when they did not have to previously.”).

114. See Ryan Edwards & Francesc Ortega, *The Economic Impacts of Removing Unauthorized Immigrant Workers*, CTR. FOR AM. PROGRESS (Sept. 21, 2016, 3:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2016/09/21/144363/the-economic-impacts-of-removing-unauthorized-immigrant-workers>.

115. See, e.g., Vivian Yee, *Immigrants Hide, Fearing Capture on ‘Any Corner,’* N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html>.

Beyond these secondary effects, the act of deportation also exacerbates the ever-present fear of the *threat of deportation* that looms over the deportable—a far-reaching effect, considering that the unauthorized population is now estimated to be approximately 22 million.<sup>116</sup> This threat operates as a low-cost enforcement mechanism that indirectly executes federal immigration laws in the logistical void the Executive cannot fill.<sup>117</sup> This gap in enforcement capacity results from Congress' decisions, especially since the mid-1990s, to simultaneously expand the grounds of deportability and contract the opportunities for relief from removal.<sup>118</sup> Along with the private sector's labor demands, which have long incentivized unauthorized migration at the government's acquiescence,<sup>119</sup> this legislative trend has worked to produce exponentially more deportable individuals than the immigration enforcement system was ever designed to handle.<sup>120</sup> To fill this gap, the federal government has increasingly relied on "spectacle" to incite fear of removal in the minds of the deportable.<sup>121</sup> Such terror can lead to "system avoidance," a behavioral pattern whereby immigrants forego interactions with record-keeping institutions that provide necessary health, safety, educational, and welfare resources in order to minimize contact with system actors that could trigger the path to deportation.<sup>122</sup>

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116. Mohammad M. Fazel-Zarandi et al., *The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990 to 2016*, PLOS ONE (Sept. 21, 2018), <https://doi.org/10.1371/journal.pone.0201193>. A 2018 survey found that seventy-eight percent of unauthorized Latinx immigrants "worry that they, a family member or a close friend could be deported." MARK HUGO LOPEZ ET AL., PEW RSCH. CTR., MORE LATINOS HAVE SERIOUS CONCERNS ABOUT THEIR PLACE IN AMERICA UNDER TRUMP 31 (2018), [https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2018/10/Pew-Research-Center\\_Latinos-have-Serious-Concerns-About-Their-Place-in-America\\_2018-10-25.pdf](https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2018/10/Pew-Research-Center_Latinos-have-Serious-Concerns-About-Their-Place-in-America_2018-10-25.pdf).

117. See K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1927-32 (2019) (explaining the "logic of self-deportation").

118. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered titles of U.S.C. (2018)), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered titles of U.S.C. (2018)), are two such statutes that dramatically increased the grounds of deportability and altered the judicial review scheme for challenging removal. See *infra* Part III.B.5; Park, *supra* note 117, at 1925.

119. Park, *supra* note 117, at 1932; DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 15-21 (First Papercover Ed. 2003) (2002) (explaining that "international migration stems from a relatively permanent demand for unskilled labor").

120. Park, *supra* note 117, at 1931 ("Despite the massive growth of the deportation system, as of 2010, ICE had the capacity to remove less than 2% of the 22 million unauthorized persons then present in the United States. This circumstance is popularly called the country's 'immigration crisis.'").

121. *Id.* at 1928-31.

122. Jain, *supra* note 48, at 1467 (citing Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOCIO. REV. 367, 368 (2014)).

System avoidance can render life so unbearable for some immigrants that they opt to self-deport, remedying the government's enforcement failure with "de facto deportation."<sup>123</sup> Thus, considering the individual- and communal-level repercussions of the act of deportation, and how the act itself magnifies the fear of the omnipresent threat of deportation, a common thread emerges that characterizes the secondary effects of forced removals: their reverberations stretch wide across communities in the United States and abroad, and run deep within the psyches and pocketbooks of those expelled and those left behind.

### III. THE FINAL ACT—RIGHTS VIOLATIONS AT REMOVAL

ICE Air's mass-deportation machinery implements the final act of expulsion, as it commences a new set of harms in the aftermath of deportation. In Part III, we focus on the rights violations implicated by this phenomenon.<sup>124</sup> We begin by providing an overview of the ever-expanding mechanisms of deportation to demonstrate the troublesome ways that greater numbers of immigrants arrive at the point of the final act of removal.<sup>125</sup> We then delineate specific rights violations implicating airports and airplanes that occur at the point of removal to argue that the final act of deportation facilitates previous rights abuses and creates new ones.<sup>126</sup> Such abuses range from various permutations of wrongful deportation to physical mistreatment of deportees aboard airplanes and in airports.<sup>127</sup> As to wrongful removal, deportation flights—and the airport infrastructures that facilitate their operation—function as the actualization of the termination of immigrants' rights by bringing to fruition preexisting violations, such as the lack of due process protections in defending against removal proceedings; the execution of premature, negligent, or erroneous removals; and the issuance of inadequate or fraudulent travel documents whose use may render a noncitizen stateless.<sup>128</sup>

#### A. *Deportation Dragnets*

In recent years, there has been an ever-expanding deportation apparatus by which growing numbers of immigrants, including many

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123. See DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* 135 (2012); Hagan et al., *supra* note 8, at 1814.

124. See *infra* Part III.

125. See *infra* Part III.A.

126. See *infra* Part III.B.

127. See *infra* Parts III.B, IV.

128. See *infra* Part III.B.

fleeing persecution, are siphoned off into the mechanism of expulsion from the United States. Before describing the rights violations that deportees suffer, this Subpart sets forth the augmented efforts to accelerate the removal of noncitizens from the United States and the ways in which the immigration system functions as a “deportation machine” with little regard to rights and fairness.<sup>129</sup>

### 1. Expanding the Local as Sites of Removal

Much has been written about the federal government’s determination to relinquish its claim to exclusive jurisdictional authority and to “deputize” state and local law enforcement officials to enforce immigration laws through the 1996 amendments to immigration laws, known as the 287(g) program.<sup>130</sup> Similarly, through the enactment and reinstatement of a second program known as Secure Communities, state and local authorities are now required to report to DHS certain noncitizens, thereby significantly increasing the rate of deportation through the efforts of local authorities.<sup>131</sup> Section 9 of Trump’s 2017 Executive Order on Interior Enforcement further expanded the local immigration deportation mechanisms by threatening the loss of federal funds as sanctions on so-called sanctuary jurisdictions.<sup>132</sup> The legal challenges and the resolution of the National League of Cities protesting the threats of sanctions have not assuaged local governments.<sup>133</sup> Increasing numbers of localities have banned sanctuary policies through

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129. See Complaint at 3, *Las Ams. Immigrant Advoc. Ctr. v. Trump*, 475 F. Supp. 3d 1194 (D. Or. 2020) (No. 3:19-cv-02051-SB), <https://innovationlawlab.org/wp-content/uploads/2019/12/ECF-1-Las-Americas-v.-Trump-No.-19-cv-02051-SB-D.-Or..pdf> [hereinafter *Las Americas Complaint*].

130. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g); see also Liz Robbins, *A Lone New York Sheriff Signs Up to Aid Immigration Crackdown*, N.Y. TIMES (Mar. 20, 2018), <https://www.nytimes.com/2018/03/20/nyregion/new-york-reusselaer-county-ice-jails.html>; Editorial, *Too Broken to Fix*, N.Y. TIMES (Apr. 8, 2010), <https://www.nytimes.com/2010/04/09/opinion/09fri3.html>.

131. See *Secure Communities*, U.S. DEP’T HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF’T, [http://www.ice.gov/secure\\_communities](http://www.ice.gov/secure_communities). Secure Communities was inaugurated in 2008, replaced under the Obama Administration with the more limited Priority Enforcement Program, then reinstated under the Trump Administration in 2016. See *id.*; *Priority Enforcement Program*, U.S. DEP’T HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/pep>; Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801 (Jan. 25, 2017). Ostensibly created for the purposes of removal of noncitizens with serious criminal convictions, the program targets everyone who had contact with the immigration system, including low-level offenders and those without any criminal history. See Juliet P. Stumpf, *D(E)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1267-71 (2015).

132. See Exec. Order No. 13,768, 82 Fed. Reg. at 8,801.

133. NAT’L LEAGUE OF CITIES, 2019 NATIONAL MUNICIPAL POLICY AND RESOLUTIONS 223-24 (2018).

laws that preempt municipalities from refusing to comply with federal immigration enforcement and detainer requests.<sup>134</sup>

The expansion of localities as sites for deportation efforts has significantly increased the numbers of immigrants subject to the final act of removal. As one expert has observed, “[o]ver the last few decades, the way that DHS has carried out most of its deportations is by co-opting the resources of local and state agencies,” adding that “[w]ithout the assistance and active help and participation of localities, DHS can’t deport as many people as they otherwise would.”<sup>135</sup>

## 2. The New Places and Spaces of Enforcement Efforts

In addition to reaching into localities to accomplish the effectuation of the removal of immigrants, the Trump Administration has increased its enforcement actions in previously unheard-of places. ICE officials, acting pursuant to an internal CBP memo signed “Happy hunting!”, have boarded buses and trains far from the border to demand documentation from passengers, particularly those suspected to be foreign.<sup>136</sup> In recent years, ICE has executed arrests of immigrants in state courthouses when they appear for their state-related legal proceedings.<sup>137</sup> According to a Brennan Center for Justice report,

ICE officers have walked the halls, sat in courtrooms, and questioned court attendees and staff, trying to identify and arrest people in court for cases unrelated to immigration. The people they target may be

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134. *What’s a Sanctuary Policy? FAQ on Federal, State and Local Action on Immigration Enforcement*, NAT’L CONF. OF STATE LEGISLATURES (June 20, 2019), <https://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx> (noting an increase in states that have prohibited municipalities from refusing to engage in immigration enforcement collaboration).

135. Marc Rod, *‘Sanctuary’ Policies Can Limit but Won’t Stop Trump’s Deportation Plans*, CNBC (June 21, 2019, 12:50 PM), <https://www.cnn.com/2019/06/21/sanctuary-policies-wont-stop-trumps-deportation-plans.html> (quoting Lena Graber, attorney for the Immigrant Legal Resource Center).

136. Tessa Stuart & Reed Dunlea, *The Faces of Deportation*, ROLLING STONE (July 22, 2020, 8:00 AM), <https://www.rollingstone.com/culture/culture-features/photographs-families-fighting-deportation-orders-from-trump-administration-1027700/>; see also Adiel Kaplan & Vanessa Swales, *Border Patrol Searches Have Increased on Greyhound, Other Buses Far from Border*, NBC NEWS (June 5, 2019, 4:30 AM), <https://www.nbcnews.com/politics/immigration/border-patrol-searches-have-increased-greyhound-other-buses-far-border-n1012596>.

137. U.S. Immigr. & Customs Enf’t, Directive 11072.1, Civil Immigration Enforcement Actions Inside Courthouse (Jan. 10, 2018), <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf>; see also ANGELA IRVINE ET AL., CERES POL’Y RSCH., *THE CHILLING EFFECT OF COURTHOUSE ARRESTS* 8 (2019), <https://www.cerespolicyresearch.com/s/icerreportfinal21oct2019.pdf>.

appearing as a defendant or witness, seeking a restraining order against an abusive partner, or seeking custody of their children.<sup>138</sup>

Through a 2011 policy memorandum, DHS designated medical care facilities as “sensitive locations,” that is, sites where enforcement actions are to be avoided.<sup>139</sup> The memo has not been rescinded, yet recently, health care locations have been targeted by federal immigration enforcement officers. A 2019 report by Physicians for Human Rights found that “[CBP] agents conduct searches in hospital parking lots and hold ambulances at checkpoints while critically ill patients languish inside.”<sup>140</sup> ICE agents have arrested immigrants in hospitals where they were receiving care, in one case even arresting an immigrant man donating bone marrow for his U.S.-citizen niece.<sup>141</sup> In another shocking instance, ICE intercepted an ambulance carrying a ten-year-old child with cerebral palsy who required emergency surgery, detained her, and commenced deportation proceedings immediately following her hospitalization.<sup>142</sup>

The Trump Administration shifted to data-driven enforcement mechanisms as a way to mine new forms of repositories of personal information to increase deportation efforts.<sup>143</sup> A study by *The Wall Street Journal* reported that the Trump Administration purchased one of the “largest known troves of bulk data” that “maps the movements of millions of cellphones in America” in order to detect, track, and deport immigrants.<sup>144</sup> The data has been obtained without judicial warrants,

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138. Douglas Keith, *States Push Back Against ICE Courthouse Arrests*, BRENNAN CTR. FOR JUST. (Nov. 22, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/states-push-back-against-ice-courthouse-arrests>.

139. See Memorandum from John Morton, Director, U.S. Immigr. & Customs Enf’t, to Field Office Directors et al., U.S. Immigr. & Customs Enf’t (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>; Memorandum from David V. Aguilar, Deputy Commissioner, U.S. Customs & Border Prot., to Assistant Comm’r, Office of Air & Marine et al. (Jan. 18, 2013), <https://foiarr.cbp.gov/streamingWord.asp?i=1251>.

140. Sarah Stoughton & Kathryn Hampton, *Not in My Exam Room*, PHYSICIANS FOR HUM. RTS. (June 10, 2019), <https://phr.org/our-work/resources/not-in-my-exam-room>.

141. David M. Perry, *ICE Keeps Raiding Hospitals and Mistreating Disabled Children*, PAC. STANDARD (Jan. 15, 2018), <https://psmag.com/social-justice/ice-keeps-raiding-hospitals-and-harming-disabled-children>.

142. Scott Neuman & John Burnett, *10-Year-Old Girl Is Detained by Border Patrol After Emergency Surgery*, NPR (Oct. 26, 2017, 5:07 AM), <https://www.npr.org/sections/thetwo-way/2017/10/26/560149316/10-year-old-girl-is-detained-by-ice-officers-after-emergency-surgery>.

143. See, e.g., McKenzie Funk, *How ICE Picks Its Targets in the Surveillance Age*, N.Y. TIMES MAG. (Oct. 3, 2019), <https://www.nytimes.com/2019/10/02/magazine/ice-surveillance-deportation.html> (“The business of deportation, like so much else in the modern world, has been transformed by the power of big data.”); *Gonzalez v. Immigr. & Customs Enf’t*, 416 F. Supp. 3d 995, 999-1001 (C.D. Cal. 2019).

144. Byron Tau & Michelle Hackman, *Federal Agencies Use Cellphone Location Data for Immigration Enforcement*, WALL ST. J. (Feb. 7, 2020, 7:30 AM),

through contracts with private vendors, notwithstanding privacy protection concerns about the gathering of such data without judicial or legislative oversight—as articulated by the Supreme Court in its 2018 decision in *Carpenter v. United States*.<sup>145</sup>

ICE and the FBI have begun to probe state driver's license databases, “scanning through millions of Americans’ photos without their knowledge or consent,” most of whom have no criminal record, and without the consent of Congress.<sup>146</sup> As one report observed, ICE has “turned state departments of motor vehicles databases into the bedrock of an unprecedented surveillance infrastructure.”<sup>147</sup> Further, DHS promoted agreements with technology companies to use facial recognition and other software programs in order to identify and remove noncitizens.<sup>148</sup>

Residents presumably beyond the reach of deportation for having obtained U.S. citizenship now face prospects of denaturalization and removal based on allegations that they wrongfully obtained citizenship.<sup>149</sup> The number of denaturalization cases criminally prosecuted from 2016 to 2018, the first two years of the Trump Administration, was double the average amount of cases criminally prosecuted from 2004 to 2016.<sup>150</sup> In the 2019 fiscal year, the administration included a budget request of \$207.6 million to investigate

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[https://www.wsj.com/articles/federal-agencies-use-cellphone-location-data-for-immigration-enforcement-11581078600?mod=hp\\_lead\\_pos5](https://www.wsj.com/articles/federal-agencies-use-cellphone-location-data-for-immigration-enforcement-11581078600?mod=hp_lead_pos5).

145. 138 S. Ct. 2206, 2217–20 (2018) (Sotomayor, J., concurring) (holding that with some exceptions, the Fourth Amendment protects against cell phone location tracking). It is not clear whether the decision in *Carpenter* applies to this particular type of data collection. See Editorial, *The Government Uses ‘Near Perfect Surveillance’ Data on Americans*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/opinion/dhs-cell-phone-tracking.html>.

146. Drew Harwell, *FBI, ICE Find State Driver's License Photos Are a Gold Mine for Facial-Recognition Searches*, WASH. POST (July 7, 2019, 3:54 PM), <https://www.washingtonpost.com/technology/2019/07/07/fbi-ice-find-state-drivers-license-photos-are-gold-mine-facial-recognition-searches>.

147. *Id.*

148. See Drew Harwell, *Amazon Met with ICE Officials over Facial-Recognition System that Could Identify Immigrants*, WASH. POST (Oct. 23, 2018, 9:04 PM), <https://www.washingtonpost.com/technology/2018/10/23/amazon-met-with-ice-officials-over-facial-recognition-system-that-could-identify-immigrants>.

149. See *Featured Issue: Denaturalization Efforts by USCIS*, AM. IMMIGR. LAWS. ASS'N (Sept. 4, 2020), <https://www.aaila.org/advo-media/issues/all/featured-issue-denaturalization-efforts-by-uscis> (describing efforts to identify lawful permanent residents or citizens who wrongfully obtained their status); Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration's War on Immigration?*, N.Y. TIMES MAG. (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html>.

150. See Wessler, *supra* note 149.



and pursue American citizens who may be vulnerable to denaturalization.<sup>151</sup>

### B. Wrongful Deportation

As the mechanisms of deportation have further expanded into localities and have encroached into new sites in order to channel increasing numbers of immigrants into expulsion proceedings and toward the final act of deportation, an immigrant's rights to challenge her removal have been significantly impaired. This Subpart examines the multiple rights violations experienced by immigrants and illuminates the demise of the integrity of the courts established to prohibit these myriad violations.

#### 1. Barriers to Seeking and Obtaining Relief from Removal

Deportations ordered and executed in reliance on an unfair process are wrongful. Thus, when ICE Air, and the airports through which its planes pass, carry out removal orders issued pursuant to unfair processes, they give effect to the underlying due process violations and eliminate any remaining rights.<sup>152</sup> Given that removal proceedings present, at best, a procedurally infirm opportunity to seek relief from deportation, it follows that removals predicated on such a process constitute wrongful deportations. For one, indigent noncitizens in removal proceedings have no right to appointed counsel.<sup>153</sup> It is unsurprising, then, that nationally, over sixty percent of immigrants defending against deportation proceed pro se, with representation rates varying dramatically across jurisdictions.<sup>154</sup> This proves significant

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151. See Maryam Saleh, *Trump Administration Is Spending Enormous Resources to Strip Citizenship from a Florida Truck Driver*, INTERCEPT (Apr. 4, 2019, 6:00 AM), <https://theintercept.com/2019/04/04/denaturalization-case-citizenship-parvez-khan> (intending to investigate 887 cases and review another 700,000 immigrant files for purposes of prosecution and removal).

152. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

153. See Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (providing that noncitizens may be represented in removal proceedings "at no expense to the Government"). Professor Ingrid Eagly has optimistically argued that the Supreme Court's influential decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), could potentially transform public defender organizations into an "institutional form of immigration defense" and open the possibility for the "migration" of *Gideon* counsel into the immigration context. See Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2293-95, 2297-3000 (2013). So far, this has not been the case on any large scale.

154. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), [https://americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf). For example, the representation rate of non-detained respondents in New York City is forty percent higher than that in Atlanta. *Id.*

because, as the first nationwide study of access to counsel in United States immigration courts shows, non-detained, represented respondents are 3.5 to 5.5 times more likely to prevail on their claims for relief than their pro se counterparts.<sup>155</sup> The disparities are even greater for the eighty-six percent of detained noncitizens who proceed without counsel, as the study found that twenty-one percent of detained, represented noncitizens obtained relief from removal compared to two percent of those who represented themselves.<sup>156</sup> Those who persist with their pro se efforts no longer have the benefit of the Legal Orientation Program, designed to assist immigrants without counsel to navigate their way through deportation proceedings—a program which was ended by the Trump Administration.<sup>157</sup> New proposed regulations will effectively limit the right to appeal deportation orders by imposing a nearly \$1,000 fee—an amount out of the reach of many immigrants.<sup>158</sup>

Even for detainees who would otherwise be able to secure counsel, the nature of immigration detention often forecloses the possibility of representation because ICE regularly transfers individuals to remote locations hundreds of miles away from detainees' community support networks and the nearest immigration attorney.<sup>159</sup> In addition, given that the vast majority of deportees are detained prior to removal,<sup>160</sup> many noncitizens are forced to litigate from detention—sometimes for extended periods of time—which compromises their chances of presenting a compelling claim for relief by curtailing their ability to gather evidence from within the United States and abroad or to contact potential witnesses to testify.<sup>161</sup> Others, broken by the detention system,

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155. See, e.g., Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 6, 49-50 (2015).

156. See *id.*; EAGLY & SHAFER, *supra* note 154, at 23.

157. See *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. & Immigr. of the S. Comm. on the Judiciary*, 115th Cong. 5-6 (2018) (statement of J. A. Ashley Tabaddor, President, National Association of Immigration Judges) [hereinafter Statement of J. A. Ashley Tabaddor].

158. Vanessa Swales, *Immigrants Could Face Nearly \$1,000 Charge to Appeal Deportation Orders*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/us/immigration-court-deportation-appeals.html>.

159. See HUM. RTS. WATCH, A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES 12-16 (2011), [https://www.hrw.org/sites/default/files/reports/us0611webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf); RYO & PEACOCK, *supra* note 52, at 2 (“About 48 percent, 26 percent, and 22 percent of detainees were confined at least once in a facility that was located more than 60 miles, 90 miles, and 120 miles away, respectively, from the nearest nonprofit immigration attorney who practiced removal defense.”).

160. See Immigration and Nationality Act § 236(a), 8 U.S.C. § 1226(a). Many noncitizens with criminal convictions are subject to mandatory detention. 8 U.S.C. § 1226(c)(1).

161. Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 127-30 (2008); HUM RTS. WATCH, *supra* note 159, at 14-15.

abandon their claims altogether and request “voluntary departure,”<sup>162</sup> calculating that the risks of harm they will face upon return may be no worse than the inhumane living conditions of immigration detention.<sup>163</sup>

Apart from the procedural infirmities in the context of removal proceedings, even greater procedural unfairness—both in kind and in volume—exists when noncitizens cannot access courts in the first place, as is the case for those subject to summary removal processes, such as expedited removal, administrative removal, and reinstatement of removal.<sup>164</sup> Indeed, in fiscal year 2018, approximately seventy-one percent of deportations on ICE Air were through such summary processes.<sup>165</sup> Summary removal systems erect barriers to seeking and obtaining relief from removal, thereby suggesting that deportations that flow from these “poisonous tree[s]”<sup>166</sup> should be deemed invalid.

Finally, when immigrants are successful in obtaining counsel and accessing the courts, they face compromised tribunals whose ability to properly function has been undermined.<sup>167</sup> Immigration judges testifying before Congress have related the ways in which the Trump Administration has politicized immigration courts, including the relocation of judges for seemingly punitive purposes.<sup>168</sup> The DHS, under

162. See 8 U.S.C. § 1229c(a)(1)–(2) (permitting qualifying noncitizens “voluntarily to depart the United States at [their] own expense” within 120 days of the order’s issuance).

163. Christie Thompson & Andrew R. Calderón, *More Immigrants Are Giving Up Court Fights and Leaving the U.S.*, MARSHALL PROJECT (May 8, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/05/08/more-detained-immigrants-are-giving-up-court-fights-and-leaving-the-u-s> (reporting that “[i]n fiscal year 2018, the number of applications [for voluntary departure] doubled from the previous year—rising much faster than the 17 percent increase in overall immigration cases”). One of the authors witnessed this firsthand in 2019 while representing a Honduran asylum seeker in her bond proceedings at a detention facility in the rural South. Although the young woman had a meritorious sexual-orientation-based claim, after spending several months in custody with no certain release date in sight, she opted to request voluntary departure and return to Honduras until she could save enough money to flee to another country to seek asylum there.

164. See *supra* Part II.B. Reinstatement of removal is a procedure that applies to noncitizens who return to the United States illegally after having been removed under a prior order of deportation, exclusion, or removal. See 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8 (2019). The noncitizen then may neither apply for any relief under the INA nor obtain review of the prior order, save for certain circumstances. See § 1231(a)(5).

165. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

166. *Nardone v. United States*, 308 U.S. 338, 341 (1939).

167. Immigration scholars have long expressed concerns about the lack independence of immigration courts and the Board of Immigration Appeals (“BIA”) controlled by the Executive Branch via the Executive Office of Immigration Review within the Department of Justice. For a review of the need to redesign immigration adjudication, see generally Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010).

168. See *Strengthening and Reforming America’s Immigration Court System: Hearing Before the Subcomm. on Border Sec. & Immigration of the S. Comm. on the Judiciary*, 115th Cong. 3

the Trump Administration, has interfered with the day-to-day operation of immigration courts. Described as “unparalleled turmoil,” immigration courts are overwhelmed with backlogs and inconsistent requirements, resulting in an apparent inability to maintain routine administrative functions.<sup>169</sup> Immigration judges have expressed their concerns, if not fears, about the demise of the integrity of their courts.<sup>170</sup>

As national civil rights groups have claimed, the immigration court system under the Trump Administration functions as a “deportation machine” with little regard to rights and fairness.<sup>171</sup> Worse yet, the opportunity to document these rights violations has been diminished. Former Immigration Judge Jeffrey Chase has lamented the pronouncements by the Executive Office for Immigration Review (“EOIR”) to deny public access to some immigration proceedings and the refusal of some judges to allow even former immigration judges into their courts to observe.<sup>172</sup> Given the general right of public access to such hearings,<sup>173</sup> and the ways in which the deportation machinery has been fortified in recent years, the need for transparency in these circumstances is heightened.

## 2. Premature Removal

Immigrants often suffer premature removal—that is, a deportation effectuated while legal proceedings are still pending or before avenues for relief are exhausted.<sup>174</sup> Premature removal arguably violates the Due Process Clause of the Fifth Amendment by cutting off access to courts and a fair legal process.<sup>175</sup> Thus, when airports and air carriers aid and

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(2018) (statement of J. A. Ashley Tabaddor, President, National Association of Immigration Judges).

169. Sophia Tareen, *Lawyers: Immigration Court System Is ‘Red Tape Gone Crazy,’* AP NEWS (Jan. 16, 2020), <https://apnews.com/b8e7f7148b2d104ca21c1e41fff70d23> (noting misplaced files, missing interpreters, and inaccurate notices of court dates and dockets).

170. *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the Subcomm. on Immigr. and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. (2020), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2757> (statement of the Round Table of Former Immigration Judges).

171. See Las Americas Complaint, *supra* note 129, at 3.

172. Jeffrey S. Chase, *The Need for Transparency*, OPS./ANALYSIS ON IMMIGR. L. (Dec. 30, 2019), <https://www.jeffreyschase.com/blog/2019/12/30/the-need-for-transparency> (describing proceedings under the Migration Protection Protocols, wherein immigrants are returned to Mexico where they wait indefinitely to reenter the United States for their removal proceedings).

173. See 8 C.F.R. § 1003.27 (2020) (establishing the right of the public to access hearings with limited exceptions).

174. See, e.g., Zack Peterson, *Deported Before His Case Was Closed*, APPEAL (Sept. 11, 2018), <https://theappeal.org/ice-deporting-people-appealing-cases> (describing ICE’s practice of “unannounced deportation attempts in the middle of ongoing cases”).

175. Case law supports the argument that interfering with an individual’s right to meaningfully engage in and complete a judicial process violates due process. See *Bounds v. Smith*, 430 U.S. 817,

abet such removals, they are complicit in violating noncitizens' due process rights and, in many cases, their actions are the nail in the coffin that ultimately prevents deported noncitizens from completing or benefiting from a legal process decided in their favor.

To illustrate, while the *Grace v. Whitaker*<sup>176</sup> litigation was ongoing in the District Court for the District of Columbia, ICE removed two of the asylum-seeking plaintiffs, a mother and daughter.<sup>177</sup> Ironically, at the temporary restraining order hearing, just after oral argument on whether the plaintiffs' deportation should be stayed pending the court's determination of its jurisdiction, the district court judge, the plaintiffs' attorneys, and the government lawyers all learned that the parties' deportation had already been carried out earlier that morning.<sup>178</sup> District Court Judge Emmet Sullivan, who became "extremely upset" upon learning this information, issued an oral order in open court "directing the government to turn that plane around . . . and bring those people back to the United States."<sup>179</sup> Judge Sullivan warned, "[I]f they aren't brought back forthwith, I'm going to issue orders to show cause why people should not be held in contempt of court, and I'm going to start with the Attorney General."<sup>180</sup> He elaborated that he found it "outrageous" that "[s]omebody in pursuit of justice who has alleged a credible fear in her mind and is seeking justice in a United States court is just . . . spirited away while her attorneys are arguing for justice for her."<sup>181</sup> Unfortunately, though documentation of a premature removal in a federal court transcript may be rare, ICE's practice of deporting individuals with pending legal proceedings is by no means an uncommon occurrence. In fact, during fiscal years 2011–2018, ICE's own records show that ICE Air deported 8,078 noncitizens who, at the

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827-28 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."); *Ex parte Hull*, 312 U.S. 546, 549 (1941) (holding that a state may not interfere with an individual's efforts to file documents with a court).

176. 344 F. Supp. 3d 96 (D.D.C. 2018), *aff'd in part*, 965 F.3d 883 (D.C. Cir. 2020). On appeal, the party of Matthew Whitaker was changed to William Barr, reflecting the change in the United States Attorney General from the time of the district court decision to the time of the appellate court decision.

177. Michelle Mount, "Turn That Plane Around!": *The Pending Decision on the Deportation of Asylum Seekers*, 33 GEO. IMMIGR. L.J. 149, 156-57 (2018).

178. *Id.*; see also Transcript of Temporary Restraining Order Proceedings Before the Honorable Emmet G. Sullivan, United States District Court Judge at 39-42, *Grace*, 344 F. Supp. 3d 96 (No. 18-1853) [hereinafter Transcript of TRO Proceedings].

179. Transcript of TRO Proceedings, *supra* note 178, at 42, 46.

180. *Id.* at 41.

181. *Id.* at 45.

time of deportation, were still engaged in a pending legal process.<sup>182</sup> These pending legal processes—whether before the immigration courts, the BIA, or the federal courts of appeals—combined with deportation give rise to premature removal—again, defined here as a deportation carried out despite the existence of a legal proceeding challenging that very act.

#### a. Proceedings Before the EOIR<sup>183</sup>

ICE may not lawfully execute an order of removal until it has become administratively final.<sup>184</sup> EOIR-issued orders of removal (those issued by immigration judges) become administratively final in a number of ways, including if the noncitizen waives her right to appeal; the thirty-day period for filing an appeal to the BIA expires; or the BIA dismisses the appeal.<sup>185</sup> In contrast, the administrative finality of DHS-issued removal orders (those issued by ICE or CBP)—such as reinstatement orders and removal orders against non-lawful permanent residents with aggravated felony convictions—“depends on the type of order and whether the person has a fear of return to his or her country of origin.”<sup>186</sup>

With respect to EOIR-issued removal orders, the noncitizen respondent has thirty days from the date of issuance to challenge the order by filing a Notice of Appeal with the BIA,<sup>187</sup> during which time the noncitizen’s deportation is automatically stayed.<sup>188</sup> If the noncitizen files a timely appeal to the Board, the individual’s deportation is further automatically stayed during the pendency of the appeal<sup>189</sup> because, until the BIA renders its decision, the order has yet to become administratively final and thus subject to execution by ICE.<sup>190</sup>

182. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

183. The Executive Office for Immigration Review (“EOIR”), within the Department of Justice, consists of the immigration courts and their administrative appeal body, the BIA. *About the Office*, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/about-office> (Feb. 3, 2021).

184. See Immigration and Nationality Act § 241(a)(1)(B); 8 U.S.C. § 1231(a)(1)(B).

185. 8 U.S.C. § 1252(b)(1); 8 C.F.R. §§ 241.1, 1241.1 (2020).

186. TRINA REALMUTO ET AL., SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS 3-4 (2014), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/seeking\\_a\\_judicial\\_stay\\_of\\_removal\\_fin\\_1-21-14.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/seeking_a_judicial_stay_of_removal_fin_1-21-14.pdf); see also TRINA REALMUTO ET AL., REINSTATEMENT OF REMOVAL 25 (2019), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/reinstatement\\_of\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf) (listing the types of removal orders that DHS may issue).

187. See 8 U.S.C. § 1229a(c)(6).

188. 8 C.F.R. § 1003.6 (2020).

189. *Id.*

190. See 8 C.F.R. §§ 241.1, 1241.1 (2020). Determining the administrative finality of an order of removal, however, can be complicated, e.g., when the Board decides some issues and remands

### b. Proceedings Before the Federal Courts of Appeals

In the event that the BIA dismisses the appeal and the noncitizen files a petition for review with the appropriate circuit court of appeals within the thirty-day filing window,<sup>191</sup> no automatic stay of the removal order goes into effect.<sup>192</sup> Instead, when an individual seeks judicial review at the circuit level, she must file a separate, simultaneous motion for a stay of deportation to protect against removal.<sup>193</sup> If the stay is granted, the noncitizen is shielded from deportation while her appeal is ongoing; if it is denied, she remains at risk of deportation while the court adjudicates her case on the merits.<sup>194</sup> This scheme has the potential to—and at times does—create the nonsensical reality that a noncitizen ultimately prevails on appeal but has already been removed from the United States with practically no way to return.<sup>195</sup>

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others to the immigration judge. The order does not become final until the immigration judge re-decides the issues on remand. Jesi J. Carlson et al., *Finality and Judicial Review Under the Immigration and Nationality Act: A Jurisprudential Review and Proposal for Reform*, 49 U. MICH. J.L. REFORM 635, 648-50 (2016). A major exception to the automatic stay of an order of removal while an appeal is pending before the BIA involves motions to reopen. That is, if the immigration judge denies the motion to reopen, and the noncitizen appeals the denial to the Board, a stay does not automatically kick in as it does for other types of appeals to the BIA. 8 C.F.R. § 1003.2(f) (2020). Likewise, filing a motion to reopen in immigration court does not bar ICE from executing the removal order in all circumstances. *Id.* § 1003.23(b)(1)(v). Rather, the pendency of a motion to reopen an order of removal before an immigration judge only triggers a stay in two circumstances: (1) while a motion to rescind an in-absentia removal or deportation order is pending at the immigration court; or (2) while a motion filed by a qualified battered spouse, child or parent is pending. 8 U.S.C. § 1229a(b)(5)(A)–(C), (c)(7)(C); 8 C.F.R. § 1003.23(b)(4)(ii)–(iii) (2020).

191. After exhausting administrative remedies, a noncitizen may file a petition for review with the circuit court of appeals in which the immigration judge completed proceedings. *See* 8 U.S.C. § 1252.

192. *See id.* § 1252(b)(3)(B) (filing a petition for review “does not stay the removal of [a noncitizen] pending the court’s decision on the petition, unless the court orders otherwise”). Before Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), the filing of a petition for review with a federal court of appeals automatically stayed the order of removal during the pendency of the appeal. *See* 8 U.S.C. § 105a(a)(3) (1994) (repealed 1996). For an argument for the return of the automatic stay upon filing a petition for review, *see* Legomsky, *supra* note 167, at 1719-20.

193. REALMUTO ET AL., SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS, *supra* note 186, at 2 & n.2.

194. In the Ninth and Second Circuits, the mere filing of a stay motion temporarily stays removal until the court adjudicates the motion. *De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997); *In re Immigr. Petitions for Rev. Pending in the U.S. Ct. of Appeals for the Second Cir.*, 702 F.3d 160, 162 (2d Cir. 2012).

195. Tianyin Luo & Sean Lai McMahon, *Victory Denied: After Winning on Appeal, an Inadequate Return Policy Leaves Immigrants Stranded Abroad*, BENDER’S IMMIGR. BULL., Oct. 2014, at 1061, 1062, [https://www.law.nyu.edu/sites/default/files/upload\\_documents/19%20Benders%20Immigr%20Bull%201061\\_Victory%20%282%29.pdf](https://www.law.nyu.edu/sites/default/files/upload_documents/19%20Benders%20Immigr%20Bull%201061_Victory%20%282%29.pdf) (arguing that the gaps in the government’s return policy of deportees who later prevail in the courts of appeals should lead courts to presume removal an irreparable harm when adjudicating a stay of removal).

One notable empirical study examined this phenomenon in the wake of the Supreme Court's decision in *Nken v. Holder*,<sup>196</sup> in which the Court held that the appropriate legal standard for adjudicating stay motions is that employed in deciding preliminary injunctions.<sup>197</sup> The study found that out of a sample of 1,646 cases filed after April 22, 2009 (the date *Nken* was decided), federal courts of appeals "denied stays of removal in about half of the appeals that were ultimately granted," including appeals involving asylum, withholding of removal, or protection under the Convention Against Torture ("CAT").<sup>198</sup> They also found that "[forty-four percent] of applicants for asylum and related forms of relief who eventually prevailed in their appeals were first denied stays," meaning that "[d]espite their meritorious claims, they remained at risk of deportation—or were actually deported—to countries where they faced a risk of serious harm."<sup>199</sup> Thus, whether proceedings are pending before EOIR or the federal appellate courts, premature removals—those that occur while a legal proceeding challenging that very removal has not concluded—violate baseline due process and, accordingly, are wrongful.<sup>200</sup> When airports and airplanes carry out the act of expulsion during the pendency of an appeal, they participate in, and give final effect to, these due process violations.

### 3. Mistaken or Erroneous Removal

Wrongful removal in airports and on airplanes also occurs in the context of negligent or mistaken deportations, broadly defined as removals executed on a mistaken belief of fact or law.<sup>201</sup> And no deportations are more egregiously erroneous than those involving U.S. citizens. Although the federal government claims that it does not keep records of detained or deported U.S. citizens, information from individual case studies and data from the largest national legal orientation program reveal much about the issue.<sup>202</sup> Despite the

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196. 556 U.S. 418 (2009).

197. See *id.* at 434; Fatma Marouf et al., *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO STATE L.J. 337, 345-46 (2014).

198. Marouf et al., *supra* note 197, at 340.

199. *Id.* at 385. "[A]bout half of the individuals who ended up winning their appeals had *never even requested* a stay of removal." *Id.* at 342. Whatever the reason may be for not filing a stay motion—whether because petitioners (or their attorneys) did not know of the requirement to avoid deportation during the appeals process—the finding indicates that a sizeable number of petitioners with winning claims remain exposed to removal during the pendency of their appeals. *Id.*

200. See *id.* at 401.

201. KANSTROOM, *supra* note 123, at 98-100.

202. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 618-620 (2011). Stevens's analysis of detainee files maintained by the Florence Immigrant and Refugee Rights Project ("FIRRP"), showed that "of the



difficulties in ascertaining exact figures, political scientist Jacqueline Stevens estimates that “.05% of those detained at the border or in an ICE facility who sign removal orders and are physically removed are U.S. citizens”—meaning that from 2003 to 2011, ICE likely deported thousands of U.S. citizens.<sup>203</sup> How ICE commits such grave mistakes can be explained, in part, by “the complexity of the law, overzealous agents and prosecutors, lack of appointed counsel (and, sadly, often ineffective retained counsel), detentions, transfers, and inadequate judicial resources.”<sup>204</sup> Still, it can be difficult to comprehend just how ICE manages to make such major errors that lead to serious consequences for the deported, as the case of Mark Lyttle illustrates.

In 2008, Lyttle, a U.S. citizen born in North Carolina who suffers from bipolar disorder and cognitive disabilities, was deported to Mexico after ICE officials coerced him into signing a document stating that he was from there.<sup>205</sup> After detaining Lyttle for fifty-one days—and despite having criminal background checks, Lyttle’s Social Security number, and the names of his parents indicating that he was a citizen—ICE flew him to the Mexican side of the border and forced him to disembark there.<sup>206</sup> Lyttle had \$3, no documentation that proved his identity, and no doses of his bipolar medication; he also spoke no Spanish, and knew no one in the country.<sup>207</sup> For the next four months, Lyttle wandered, largely on foot, through Mexico, Honduras (where he was imprisoned), Nicaragua, and Guatemala.<sup>208</sup> Once in Guatemala, he came into contact with a U.S. embassy official, who called Lyttle’s brother, obtained copies of his identity documents, and issued him a U.S. passport.<sup>209</sup>

As the numbers above suggest, Lyttle’s deportation was not a one-off incident.<sup>210</sup> Given that removals of U.S. citizens—the polity to

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6,775 detainees in the Eloy Detention Center meeting with FIRR attorneys between 2006 and 2008, and 1,252 detainees meeting with FIRR attorneys from other facilities in the area in 2008, an EOIR adjudicator decided that eighty-two (one percent) could not be deported because the detainees were U.S. citizens.” *Id.* at 622.

203. *Id.* at 629-30.

204. See KANSTROOM, *supra* note 123, at 98.

205. Esha Bhandari, *U.S. Citizen Wrongfully Deported to Mexico, Settles His Case Against the Federal Government*, ACLU (Oct. 5, 2012, 12:15 PM), <https://www.aclu.org/blog/speakeasy/us-citizen-wrongfully-deported-mexico-settles-his-case-against-federal-government>.

206. *Id.*; Kristin Collins, *N.C. Native Wrongly Deported to Mexico*, CHARLOTTE OBSERVER (Aug. 30, 2009, 5:45 AM), <https://www.charlotteobserver.com/news/local/article9028529.html>.

207. See Collins, *supra* note 206; Bhandari, *supra* note 205.

208. Collins, *supra* note 206; Bhandari, *supra* note 205.

209. Collins, *supra* note 206; Bhandari, *supra* note 205.

210. See Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1803-07 app. C (2015) (listing examples of U.S. citizens whom ICE unlawfully detained and/or deported); Meredith Hoffman, *The US Keeps Mistakenly Deporting Its Own Citizens*, VICE NEWS (Mar. 8, 2016,

whom deportation laws do not apply<sup>211</sup>—are a disturbingly prevalent reality, it is no wonder that noncitizens with valid claims for relief become swept up in the deportation dragnet. Indeed, as the UWCHR found, ICE’s own records reveal that 102 noncitizens were removed between 2011 and 2018 despite having been granted an immigration benefit that provides protection from deportation.<sup>212</sup>

In addition to mistakenly deporting U.S. citizens and noncitizens who have been granted immigration relief, ICE also routinely executes deportation orders that are legally erroneous under the U.S. Constitution or federal statutes and regulations.<sup>213</sup> Removal orders predicated on criminal convictions that, per *Padilla*, violate a noncitizen’s Sixth Amendment right provides an illustrative example.<sup>214</sup> Such orders of removal are constitutionally invalid and thus, when executed, they result in a mistaken deportation. For deported noncitizens seeking to vindicate their *Padilla* right from abroad, challenging their unconstitutional removal involves first obtaining post-conviction relief in the court that entered the conviction and then filing a motion to reopen in the immigration court that ordered the individual removed.<sup>215</sup> A removed noncitizen, however, faces significant barriers, such as the difficulties in developing the fact-specific claims necessary to prevail on a *Padilla* motion without the petitioner being present to testify or have her credibility assessed, and/or the inability to satisfy custody requirements in some jurisdictions.<sup>216</sup> For the few deportees able to secure vacatur of

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7:43 AM), [https://www.vice.com/en\\_us/article/pa4mq7/the-us-keeps-mistakenly-deporting-its-own-citizens](https://www.vice.com/en_us/article/pa4mq7/the-us-keeps-mistakenly-deporting-its-own-citizens).

211. Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2018) (“The term ‘alien’ means any person not a citizen or national of the United States.”).

212. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

213. Examples include removal on the basis of a conviction that should not have triggered grounds of inadmissibility or deportability, or an in-absentia removal order where the respondent’s absence was due to lack of notice of the hearing or exceptional circumstances.

214. *Padilla v. Kentucky*, 559 U.S. 356, 373–74 (2010). For an analysis of the convergence of the criminal and civil immigration law systems toward the regulation of noncitizens—the legal phenomenon known as “crimmigration”—see generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006). Conversely, one scholar argues that the phrase “immigrationization of criminal law” better captures the “interjection of the regulatory, administrative (and inherently more discretionary) practices of immigration control into the criminal justice system.” Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 618 (2003).

215. See 8 C.F.R. § 1240.12(c) (2020) (“The order of the immigration judge shall direct . . . the termination of the proceedings.”); MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK § 5:23 (2019) (noting that an immigration judge may terminate removal proceedings where the Government lacks sufficient evidence to sustain a removal order, such as when “a conviction that rendered a noncitizen inadmissible or deportable has been vacated”).

216. Rachel E. Rosenbloom, *Will Padilla Reach Across the Border?*, 45 NEW ENG. L. REV. 327, 338–43 (2011).

their criminal convictions from abroad, additional hurdles abound in the immigration context, likely resulting in the inability to reopen removal proceedings due to the “departure bar,” which forecloses some who have departed the United States on an order of removal from accessing the motion to reopen procedure.<sup>217</sup> Thus, an unlawful ICE-executed removal—with the assistance of airports—predicated on a constitutionally infirm conviction can result in the conundrum of a noncitizen having a viable legal argument for return to the United States but concurrently being unable to secure that return due to the labyrinthine process required to do so. As the foregoing suggests, mistaken or erroneous removals are not isolated incidents, and when ICE and its affiliated contractors and airports carry out such deportations, they perpetuate the underlying rights violations and render it virtually impossible for many noncitizens to successfully seek recourse.

#### 4. Rendering a Noncitizen Stateless

Before ICE can execute the final act of deportation, it must acquire travel documents from the receiving country—such as passports, visas, or national identity cards—for each deportee.<sup>218</sup> The process of securing travel documents generally entails completing Form I-217, Information for Travel Document or Passport, and liaising with foreign consular officials after either the issuance of the initial charging document (Form I-862, Notice to Appear) or the final order of removal.<sup>219</sup> Despite the existence of these guidelines, there is evidence that ICE sometimes fails to follow them and departs individuals without identity documents or with invalid ones, thereby exposing deportees to the risk of becoming stateless and being vulnerable to arrest, homelessness, and unemployment in the receiving country.<sup>220</sup> Indeed, ICE has even deported individuals to countries where they lack citizenship or legal status altogether.<sup>221</sup> In addition to the numerous individual accounts of

217. *Id.* at 346 & n.105.

218. U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., DETENTION AND REMOVAL OPERATIONS POLICY AND PROCEDURE MANUAL § 16.1(a) (2006), [https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/09684drofieldpolicymanual.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf).

219. *Id.* §§ 11.3(b)(5), 16.1(a), 16.2(a).

220. *See, e.g.,* Aviva Stahl, *How US Immigration Officers Use Dubious Identity Papers to Deport People*, ALJAZEERA AM. (Sept. 30, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/9/30/do-us-immigration-officers-use-invalid-identity-papers-to-deport-people.html> (detailing the deportation of a Cameroonian national using a questionable “temporary one-way passport” that ICE obtained from “an honorary consul for Cameroon,” a Texas-born Methodist minister with no formal experience in foreign affairs).

221. *See, e.g.,* FAMILIES FOR FREEDOM, SMUGGLED INTO EXILE: IMMIGRATION CUSTOMS AND ENFORCEMENT’S PRACTICE OF DEPORTING NON-CITIZENS WITHOUT VALID TRAVEL DOCUMENTS 8-9, 11 (2015), <https://familiesforfreedom.org/sites/default/files/resources/Smuggled%20into%20Ex>

deportations that relied on fraudulent or nonexistent travel documents,<sup>222</sup> the UWCHR identified fifty-seven cases in the ICE Air dataset in which noncitizens were removed despite ICE's own records indicating that the agency was "unable to obtain travel documents."<sup>223</sup> According to a DHS Office of Inspector General report, due to inadequate staffing and funding within ICE's Headquarters Custody Determination Unit's Travel Document Unit, ICE field offices tasked with obtaining travel documents lack adequate training and guidance to do so—leading to field offices "routinely" submitting nothing more than passport photographs and Form I-217 to foreign consulates, often insufficient information to secure the requisite identity documents.<sup>224</sup> Thus, although the known number of cases of deportees expelled with invalid travel documents is relatively low, ICE's lack of capacity, proper training, and oversight suggest that the actual numbers may be much higher. When ICE carries out the final act of deportation against individuals with improper documentation, its contractors and partner airports who facilitate such removals deliver noncitizens into precarious circumstances—even statelessness<sup>225</sup>—in the nation to which they supposedly belong. Deporting noncitizens with false travel documents or none at all—along with executing removal orders prematurely or by mistake—constitutes significant rights violations in and of themselves. Such violations are made more egregious, however, in light of the obstacles attendant to challenging a wrongful deportation and securing return to the United States.

### 5. Challenges in Attaining Post-Removal Judicial and Administrative Review

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>226</sup> conferred jurisdiction on the federal courts of appeals to consider petitions for review filed by noncitizens who were no longer in the country, providing for, at least in theory, the opportunity for a

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222. See generally *id.* (compiling stories of deportees who were removed with false travel documents or without any at all).

223. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

224. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-07-28, ICE'S COMPLIANCE WITH DETENTION LIMITS FOR ALIENS WITH A FINAL ORDER OF REMOVAL FROM THE UNITED STATES 25-26 (2007), [https://www.oig.dhs.gov/assets/Mgmt/OIG\\_07-28\\_Feb07.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIG_07-28_Feb07.pdf).

225. Jay Milbrandt, *Adopting the Stateless*, 39 BROOK. J. INT'L L. 695, 711 (2014) (defining "statelessness" as "the condition of not possessing recognized citizenship in a state or nation").

226. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

noncitizen to pursue or continue an immigration appeal from abroad.<sup>227</sup> Notwithstanding, removal before a noncitizen has had the opportunity to seek appellate review, or even during the pendency of an appeal, often results in the wholesale deprivation of the benefits of judicial review due to the impracticability of litigating such cases from abroad.<sup>228</sup> Successfully litigating in the federal courts inevitably requires legal representation, a crucial resource many deportees simply cannot afford, given that they likely spent a period of time unemployed in immigration detention and subsequently were cut off from their prior source of income by the final act of removal itself. Even for those who are able to secure counsel, being forced to litigate from abroad makes it more difficult to acquire and present evidence and meaningfully participate in the appeals process, given the disparities in internet access in various parts of the world.<sup>229</sup> This reality places deportees in a nearly impossible predicament: they face enormous obstacles to litigating from abroad but remain practically and legally unable to return unless the litigation is decided in their favor.

For deportees who do not file or have an appeal pending before the federal appellate courts and were removed under a final order of removal, additional issues present. The proper vehicle for such deportees to challenge their removal is through a motion to reopen—a statutory mechanism through which noncitizens who have been ordered removed may seek dismissal of the removal order by bringing new material evidence before the immigration judge or the BIA.<sup>230</sup> The effect of reopening a case is vacatur of the existing removal order.<sup>231</sup> Deportees, unlike noncitizens with not-yet-executed final orders of removal, must contend with the so-called “departure bar”—regulations that foreclose pursuit of a motion to reopen or reconsider, both before immigration judges<sup>232</sup> and the BIA,<sup>233</sup> after the noncitizen has departed the United

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227. *Id.* § 306 (amending § 242 of the Immigration and Nationality Act); Immigration and Nationality Act § 242, 8 U.S.C. § 1252. Prior to the enactment of IIRIRA, the federal courts lacked jurisdiction to review a deportation or exclusion order following a deportee’s departure from the United States. Immigration and Nationality Act § 106(c), 8 U.S.C. § 1105a(c) (repealed 1996).

228. *See, e.g.,* TRINA REALMUTO ET AL., RETURN TO THE UNITED STATES AFTER PREVAILING ON A PETITION FOR REVIEW OR MOTION TO REOPEN OR RECONSIDER 5 n.12, 17 (2015), [https://nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/fed/2015\\_27Apr\\_return-advisory.pdf](https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2015_27Apr_return-advisory.pdf).

229. *See, e.g.,* Rosenbloom, *supra* note 216, at 342.

230. *See* Immigration and Nationality Act § 240(c)(7), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3) (2020). A noncitizen can also seek vacatur of an existing removal order through a motion to reconsider where the basis for reconsideration is an error of law or fact in the previous decision. *See* § 240(c)(6), § 1229a(c)(6).

231. *Nken v. Holder*, 556 U.S. 418, 429 n.1 (2009).

232. *See, e.g.,* 8 C.F.R. § 1003.23(b)(1) (2020) (barring motions before immigration judges).

States. Both regulations provide that motions to reopen or reconsider “shall not be made by or on behalf of a person who is the subject of [removal, deportation, or exclusion] proceedings subsequent to his or her departure from the United States.”<sup>234</sup> Notwithstanding, for removed noncitizens seeking reopening based on the motion statutes,<sup>235</sup> ten circuit courts have found the departure bar regulations unlawful. Seven circuits have concluded that the regulations conflict with the motion statutes,<sup>236</sup> while three others have reversed where the immigration judge or BIA refused to adjudicate post-departure motions on jurisdictional grounds in contravention of the congressionally conferred jurisdiction to rule on *all* such motions.<sup>237</sup> In contrast, with respect to immigration judges’ and the BIA’s *regulatory* authority to reopen proceedings “at any time,”<sup>238</sup> several circuit courts have upheld denials of motions to reopen based on the departure-bar regulations.<sup>239</sup> Thus, in light of these adverse *sua sponte* reopening decisions, a noncitizen filing a motion to reopen outside of the ninety-day claims-processing deadline (or thirty days for motions to reconsider) has a better chance of prevailing if the individual seeks to reopen proceedings pursuant to the statute and argues for *sua sponte* reopening pursuant to the regulation in the alternative.<sup>240</sup> Due to varying law across circuits, whether post-departure reopening of removal proceedings with EOIR is even a possibility depends largely on the circuit in which the immigration court that issued the removal order is located.

Further, where a federal appellate court decides certain issues on appeal but remands others to the BIA, whether EOIR has jurisdiction

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233. 8 C.F.R. § 1003.2(d) (2020) (barring motions before the BIA).

234. 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) (2020).

235. Immigration and Nationality Act § 240(c)(6)–(7), 8 U.S.C. § 1229a(c)(6)–(7).

236. See *Santana v. Holder*, 731 F.3d 50, 51, 61 (1st Cir. 2013); *Garcia-Carias v. Holder*, 697 F.3d 257, 264 (5th Cir. 2012); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) (en banc); *Jian Le Lin v. U.S. Att’y Gen.*, 681 F.3d 1236, 1241 (11th Cir. 2012); *Prestol Espinal v. U.S. Att’y Gen.*, 653 F.3d 213, 224 (3d Cir. 2011); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011); *Coyt v. Holder*, 593 F.3d 902, 907–08 (9th Cir. 2010); *William v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007).

237. *Luna v. Holder*, 637 F.3d 85, 100, 102 (2d Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234, 235 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 594 (7th Cir. 2010).

238. 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1) (2020).

239. *Desai v. U.S. Att’y Gen.*, 695 F.3d 267, 270–71 (3d Cir. 2012); *Zhang v. Holder*, 617 F.3d 650, 664 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288, 299 (5th Cir. 2009); *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1156 (10th Cir. 2009); *Pena-Muriel v. Gonzales*, 489 F.3d 438, 442–43 (1st Cir. 2007).

240. To overcome the untimely nature of such a statutory motion, equitable tolling is available in most circuits in the event that another exception does not apply. See, e.g., Immigration and Nationality Act § 240(c)(7)(C)(ii)–(iii), 8 U.S.C. § 1229a(c)(7)(C)(ii)–(iii) (setting forth requirements regarding motions to reopen and rescind an order of removal in absentia and motions seeking to reopen to apply for asylum).

over removal proceedings on remand when the noncitizen has already been removed remains an open question, making it difficult and, at times, impossible for noncitizens to continue with their cases from abroad. For example, in the course of the *Desire v. Gonzales*<sup>241</sup> litigation—in which lawful permanent resident (“LPR”) Petitioner Jo Desire was deported to his native Haiti during the pendency of his petition for review—the Ninth Circuit ordered the Government to file supplemental briefing addressing whether, on remand, “the Immigration Judge would have jurisdiction to conduct the reopened removal proceedings while [Mr. Desire] remain[ed] outside the country.”<sup>242</sup> The Government ultimately failed to file such briefing after requesting three extensions, and documents later disclosed through a Freedom of Information Act (“FOIA”) request revealed that this was likely because the Government did not know the answer, as the relevant agencies took different positions on the issue.<sup>243</sup> Apparently, when the Office of Immigration Litigation (“OIL”) asked ICE what its position would be if Mr. Desire pursued his case from abroad, ICE responded that it would contest the immigration judge’s jurisdiction, at which point OIL sought the advice of the EOIR and the Office of the Solicitor General.<sup>244</sup> When it became apparent that EOIR’s position conflicted with representations the Department of Justice (“DOJ”) had been making to the courts about ICE’s return policy for prevailing noncitizen litigants, rather than answer the Ninth Circuit’s jurisdictional question, the DHS dropped all charges of removability against Mr. Desire and returned him to the United States at the Government’s expense.<sup>245</sup> Because the DOJ dodged the issue in Mr. Desire’s case to avoid the appearance of having misrepresented information to the federal courts, in circuits that have not ruled on the question, immigration judges will be left to determine for themselves whether they have jurisdiction over a matter on remand while a respondent remains abroad. In addition, immigration attorneys have reported instances of immigration judges administratively closing proceedings or issuing a removal order in absentia where the noncitizen respondent remains outside the country post-deportation and thus is unable to appear in court.<sup>246</sup>

## 6. Lack of Effective Policies and Procedures for Returning the

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241. 245 Fed. App’x 627 (9th Cir. 2007).

242. Order, *Desire*, 245 Fed. App’x 627 (No. 11-15199).

243. Luo & McMahon, *supra* note 195, at 1065-66.

244. *Id.* at 1066.

245. *Id.*

246. REALMUTO ET AL., *supra* note 228, at 5 n.12.

### Wrongfully Deported

Despite the availability—albeit challenging—of obtaining judicial or administrative review from abroad, wrongful deportations are largely irreparable due to the government’s inadequate return “policies” and procedures, which render the final act of removal, and airports’ participation in it, that much more severe. The only ICE policy directive dealing with the return of deportees to the United States provides:

[I]f an alien who prevails before the U.S. Supreme Court or a U.S. court of appeals was removed while his or her [petition for review] was pending, ICE will facilitate the alien’s return to the United States if either the court’s decision restores the alien to [LPR] status, or the alien’s presence is necessary for continued administrative removal proceedings.<sup>247</sup>

On its face, this non-binding internal policy only applies to deportees who prevail in the federal courts and makes no mention of the return of those who obtain a grant on a motion to reopen before the EOIR.<sup>248</sup> The policy directive also only discusses the return of LPRs and does not guarantee that non-LPRs—such as asylum seekers and victims of human trafficking or other serious crimes—will be brought back if they prevail in the federal courts.<sup>249</sup> Instead, it instructs that non-LPRs may only be returned when ICE, in an exercise of its unchecked discretion, deems their presence “necessary for continued administrative removal proceedings.”<sup>250</sup> Of course, precisely what circumstances would lead ICE to conclude that the deported noncitizen’s presence was “necessary” remain unclear.<sup>251</sup> The limited circumstances the directive identifies as meriting return are made more troubling by the fact that eligibility for some types of relief from removal actually require the applicant to be in the United States at the time of filing, making otherwise available relief unattainable for those that are outside the

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247. U.S. Immigr. & Customs Enf’t, Directive 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens (2012), [https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/11061.1\\_current\\_policy\\_facilitating\\_return.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf).

248. *Id.*

249. *See id.*

250. *See id.*

251. The Frequently Asked Questions document released by ICE explains that a noncitizen’s presence may be necessary when “the court of appeals specifically ordered [the noncitizen’s] presence, or because the nature of the court’s order requires [the noncitizen] to return for further testimony. *Frequently Asked Questions (FAQs) on Facilitating Return for Lawfully Removed Aliens*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/sites/default/files/documents/Document/2017/facilitatingReturnLawfullyRemovedAliensFAQ.pdf> (last visited Feb. 8, 2021). It continues, “ICE may explore other options in lieu of facilitating [a noncitizen’s] return, such as arranging for video teleconferencing or telephonic testimony.” *Id.*



purview of the directive.<sup>252</sup> Even for those who prevail in the federal courts and come within the ambit of the ICE policy (i.e., restored to LPR status or presence deemed “necessary” for continued proceedings), the possibility of actually returning will often be foreclosed for indigent individuals, as they must pay for the cost of their return.<sup>253</sup> For the few who can afford to fund their return, the sheer lack of coordination among ICE and the other agencies involved in facilitating a deportee’s return—including the Department of State and Customs and Border Protection—along with the lack of centralization in implementing the directive, which permits individual ICE offices and agents to exercise unfettered discretion leading to the lack of uniformity, results in a largely haphazard and unreliable return policy.<sup>254</sup>

#### IV. HUMAN RIGHTS ABUSES ON AIRPLANES AND IN AIRPORTS

The preceding examination of the ICE Air removal machinery and the analysis of the rights violations and harms occasioned by the deportation dragnet brings us to the egregious abuses that occur on airplanes and in airports. As others have observed, certain forms of academic writing avoid talking about the harms themselves when describing brutal violence, thus diluting the impact of the specific practices.<sup>255</sup> Here, we describe many of the details of the abuse that occurs through the network of airports, airlines, and flight brokers that comprise the ICE Air machinery to demonstrate the need for accountability. This Part concludes with an overview of the human rights norms to which the United States has committed, but nonetheless violates, through its operation of ICE Air.

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252. See, e.g., 8 U.S.C. § 1184(p)(6) (providing requirements for extension of § 1101(a)(15)(U) visas); *Kaur v. Holder*, 561 F.3d 957, 959 (9th Cir. 2009) (“[T]he question is whether [Petitioner’s] claim for withholding of deportation is moot. We agree with the government that we cannot give [Petitioner] any relief with respect to withholding because he has already been deported and he suffers no collateral consequence from the withholding decision.”). Physical presence in the United States as a filing prerequisite is especially troubling because “[a]ny motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents.” 8 C.F.R. § 1003.23(b)(3) (2020).

253. *Frequently Asked Questions (FAQs) on Facilitating Return for Lawfully Removed Aliens*, *supra* note 251; Luo & McMahon, *supra* note 195, at 1070.

254. Luo & McMahon, *supra* note 195, at 1070-73.

255. Peter C. Baker, *A Legacy of Torture in Chicago*, N.Y. REV. BOOKS (July 2, 2020), <https://www.nybooks.com/articles/2020/07/02/legacy-police-torture-chicago>.

### A. Physical and Psychological Abuse

Like immigration detention centers exposed as sites of physical and psychological abuse,<sup>256</sup> so, too, are airplanes and airports that carry out the final act of deportation. The most infamous incident of physical abuse aboard an ICE Air-chartered flight involved the 2017 failed deportation of ninety-two individuals to Somalia, during which the deportee passengers—continuously shackled at their wrists, waists, and ankles—endured outrageous mistreatment over the two-day period that they were on the airplane.<sup>257</sup> The Mogadishu-bound flight stopped in Dakar, Senegal, where it remained on the tarmac for nearly twenty-four hours before rerouting and making the 5,000-mile trek back to the United States.<sup>258</sup> Upon their return, dozens of the deportee passengers filed a class-action lawsuit alleging that during the course of the deportation flight, ICE agents and contract guards had “punched and kicked people, choked them, stepped on their shackles, and threw them on the floor, drawing blood and causing injury.”<sup>259</sup> The plaintiffs also reported that “[p]eople were placed in straight jackets and turned upside down” and were denied access to the restroom—sometimes as a form of punishment—which forced some passengers to urinate in plastic bottles or soil themselves.<sup>260</sup> In addition, ICE and contract officers psychologically abused the deportees, verbally berating them by calling them criminals and threatening to kill them.<sup>261</sup>

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256. See, e.g., TOM K. WONG ET AL., U.S. IMMIGR. POL’Y CTR., SEEKING ASYLUM: PART 1, at 5, 10 (2019), <https://usipc.ucsd.edu/publications/usipc-seeking- asylum-part-1-final.pdf> (finding that, out of the 7,300 asylum-seeking heads of household that were detained between October 2018 and June 2019 whom the San Diego Rapid Response Network assisted, “11.8% . . . reported some form of mistreatment in immigration detention”).

257. See Fortin, *supra* note 92; Amanda Holpuch, *Somalis Were Shackled for Nearly 48 Hours on Failed US Deportation Flight*, GUARDIAN (Dec. 19, 2017, 2:18 PM), <https://www.theguardian.com/us-news/2017/dec/19/somalis-shackled-48-hours-failed-us-deportation-flight>; Stephen Snyder, *Somalis Faced ‘Slave Ship Conditions’ on Failed Deportation Flight*, USA TODAY (Dec. 18, 2017, 6:45 AM), <https://www.usatoday.com/story/news/world/2017/12/18/somalis-faced-slave-ship-conditions-failed-deportation-flight/960271001>.

258. Fortin, *supra* note 92; Holpuch, *supra* note 257.

259. Class Action Complaint for Declaratory and Injunctive Relief and Class Petition for Writ of Habeas Corpus at 23, *Ibrahim v. Acosta*, No. 17-cv-24574, 2019 WL 1206327 (S.D. Fla. Mar. 14, 2019).

260. *Id.* at 23-24.

261. *Id.* at 23. In March 2019, the United States District Court for the Southern District of Florida granted the defendants’ motion to dismiss, concluding that it lacked subject matter jurisdiction since all of the plaintiffs had already filed motions to reopen their removal proceedings. *Ibrahim*, 2019 WL 1206327, at \*3. Following the court’s ruling, in April 2019, ICE intended to re-deport some of the individuals who were aboard the failed deportation flight. Maryam Saleh, *ICE Set to Deport Somalis Who Were Returned to U.S. on Infamous Botched Flight*, INTERCEPT (Apr. 9, 2019, 3:57 PM), <https://theintercept.com/2019/04/09/somalis-ice-deportation-flights>.

While known incidents of such severe mistreatment at the hands of ICE agents and their contract guards are few, this may be because it is rare for a deportation flight to return to the United States. Indeed, the experiences of the individuals aboard the failed Somalia-bound flight came to light precisely because—unlike most deportation flights which cause deportees to “basically disappear to U.S. human rights activists”<sup>262</sup>—this one turned around, permitting the deportee passengers to bear witness to the abuse they suffered.<sup>263</sup>

South Asian deportees from Nepal, Bangladesh, and India reported similar incidents of abuse in connection with their 2016 ICE Air-chartered deportation flight.<sup>264</sup> These incidents, however, began on the tarmac and thus more directly implicate the host airport in the violent conduct.<sup>265</sup> While in the process of boarding, ICE agents and contract personnel allegedly forced about fifteen deportees into “body bags” by pinning them to the ground, at times face-down, and wrapping them in the “security blankets,”<sup>266</sup> which they fastened tightly with numerous Velcro belts.<sup>267</sup> The ICE officers then carried the fully-restrained individuals—some of them bleeding—onto the plane.<sup>268</sup> Against the deportees who resisted the full body restraints, and in addition to their handcuffs, waist chains, and leg shackles, the agents allegedly fired tasers.<sup>269</sup> Several fellow deportee witnesses shared that the agents also punched and kicked some of the detainees, while other officers mocked and swore at those being subjected to the brutality.<sup>270</sup> ICE has denied the use of tasers, maintaining that the officers used only “minimal force” when “the detainees refused to comply with officers’ instructions and

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262. Carlos Ballesteros, *ICE Kept 92 Immigrants Shackled on a Plane for Two Days in ‘Slave Ship’ Conditions, Advocates Say*, NEWSWEEK (Dec. 14, 2017, 9:48 AM), <https://www.newsweek.com/ice-deports-92-somaliens-plane-human-rights-747557>.

263. *Id.*

264. See Aviva Stahl, *South Asian Migrants Say They Were Put in ‘Body Bags’ for Deportation from US*, GUARDIAN (May 27, 2016, 7:00 AM), <https://www.theguardian.com/us-news/2016/may/27/south-asian-migrants-body-bags-deportation-us>.

265. Advocates have discovered other incidents of abuse at airports. In one case, when an Indian man refused to board the plane, his family reported to his attorney that ICE agents beat him outside of view of cameras at the airport.

266. Stahl, *supra* note 264. Pre-2017, ICE utilized what the agency referred to as “humane restraint blankets”; however, under current Authorized Restraints Device Guidelines, ICE agents may only utilize a product manufactured by Safe Restraints, Inc. called “The Wrap.” Ken Klippenstein, *ICE Orders Dozens of Straitjacket-Like Restraints*, TYT NETWORK (Aug. 16, 2018), <https://legacy.tyt.com/2018/08/16/ice-orders-dozens-of-straitjacket-like-restraints>.

267. Stahl, *supra* note 264.

268. *Id.*

269. *Id.*

270. *Id.*

became combative.”<sup>271</sup> UWCHR filed a FOIA request seeking the results of a supposed Office of the Inspector General investigation into the incident; apparently, however, no such report exists.<sup>272</sup> In response to an administrative appeal filed by UWCHR, the Office of Inspector General acknowledged that no investigation occurred, though an “audit” may have; the agency declined to provide a copy of materials related to any audit, if one existed.<sup>273</sup>

Certainly, the violence that ICE officers perpetrate against deportees aboard airplanes and at airports is no new phenomenon. In 2008, ICE’s now-notorious former policy and practice of routinely sedating deportees against their will—its use of “[i]nvoluntary chemical restraint”—came into the spotlight.<sup>274</sup> Pursuant to this internal policy in effect since 2003, ICE agents forcibly injected hundreds of deportation-bound noncitizens, who had no history of mental illness, with antipsychotic drugs to quell them prior to expulsion.<sup>275</sup> American Civil Liberties Union immigrants’ rights advocates mounted a successful legal challenge to this forced-sedation policy; now ICE officials must obtain a court order prior to drugging detainees for behavioral, not psychological, reasons.<sup>276</sup> While it was common practice for ICE officials to inject the deportee with the first dose of the “pre-flight cocktail” at the detention center prior to driving to the airport, subsequent doses were administered on airport property or on the airplane itself, thus implicating airports and rendering these spaces frequent sites of abusive misconduct against noncitizens.<sup>277</sup>

In addition to these widely publicized accounts of physical and psychological forms of mistreatment, other incidents of abuse abound, as illuminated by a DHS document recounting complaints of

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271. *Id.*

272. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

273. Letter from Jillian M. Clouse, Off. of Inspector Gen., to Dr. Angela Godoy, Univ. of Washington (Dec. 19, 2019) (on file with authors).

274. Amy Goldstein & Dana Priest, *Some Detainees Are Drugged for Deportation: Immigrants Sedated Without Medical Reason*, WASH. POST, May 14, 2008, at A1.

275. *Id.* Haldol, a drug used to treat schizophrenia, was often the drug of choice. See Bill Meyer, *Immigration Officials Curtail Sedation of Deportees with Anti-Psychotic Haldol After Criticism*, SUITS, CLEVELAND.COM, [https://www.cleveland.com/nation/2009/01/immigration\\_officials\\_curtail.html](https://www.cleveland.com/nation/2009/01/immigration_officials_curtail.html) (Mar. 28, 2019).

276. Sonya Geis, *ACLU Suit Alleges Deportees Were Drugged*, WASH. POST (June 20, 2017), <https://www.washingtonpost.com/wp-dyn/content/article/2007/06/19/AR2007061902168.html>; Joe Mozingo, *Deportees File Motion over Forced Sedation*, L.A. TIMES (Oct. 10, 2007, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2007-oct-10-me-sedate10-story.html>; Meyer, *supra* note 275.

277. See Goldstein & Priest, *supra* note 274, at A1, A8; Mozingo, *supra* note 276 (describing how one deportee “was wrestled down in the aisle of a plane parked at LAX and injected with medication”).

mistreatment.<sup>278</sup> The spreadsheet—obtained by the UWCHR through a FOIA request—contains ninety-nine records of complaints filed with the DHS Office of Civil Rights and Civil Liberties that contained the word “flight” in the summary of the allegation.<sup>279</sup> These complaints generally involve mistreatment, excessive use of force, and due process violations, and a few reveal particularly heinous incidents that transpired during deportation flights, including that of a Salvadoran woman who had a miscarriage of triplets while aboard the plane after previously experiencing violence in the flight staging area at Los Angeles International (LAX) Airport, and a Honduran woman who died in the air during her deportation.<sup>280</sup> In some cases, people reported violence prior to boarding that resulted in their being bloodied, shackled, or screaming to the point where the pilots ordered their removal from the plane prior to departure.<sup>281</sup> At this point, there is no indication that any of the complaints were ever investigated, even when they were referred to the DHS Office of the Inspector General, given that UWCHR FOIA requests seeking such documentation have elicited the response that no such records exist.<sup>282</sup> In one case, an attorney reported that when his client refused to board a deportation flight at John F. Kennedy Airport on July 17, 2013, he was assaulted by four ICE officers, who beat him with their hands and feet and either a gun butt or flashlight, knocking him to the ground; at that point, an officer “put his boot on his face and smashed his face into the ground,” to the point where the man’s face was imprinted with the markings of the boot in later photographs.<sup>283</sup> Bleeding from the nose and mouth, he was then taken to Jamaica Hospital, from which he was subsequently returned to county jail and eventually to an ICE detention facility in Louisiana, and then transferred to Alabama.<sup>284</sup> The Office of the Inspector General declined to investigate the case.<sup>285</sup>

Other reports depict ICE officers humiliating deportees, including by refusing them access to restrooms, causing them to soil themselves in

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278. *DHS Document Reveals Allegations of Abuse on ICE Air Deportation Flights*, UNIV. WASH. CTR. FOR HUM. RTS. (Aug. 16, 2019), <https://jsis.washington.edu/humanrights/2019/08/16/ice-air-deportation-flight-complaints>.

279. *Id.*

280. *See id.*; *ICE Matters with Flight(s) in the Summary*, DEP’T OF HOMELAND SEC.: OFF. OF C.R. AND C.L. (Feb. 19, 2019, 4:27 PM), <https://jsis.washington.edu/humanrights/wp-content/uploads/sites/22/2019/08/2019-HQFO-00350.pdf>.

281. *ICE Matters with Flight(s) in the Summary*, *supra* note 280.

282. *DHS Document Reveals Allegations of Abuse on ICE Air Deportation Flights*, *supra* note 278.

283. *ICE Matters with Flight(s) in the Summary*, *supra* note 280.

284. Email from U.S. Dep’t of Homeland Sec. Off. of C.R. and C.L., to U.S. Dep’t of Homeland Sec. Off. of Inspector Gen. (Aug. 29, 2013, 1:38 PM).

285. *ICE Matters with Flight(s) in the Summary*, *supra* note 280.

their seats.<sup>286</sup> One Salvadoran national described being called “scum,” being accused of “taking our jobs,” and observing “other deportees stumble on the tarmac when shoved while wearing leg shackles.”<sup>287</sup> Still other reports have found that increasing numbers of children were being flown back to their home countries without parents or guardians, or other screenings or precautions, thus putting children at risk of kidnapping or other exploitation.<sup>288</sup>

During the pandemic, ICE Air operations have endangered deportees’ well-being by flying them from detention centers with high rates of COVID-19 and while air travel is known to be risky.<sup>289</sup> To make matters worse, because of the lack of training as well as lack of concern, some deportees are unnecessarily flown on multiple circuits, a finding criticized by the Office of the Inspector General, among others.<sup>290</sup> Individual deportees unnecessarily exposed to COVID-19 during these flights are not the only ones whose health is endangered. ICE Air departs infected individuals regardless of the danger they pose to the communities to where they are returned.<sup>291</sup> Indeed, ICE Air operations have wantonly caused a significant increase in the global spread of the illness.

### B. Human Rights Violations

As described above, in the process of expelling individuals from the United States, ICE Air has been shown to commit direct human rights violations against deportees through physical mistreatment and verbal

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286. *ICE Air Is a Real Airline that the Government Uses to Deport Thousands of Migrants Every Day*, *supra* note 16.

287. *Id.*

288. Caitlin Dickerson & Kirk Semple, *U.S. Deported Thousands Amid Pandemic. Some Were Sick*, N.Y. TIMES, Apr. 19, 2020, at A4.

289. Yeganeh Torbati et al., *In a 10-Day Span, ICE Flew This Detainee Across the Country—Nine Times*, PROPUBLICA (Mar. 27, 2020, 10:33 AM), <https://www.propublica.org/article/coronavirus-ice-flights-detainee-sirous-asgari>; see Jonathan Blitzer, *The Trump Administration’s Deportation Policy Is Spreading the Coronavirus*, NEW YORKER (May 13, 2020), <https://www.newyorker.com/news/daily-comment/the-trump-administrations-deportation-policy-is-spreading-the-coronavirus>.

290. OFF. OF INSPECTOR GEN., U.S. DEP’T HOMELAND SEC., OIG-15-57, ICE AIR TRANSPORTATION OF DETAINEES COULD BE MORE EFFECTIVE 5, 8, 10 (2015). Although the Office of Inspector General was particularly concerned about filling seats and efficiency, its assessment indicated that ICE Air lacks sufficiently trained personnel and guidance to properly carry out operations. See *id.* at 5-8, 9-11.

291. Blitzer, *supra* note 289; “*The Wuhan of the Americas*”: U.S. Deports COVID-19-Positive Immigrants to Haiti & Guatemala, DEMOCRACY NOW (May 15, 2020), [https://www.democracynow.org/2020/5/15/us\\_deportations\\_haiti\\_guatemala\\_coronavirus?fbclid=IwAR3IkG5OrXtfRFUZ8PbjXLE0xSwoif9tHWXbdECL5T1D7422qN16KzD2hyo](https://www.democracynow.org/2020/5/15/us_deportations_haiti_guatemala_coronavirus?fbclid=IwAR3IkG5OrXtfRFUZ8PbjXLE0xSwoif9tHWXbdECL5T1D7422qN16KzD2hyo).

abuse.<sup>292</sup> The violations described above are not only breaches of U.S. domestic legal norms. They are also prohibited under international human rights law, binding on all levels of government as well as private actors through treaties and customary international law per the Supremacy Clause of the U.S. Constitution.<sup>293</sup> Advocates for justice have long recognized the benefits, if not obligations, of identifying human rights norms that offer protection in domestic spaces and have invoked international protection in an effort to obtain relief at the national, state, and local levels.<sup>294</sup> This is especially true in the realm of immigrants' rights, found in numerous international norms and binding protocols.<sup>295</sup> Although these norms are considered to be derived from "soft law" and their implementation may result in aspirational victories at best, it remains critical to seek to enforce human rights norms as they reflect higher-value conventions to which we have committed. That the ICE Air machinery functions in local, state, and national sites<sup>296</sup> suggests that human rights norms may provide important mechanisms by which advocates can engage at multiple levels and locations.

Deportations often violate a host of fundamental human rights, including the right to family unity, the right to seek asylum from persecution, the rights of children, and more.<sup>297</sup> Here, we provide a brief overview of just some of the basic international human rights norms in the belief that advocates and scholars are obligated to seek to realize their potential, and to endeavor to examine ICE Air misdeeds against the standards by which we have agreed they should be judged.<sup>298</sup> In doing so, we wish to call attention to the harms occasioned by the final act of

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292. See *supra* Part IV.A.

293. U.S. CONST. art. VI, cl. 2; see also DEBORAH M. WEISSMAN ET AL., UNDERSTANDING ACCOUNTABILITY FOR TORTURE: THE DOMESTIC ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS TREATIES 41-50 (2016-2017), <http://www.law.unc.edu/documents/academics/humanrights/understanding-accountability-for-torture.pdf>.

294. See, e.g., JOANN KAMUF WARD ET AL., COLUM. L. SCH. HUM. RTS. INST., BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY 5-6 (Risa Kaufman ed., 2012).

295. Robert Pauw et al., *Using a Human Rights Approach in Immigration Advocacy: An Introduction*, 47 CLEARINGHOUSE REV. 88, 89-90 (2013).

296. See *supra* Part III.A.1.

297. See, e.g., *Unfair Arrest Leads to Deportation*, HUM. RTS. WATCH: THE DEPORTED (Nov. 28, 2017, 4:00 AM), <https://www.hrw.org/blog-feed/the-deported>. In addition to international human rights law, U.S. constitutional provisions, federal statutes, and regulations, including aviation laws, set forth provisions guaranteeing human rights protections that are applicable to the abuses described above. See, e.g., U.S. CONST. amend. VIII; 18 U.S.C. §§ 2340-2340A; 18 U.S.C. § 2441; 18 U.S.C. § 242 (prohibiting the subjection of persons to punishment or pain due to that person's race, color, or status as a noncitizen); 42 U.S.C. § 2000dd ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

298. See *infra* Part IV.B.1-3.

deportation in terms that have been established at a global level in an effort to protect our common humanity.

### 1. Human Dignity

Immigration deportees are protected under international human rights treaties and norms, not simply because of their status as immigrants, but because of the inherent dignity and rights they possess simply by virtue of being human. The Universal Declaration of Human Rights (“UDHR”), recognized as one of the first global expressions of rights to which all human beings are inherently entitled, affirms “the dignity and worth of the human person” as the fundamental principle upon which all rights are based.<sup>299</sup> In addition to the UDHR, there is “considerable overlap among” the treaties that the United States has ratified. In their preambles, most treaties give prominent recognition to “the inherent dignity and equal and inalienable rights of all”<sup>300</sup> and include specific provisions guaranteeing, for example, that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,”<sup>301</sup> and a non-derogable prohibition against degrading treatment.<sup>302</sup>

Other international norms set forth specific measures related to dignity. For example, the United Nations Standard Minimum Rules for the Treatment of Prisoners requires that deportees are provided with the means to maintain personal hygiene as a means of self-respect.<sup>303</sup> The United Nations Security Council’s Counter-Terrorism Committee specifically addressed the rights of deportees during removal, stating that “[d]uring the period when an inadmissible passenger or a person to be deported is under their custody, the state Officers concerned shall preserve the dignity of such persons and take no action likely to infringe such dignity.”<sup>304</sup> Such human rights inure to each individual, whether

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299. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

300. See JACK ROCKERS & ELIZABETH TROUTMAN, UNIV. N.C. SCH. OF L.: IMMIGR. & HUM. RTS. POL’Y CLINIC, DANGEROUS DETENTION: HUMAN RIGHTS STANDARDS AND ENFORCEMENT IN IMMIGRATION DETENTION 10-11 (2009), <https://law.unc.edu/wp-content/uploads/2019/10/dangerousdetention.pdf>.

301. International Covenant on Civil and Political Rights, art. 10, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

302. See, e.g., Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment arts. 1, 16, Dec. 10, 1984, 1465 U.N.T.S. 85.

303. Economic and Social Council Res. 663C, Standard Minimum Rules for the Treatment of Prisoners ¶¶ 15-16 (Aug. 30, 1955) [hereinafter SMRTP].

304. U.N. Security Council Counter-Terrorism Committee, ICAO Best Practices Annex 9 Chapter 5: Inadmissible Persons and Deportees (Mar. 14, 2016),



deportation flights are operationalized by government planes or privately owned and operated aircrafts, as well as to the airports from which the flights originate.<sup>305</sup>

The treatment, described above, suffered by deportees at airports and on airplanes deprives them of their rights to human dignity. The acts of debasement against deportees have no legitimate purpose and lack any legal justification. As ICE Air complaint documents and other reports of abuses demonstrate, they are designed to humiliate and undermine a deportee's sense of self and worth.

## 2. Freedom from Torture

The physical and psychological treatment described above, including beatings, shacklings, bags, kickings, threats to kill, and other mental abuse, constitutes torture and other forms of cruel, inhuman, or degrading treatment as defined and prohibited by the CAT:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed . . . or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity.<sup>306</sup>

CAT undoubtedly applies to the abuses at airports and on ICE flights notwithstanding the punishment/non-punishment paradigm as described above.<sup>307</sup> ICE officers inflict these injurious acts as a means to punish deportees who may be reluctant or fearful to board planes, who may walk too slow in their chains, or simply to punish them because of their status as noncitizens.<sup>308</sup> In addition to CAT, the SMRPT prohibits the use of restraints as a means of punishment.<sup>309</sup> The use of body bags, as described above, and the practice of flying deportees in seemingly random multiple circuits have been identified as some of the most

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<https://www.un.org/sc/ctc/news/document/icao-best-practices-annex-9-chapter-5-inadmissible-persons-and-deportees>.

305. See OFF. OF INSPECTOR GEN., U.S. DEP'T HOMELAND SEC., OIG-19-47, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 2-3 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf>.

306. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 302, at art. 1. CAT has been domesticated by U.S. federal law principally through the "Torture Act." 18 U.S.C. §§ 2340–2340A.

307. See *supra* note 47.

308. See *supra* Part III.A.

309. SMRTP, *supra* note 303, ¶ 33.

horrific experiences with long-lasting traumatic sequelae,<sup>310</sup> and most certainly a form of torture and cruel, inhuman, and degrading treatment prohibited by CAT as well as other treaties and binding norms.<sup>311</sup>

### 3. The Right to Due Process of Law

Due process is considered the linchpin of any legal system. Article 8 of the UDHR states that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”<sup>312</sup> ICE deportees most often cannot vindicate these rights because of the barriers they encounter when seeking relief from deportation and when, as a result, they are subject to premature or wrongful removal, and have little or no access to U.S. courts once removed.<sup>313</sup> Article 9 of the UDHR further prohibits “arbitrary arrest, detention or exile,” protections that apply given the deportation dragnet that eviscerates meaningful protection from wrongful removal.<sup>314</sup> The International Covenant on Civil and Political Rights (“ICCPR”) provides the same protections and more. Article 13 of the ICCPR, to which the United States has fully committed, states that expulsion of one “lawfully in the territory of a State” may occur only when:

[A] decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.<sup>315</sup>

In addition to international norms, the Inter-American regional human rights protections binding on the United States further reinforce the universal commandment of due process rights for deportees.<sup>316</sup> The

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310. *Witness Testimony*, N.C. COMM’N OF INQUIRY ON TORTURE (Nov. 30, 2017), <http://www.nccit.org/witnesstestimony> (testimony of Dr. Katherine Porterfield) (describing the experience of being rendered on airplanes while shackled and without control or knowledge of flight plans); see also *supra* Part IV.A.

311. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 302, arts. 1, 16. These acts are similarly prohibited by the UDHR, art. 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” and the International Covenant on Civil and Political Rights, art. 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” UDHR, *supra* note 299, at art. 5; ICCPR, *supra* note 301, at art. 7.

312. UDHR, *supra* note 299, at art. 8.

313. See Peterson, *supra* note 174.

314. UDHR, *supra* note 299, at art. 9.

315. ICCPR, *supra* note 301, at art. 13.

316. Organization of American States, American Declaration on the Rights and Duties of Man

current ICE Air machinery that deprives deportees of meaningful rights to defend against removal and to appeal adverse decisions also violates the due process rights found in the United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.<sup>317</sup> Moreover, the cruelty of banishment violates the human rights standards of proportionality. Deportation is an overly harsh penalty, and such punishment is disproportionately appended to what are often inconsequential immigration violations or minor offenses.<sup>318</sup>

Of course, the human rights violations suffered by immigrant deportees must not only be a matter of statutory or treaty reference but must be addressed in practice. In the following Part, we describe these efforts as they relate to advocacy directed at uncovering the network of planes and airports where government actors and their contractors have carried out grievous harms.

## V. AIRPORTS AND AIRPLANES AS SITES OF RESISTANCE

In this Part, we identify the ways in which networks of airports, airline carriers, and flight brokers that transfer migrants between detention sites—ultimately to deport them—should be included within the recent wave of local resistance to federal anti-immigration policies. In a number of places, city, county, and state laws have endeavored to limit the participation of local law enforcement and jails in civil immigration enforcement as part of a growing effort to protect immigrants from wrongful mistreatment.<sup>319</sup> Subnational advocacy is seeking to contest not only the mechanisms by which increasing numbers of people are drawn into the system of immigration enforcement, but also the institutions which detain them.<sup>320</sup> Across the country, advocates from grassroots groups to attorneys general are pressing forward with innovative campaigns to stop immigrant detention at the local level, exploring new grounds to end detention facility contracts or the increasing regulation of their activities by local and state

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arts. XVIII, XXV, XXVI (Apr. 30, 1948), [https://www.oas.org/dil/access\\_to\\_information\\_human\\_right\\_American\\_Declaration\\_of\\_the\\_Rights\\_and\\_Duties\\_of\\_Man.pdf](https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf).

317. G.A. Res. 43/173, annex, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment princ. 30 (Dec. 9, 1988).

318. *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, HUM. RTS. WATCH (July 16, 2007), <https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-united-states-deportation#defenses>.

319. See, e.g., Assemb. B. 2792, 2015–2016 Leg., Reg. Sess. (Cal. 2016); KING COUNTY, WASH., Ordinance 2013-0285 (Dec. 10, 2013); COOK COUNTY, ILL., Ordinance 11-O-73 (Sept. 7, 2011).

320. See *supra* note 32 and accompanying text.

authorities.<sup>321</sup> Add to these forms of resistance uncovering abuses on airplanes and airports that carry out the final act of deportation and pressing localities to end relationships with these flights.

As with detention, deportation by air has undergone a massive privatization, from transport on government planes in the late 1990s to a system of private charters and commercial flights today.<sup>322</sup> This poses challenges for transparency and accountability. Thus, the first step requires exposing what has previously been hidden. Deportation flights have transpired in near secrecy for decades, concealing violent contestations that sometimes occur, leaving migrants bloodied and beaten in airports or aboard planes.<sup>323</sup>

Challenging the networks of detention and deportation businesses requires contesting contracts between private entities and the federal government in ways that require innovative legal and political approaches. These companies exist in a murky legal and political space: the authority of states and localities to regulate private businesses contracting with the federal government is unclear, and the willingness of politicians to lead on an issue they may not see as directly related to their constituents' welfare may also be hamstrung. Significantly, advocates' ability to obtain information about facility operations is also compromised by secrecy, as private businesses decline to release data under public records laws. Like the detention of migrants, the nodes in the ICE Air machinery network require the involvement of a range of government institutions, whose active and passive involvement are required to provide permitting, regulation, and administration of charter flights departing from public airports across the nation.

#### A. UWCHR and the Campaign at Boeing Field, King County, Washington

Grassroots activists' efforts to sever the relationship between the county-run airport known as Boeing Field, in King County, Washington (Seattle), and ICE Air serve as an important example and teaching model of community resistance to complicity with the deportation dragnet at the local level, where much of immigration enforcement has devolved.<sup>324</sup> Notably, the campaign relied on legal theories that pertain to all levels of governance. UWCHR researchers documented various violations of

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321. David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224, 227-28 (2019).

322. See *supra* notes 77-82 and accompanying text.

323. *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

324. *Hidden in Plain Sight: King County Collaboration*, *supra* note 85.

international human rights principles including *non-refoulement*, the human right to dignity, and the fundamental right to family integrity pursuant to treaty law that the United States has ratified.<sup>325</sup> Scholars and activists drew on federal legal doctrines, stressing that the U.S. Constitution's Tenth Amendment anti-commandeering doctrine prohibits the coerced use of local resources.<sup>326</sup> They relied upon Article XI of the Washington State Constitution to demonstrate that local governments possess "the discretion to decide to what extent they will assist the federal government in the enforcement of federal laws, including federal immigration laws."<sup>327</sup> State executive orders, they argued, limited cooperation with immigration enforcement, providing the basis for a cessation of flights.<sup>328</sup> Residents invoked the local county sanctuary ordinance, which constrained county officials from collaborating with federal immigration enforcement, persuasively arguing that the operation of deportation flights from Boeing Field was contrary to the spirit, intent, and wishes of the community.<sup>329</sup> Researchers have confirmed the rights violations and mistreatment suffered by deportees on planes and at airports.<sup>330</sup> The findings were published to expose the transportation web used in wrongful deportations that upended the lives of many deportees.<sup>331</sup>

The collected data were used in a successful political campaign targeted at protecting the human rights of deportees. In 2019, King County became the first locality in the nation to limit deportation flights from its publicly owned airport when the County Executive issued an executive order expressing his intention to prohibit deportation flights from operating out of its municipal airport, King County International.<sup>332</sup> Shortly thereafter, the one FBO that had been operating deportation flights made the voluntary business decision to end its relationship with

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325. *Id.*; *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

326. *Hidden in Plain Sight: King County Collaboration*, *supra* note 85.

327. *Id.*

328. *Id.*

329. KING COUNTY, WASH., ORDINANCE 2017-0487 (2018); *Hidden in Plain Sight: King County Collaboration*, *supra* note 85. The ordinance also provides funds to assist in the legal defense of immigrants facing deportation. See *Hidden in Plain Sight: King County Collaboration*, *supra* note 85.

330. See, e.g., *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

331. *Hidden in Plain Sight: King County Collaboration*, *supra* note 85 (describing deportation flights to countries where individuals were likely to be subject to violence, enslavement, and other forms of persecution).

332. King County, Wash., Exec. Order No. PFC-7-1-EO (Apr. 23, 2019), [https://www.kingcounty.gov/~media/elected/executive/constantine/news/documents/PFC-7-1-EO\\_Signed.ashx?la=en](https://www.kingcounty.gov/~media/elected/executive/constantine/news/documents/PFC-7-1-EO_Signed.ashx?la=en).

ICE Air.<sup>333</sup> As a result, no FBOs at King County Airport currently provide aeronautical assistance to ICE Air's charter planes, forcing ICE to reroute deportation flights out of the nearest airport in Yakima, Washington, about 150 miles away from the Northwest Detention Center in Tacoma.<sup>334</sup>

In response to the EO, in February 2020, the DOJ filed suit against King County, seeking a declaration that the EO is invalid and a permanent injunction enjoining it.<sup>335</sup> The United States alleged that the EO violates the Supremacy Clause by allowing a political subdivision of a state to constrain the federal government's broad authority to legislate and execute immigration laws.<sup>336</sup> It also argued that the EO is prohibited by a provision of the Airline Deregulation Act, which prohibits a state's political subdivision from regulating "a price, route or service of an air carrier that may provide air transportation."<sup>337</sup> Recently, the federal court hearing the matter denied the Government's motion for a judgment on the pleadings, finding that the Government could not demonstrate that it had been injured by the county's executive order.<sup>338</sup> At this writing, ICE Air remains unable to operate at Boeing Field.

### *B. Trending: Resisting Deportation Flights at Airports*

There are other examples where immigrant rights activists have sought to challenge deportation flights at airports in other U.S. cities and abroad. Protests aimed at stopping deportation flights have taken place at the El Paso airport in Texas; notably, the media covering the protests has

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333. Nina Shapiro, *ICE Flights Will No Longer Use Boeing Field*, SEATTLE TIMES (May 4, 2019, 7:58 PM), <https://www.seattletimes.com/seattle-news/ice-flights-will-no-longer-use-boeing-field>.

334. See *id.*; Lex Talamo, *Report: ICE Flights Deepen Yakima's Involvement in National Immigration Enforcement*, YAKIMA HERALD (Sept. 27, 2019), [https://www.yakimaherald.com/news/local/report-ice-flights-deepen-yakima-s-involvement-in-national-immigration/article\\_ac851bbd-18df-5271-8ba4-8242d64cd99b.html](https://www.yakimaherald.com/news/local/report-ice-flights-deepen-yakima-s-involvement-in-national-immigration/article_ac851bbd-18df-5271-8ba4-8242d64cd99b.html).

335. Press Release, Off. of Pub. Affs., Dep't of Just., Justice Department Sues King County, Washington, and King County Executive for Prohibiting U.S. Immigrations and Custom Enforcement Contractors from Using King County International Airport (Feb. 10, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-king-county-washington-and-king-county-executive-prohibiting-us>; Complaint at 8, *United States v. King County*, 2020 WL 2745745 (W.D. Wash. May 27, 2020) (No. 2:20-cv-00203).

336. Complaint at 2-3, 8, *King County*, 2020 WL 2745745 (No. 2:20-cv-00203).

337. *Id.* at 5-6.

338. Adrian Cruz, *Feds Can't Yet Overturn Seattle Airport Deportation Flight Ban*, LAW 360 (May 28, 2020, 5:47 PM), <https://www.law360.com/articles/1277403/feds-can-t-yet-overturn-seattle-airport-deportation-flight-ban>.

referenced King County's order banning ICE deportation flights.<sup>339</sup> Residents opposed to the use of their local airports as staging grounds for deportation have engaged in similar actions at the Brownsville South Padre Island International Airport and the Gary/Chicago International Airport.<sup>340</sup> Protestors sought to reveal the secrecy with which ICE Air operates as well as the excessive costs for these deportation flights.<sup>341</sup> Graduate students from Wayne State University organized a protest at the Detroit Metro Airport against its hosting of the deportation flight of an Iranian PhD student and the country's xenophobic immigration policies in general, particularly against individuals from Iran.<sup>342</sup> Immigrant rights protestors shut down morning rush hour traffic in New Orleans in an effort to halt the flight of a Cuban man deemed to be too ill to travel and who faced possible retribution on his return.<sup>343</sup> These protests consistently invoke human rights norms while publicizing the wrongfulness of the relationship between ICE Air and localities.

Efforts to draw attention to airport and airline complicity with wrongful deportations have taken place in the United Kingdom and Europe as well. The London Stansted International Airport has been the site of citizen efforts to interrupt deportation planes.<sup>344</sup> Organizations concerned about a "mass deportation charter flight," to Nigeria and Ghana, and the government's practice of conducting "deliberately rushed and secretive deportations," physically prevented a plane from taking off from the airport.<sup>345</sup> During these flights, known as "ghost flights," "people are removed to undisclosed locations in the middle of

339. See, e.g., Mallory Falk, *El Paso Airport Protesters Call to End Deportation Flights*, KERA NEWS (Dec. 19, 2019, 12:38 AM), <https://www.keranews.org/post/el-paso-airport-protesters-call-end-deportation-flights>.

340. Sandra Sanchez, *Exclusive: Police, Protesters Clash over Valentine's Day Deportation Flights at South Texas Airport*, BORDER REP. (Feb. 14, 2020, 6:37 PM), <https://www.borderreport.com/top-stories/exclusive-police-protesters-clash-over-valentines-day-deportation-flights-at-south-texas-airport>; Meredith Colias-Pete, *No Deportation Flight and No Police as More Than 100 Protest at Gary Airport*, CHIC. TRIB. (July 6, 2018, 3:25 PM), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-gary-airport-protest-july-6-st-20180705-story.html>.

341. Sanchez, *supra* note 340 (noting that flights were omitted from charter flight tracking technology until just moments before they took off).

342. Wendy Guzman, *Iranian MSU Student to Be Deported*, STATE NEWS (Jan. 27, 2020), [https://statenews.com/article/2020/01/iranian-msu-student-to-be-deported?ct=content\\_open&cv=cbox\\_latest](https://statenews.com/article/2020/01/iranian-msu-student-to-be-deported?ct=content_open&cv=cbox_latest).

343. Kevin McGill, *Cuban Man Deported Despite Traffic-Blocking Protest*, AP NEWS (Sept. 12, 2019), <https://apnews.com/5317636d38954405b075874d68aa9a90>.

344. Tom Batchelor, *Stansted Airport Runway Closed After Activists Stage Protest Against Home Office Deportation Flight*, INDEPENDENT (Mar. 28, 2017, 10:44 PM), <https://www.independent.co.uk/news/uk/home-news/stansted-airport-closed-protesters-deportation-plane-runway-a7655036.html>.

345. *Id.*

the night, often with little warning and before they have exhausted all means of appeal.”<sup>346</sup> As a result of their action, some deportees on the plane, including victims of human trafficking who had been raped and forced into sex work, were able to remain in the United Kingdom.<sup>347</sup> Although charged and convicted of serious crimes, the court, after considering the intent with which the protestors had acted and their motivations to uphold human rights norms, declined to sentence them to any jail time.<sup>348</sup> Activists also shut down the center of British government in an effort to stop what they argued were “racist deportation flights” to Jamaica, and, with some success, they hindered the deportation of some refugees.<sup>349</sup> Seeking to “shine a light” on the contracts entered into between Virgin Airlines and the United Kingdom’s Home Office to fly deportation flights, organizers protested the airline and disrupted at least one Virgin Airlines flight.<sup>350</sup>

In Sweden, passengers on an airplane refused to buckle their seat belts after activists distributed information about the planned deportation of a refugee who was on the plane to Iran, where his life was in danger.<sup>351</sup> Their actions caused the flight to be canceled and, as a result, Sweden reopened the case.<sup>352</sup> In Germany, protesters disrupted the airport to call attention to the threats to the well-being of Afghan deportees; one German state defied government deportation orders on “humanitarian grounds.”<sup>353</sup> Some German pilots have refused to fly planes seeking to repatriate those Afghan deportees claiming refugee status.<sup>354</sup> Activists throughout Europe have published “How to Stop a

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346. Rosa Curling, *The Right to Protest*, LONDON REV. BOOKS, May 9, 2019.

347. Damien Gayle, *Stansted 15: No Jail for Activists Convicted of Terror-Related Offences*, GUARDIAN (Feb. 6, 2019, 10:48 AM), <https://www.theguardian.com/global/2019/feb/06/stansted-15-rights-campaigners-urge-judge-to-show-leniency>.

348. *Id.* The seriousness of the crimes with which these protesters were charged was considered by many as intended to chill “legitimate public dissent.” *Id.* Although not given any jail sentence, defendants have appealed their convictions. *Id.*

349. Faye Brown, *Protesters Shut Down Whitehall over ‘Racist’ Jamaica Deportation Flight*, METRO (Feb. 6, 2020, 11:10 PM), <https://metro.co.uk/2020/02/06/protesters-shut-white-hall-racist-jamaica-deportation-flight-12196775>.

350. Lucy Bacon, *Students to Protest Against Virgin Atlantic CEO over Deportation Flights*, TAB (Oct. 15, 2017), <https://thetab.com/uk/london/2017/10/15/students-to-protest-virgin-atlantic-ceo-over-deportation-flights-30756>.

351. Colin Daileida, *Seat-Belt Protest on Swedish Flight Halts Deportation of Iranian Man*, MASHABLE (Apr. 16, 2014), <https://mashable.com/2014/04/16/protest-swedish-flight-deportation>.

352. *Id.*

353. *Protesters Rally at Munich Airport to Decry Deportation Flights in Afghanistan*, DEUTSCHE WELLE, <https://www.dw.com/en/protesters-rally-at-munich-airport-to-decry-deportation-flights-in-afghanistan/a-38572088> (last visited Feb. 8, 2021).

354. Annalisa Merelli, *Pilots Across Germany Have Been Refusing to Deport Rejected Asylum Seekers*, QUARTZ (Dec. 5, 2017), <https://qz.com/1146669/pilots-across-germany-have-been-refusing-to-deport-rejected-asylum-seekers>.



Deportation” toolkits, which include mock videos as a means to address, at the local level, those human rights violations related to deportation flights.<sup>355</sup>

*C. Torture Chambers of the Sky, Airports, and Citizen Accountability Initiatives in North Carolina*

In May 2005, journalists following the trail of extraordinary rendition flights used in the kidnapping, detention, and torture of men (and one woman) suspected of associations with terrorist groups following September 11, 2001, identified a county airport in North Carolina as the site from which the airplanes known as the “torture taxis” or “the torture chambers of the sky” originated.<sup>356</sup> Johnston County Airport (“JNX”), a political subdivision of the state of North Carolina, is home to Aero Contractors, which operates flights on aircrafts owned by “CIA shell companies.”<sup>357</sup> Soon thereafter, a second site was identified: the North Carolina Global Transpark, a state-created industrial transportation park where Aero housed a jet used for rendition and torture purposes.<sup>358</sup> Since that disclosure, a group of North Carolina citizens from across the political spectrum engaged in a campaign against the use of the county airport for purposes of rendering persons to torture.<sup>359</sup> Activists organized North Carolina Stop Torture Now (“NCSTN”) and employed a range of strategies including demonstrations and civil disobedience at the airport; vigils; and meetings with airport officials, state and local legislators, and members of Congress.<sup>360</sup> Although this campaign addressed a somewhat different set of rights violations than deportation, the similarities are instructive.

NCSTN was determined to document the flight circuits that originated from JNX and to identify the names of those individuals who

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355. See, e.g., *How to Stop a Deportation*, GETTING THE VOICE OUT, <https://www.gettingthevoiceout.org/how-to-stop-a-deportation> (last visited Feb. 8, 2021).

356. See, e.g., Scott Shane et al., *C.I.A. Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES (May 31, 2005), <https://www.nytimes.com/2005/05/31/us/cia-expanding-terror-battle-under-guise-of-charter-flights.html>; TREVOR PAGLEN & A.C. THOMPSON, TORTURE TAXI: ON THE TRAIL OF THE CIA’S RENDITION FLIGHTS 79-91 (2006); *Witness Testimony*, *supra* note 310 (testimony of Dr. Katherine Porterfield).

357. Shane et al., *supra* note 356.

358. See DEBORAH M. WEISSMAN ET AL., THE NORTH CAROLINA CONNECTION TO EXTRAORDINARY RENDITION AND TORTURE 20-21, 24 (2012), <https://www.law.unc.edu/documents/clinicalprograms/finalrenditionreportweb.pdf>.

359. See N.C. CITIZENS COMM’N OF INQUIRY ON TORTURE, TORTURE FLIGHTS: NORTH CAROLINA’S ROLE IN THE CIA RENDITION AND TORTURE PROGRAM 50-51 (2018), <https://www.nctorturereport.org>.

360. *Id.* at 50-51, 53.

were tortured.<sup>361</sup> Together with law students, human rights experts, and, perhaps most importantly, some victims of torture, they created a record to expose JNX and Aero's involvement.<sup>362</sup> Victim narratives including highly disturbing descriptions of torture were "compiled with the hope that the revelation of circumstances and egregious violations suffered by the victims would yield transparency, repair and restoration as required by the law."<sup>363</sup> Some of the abuses experienced by rendition victims were the very same suffered by immigrants on ICE Air deportation flights: the use of body bags or other types of body restraints, sensory deprivation tactics, and physical and psychological abuse—all of which caused physical and mental health problems of a serious and permanent nature.<sup>364</sup>

North Carolina anti-torture activists relied on a range of similar legal tools as those used in the UWCHR campaign. They issued public record requests for documents and invoked international human rights principles by which to hold Aero, Johnston County, and the state accountable.<sup>365</sup> The campaign led to the creation of the North Carolina Commission of Inquiry on Torture ("NCCIT" or "the Commission"), a non-governmental organization launched in 2017.<sup>366</sup> NCCIT held public hearings, heard from torture victims and family members, and undertook a large-scale investigation into Aero's activities at JNX.<sup>367</sup> Working with global partners, NCCIT exposed the various aviation networks of which Aero and JNX were a part.<sup>368</sup>

Citizen-led activism resulted in the termination of the use of the hangar at the North Carolina Global Transpark.<sup>369</sup> Numerous media

361. *See id.* at 52.

362. *See id.* at 51.

363. MADELINE BATT ET AL., UNIV. N.C. SCH. OF L. HUMAN RTS. POL'Y LAB, EXTRAORDINARY RENDITION AND TORTURE VICTIM NARRATIVES 1 (2017).

364. *Witness Testimony*, *supra* note 310 (testimony of Dr. Katherine Porterfield).

365. Memorandum from Professor Deborah Weissman et al., N.C. Comm'n of Inquiry on Torture, to Professor Nils Melzer, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Off. of High Comm'r for Hum. Rts. 2-3 (June 20, 2019), <https://law.unc.edu/wp-content/uploads/2019/10/petitioningUNHRExpertsextraordinaryrendition.pdf>; *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, *supra* note 18.

366. *See* N.C. CITIZENS COMM'N OF INQUIRY ON TORTURE, *supra* note 359, at 6.

367. *Id.* at 6, 39.

368. The North Carolina Commission of Inquiry on Torture ("NCCIT") worked closely with the United Kingdom's Rendition Project, which was successful in obtaining global flight data to map rendition flights and identify torture victims flown on Aero-operated aircraft. *See* RENDITION PROJECT, <https://www.therenditionproject.org.uk/prisoners> (last visited Feb. 8, 2021).

369. A public records request, which is on file with the NCCIT, revealed that Aero Contractors had ceased housing its plane there due to the negative publicity focusing on the airport as a result of the efforts of North Carolina Stop Torture Now. Minutes from Meeting of the Exec. Comm. of the Bd. of the Dirs. of the North Carolina Glob. Transpark Auth. (Oct. 12, 2007) (on file with authors).

reports publicized the work of NCCIT, thus preventing the aviation networks and the airports to continue to operate in secrecy.<sup>370</sup> Torture victims and their families acknowledged the benefits of the Commission's work.<sup>371</sup> Vigils, letter-writing campaigns, and visits with government officials have continued. Recently, the Inter-American Commission on Human Rights determined that a number of torture victims who were rendered on Aero flights could proceed with their claims.<sup>372</sup> And while there is no information to suggest that the torture taxis continue to fly out of the JNX, without formal accountability and complete transparency, activists will continue to monitor Aero to ensure that the airport will no longer facilitate rendition and torture.

#### *D. Airports and Airplanes and the Lessons of Local Resistance*

All of the campaigns described above underscore the importance of focusing on the local as a means to ensure accountability for individuals whose human rights have been violated.<sup>373</sup> This has been particularly true in the realm of immigration. Recent years have seen a proliferation of immigration policymaking at the subnational level.<sup>374</sup> Against a prevailing national climate of extreme cruelty to immigrants, many immigration and human rights scholars seek to understand under what circumstances subnational governments exert effective influence to safeguard immigrants' rights and whether it works.<sup>375</sup>

The devolution of immigration enforcement through the 287(g) program and Secure Communities has provided newfound authority upon which some localities can disguise local politics of resentments and racial hostilities toward immigrants.<sup>376</sup> In other places, the political geography and the politics of immigration devolution create a protective

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370. See *Media*, N.C. COMM'N OF INQUIRY ON TORTURE, <http://www.nccit.org/nccitmedia> (last visited Feb. 8, 2021).

371. See, e.g., N.C. Comm'n of Inquiry on Torture, *1D Mohamedou Ould Slahi*, YOUTUBE (Feb. 5, 2018), <https://www.youtube.com/watch?v=neGlpG4OKE> (testimony of Mohamedou Ould Slahi).

372. *Inter-American Commission on Human Rights Orders Case to Proceed*, ACLU (July 10, 2020), <https://www.aclu.org/press-releases/survivors-us-torture-and-rendition-be-heard-international-tribunal>.

373. See *supra* Part V.A–C.

374. Weissman et al., *supra* note 31, at 132.

375. See generally, e.g., Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245 (2016); Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703 (2018); Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330 (2019).

376. See Deborah M. Weissman, *The Federalization of Racism and Nativist Hostility: Local Immigration Enforcement in North Carolina* 99, 108–09, in *MIGRATION IN AN ERA OF RESTRICTION AND RECESSION* (David L. Leal & Nestor P. Rodríguez eds., 2016).

civic and legal environment in which immigrants can assert their rights.<sup>377</sup> At the national level, there are varied factors that affect immigration policy, including history, ideology, economics, labor conditions, and national security concerns.<sup>378</sup> At the local level, communities and local officials also possess authority to choose who is subjected to immigration enforcement or who may be incorporated into the body politic.<sup>379</sup> In some areas, localities have opposed immigration enforcement and have instead promoted initiatives to assist with the integration of newcomers, irrespective of their status.<sup>380</sup>

Because immigrant-friendly policies and practices exist in physical spaces where federal agents still detain and deport people, and indeed because local and federal policies are crafted and deployed in conscious relation to one another,<sup>381</sup> “immigration federalism” is extremely complex and ever-shifting. As Rick Su has observed, “This dynamic is very different from the traditional federalism framework, which assigns issues like immigration to be decided and implemented at specific sovereign spheres.”<sup>382</sup> Instead, even so-called “sanctuary” spaces are deeply embedded in institutional networks that make the mass detention and deportation of migrants possible. If local politics is increasingly the sphere for pro-immigrant policy innovation, as many scholars have argued,<sup>383</sup> the business of deportation by air—like detention—scrambles the ingredients that have made for successful sanctuary campaigns.

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377. See Weissman et al., *supra* note 31, at 134-35.

378. DAVID SCOTT FITZGERALD & DAVID COOK-MARTÍN, CULLING THE MASSES: THE DEMOCRATIC ORIGINS OF RACIST IMMIGRATION POLICY IN THE AMERICAS 8, 12-13, 15-16, 20-21 (2014).

379. See generally Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037 (2008) (discussing broadly the local authority to regulate immigration law and policy).

380. See Rick Su, *The Promise and Peril of Cities and Immigration Policy*, 7 HARV. L. & POL’Y REV. 299, 303-05, 304 n.19 (2013) (providing numerous examples of cities opposing immigration enforcement by announcing that they will not comply with federal immigration detainers unless it is in accordance with their own internal policies; mentioning New York’s “don’t ask” policy, and the LAPD’s decision to no longer impound cars of unlicensed drivers; and, moreover, identifying programs that help provide identification cards to undocumented immigrants in cities such as Trenton, New Jersey, and San Francisco and Oakland, California).

381. For example, ICE targets sanctuary cities for heightened enforcement as an explicit objective. See, e.g., Erik Ortiz, *‘Sanctuary’ Cities Targeted by ICE in Immigration Raids as Nearly 500 Arrested*, NBC NEWS (Sept. 29, 2017, 7:58 AM), <https://www.nbcnews.com/storyline/immigration-border-crisis/sanctuary-cities-targeted-ice-immigration-raids-nearly-500-arrested-n805796>. Thus, some localities have redesigned social service or jail systems so as not to gather information that ICE could access for enforcement purposes. See generally Lasch et al., *supra* note 375, at 1736-52 (discussing local policy initiatives designed to prevent ICE from obtaining information for enforcement purposes).

382. Su, *supra* note 380, at 306.

383. See *id.* at 301-02, 311.

The UWCHR campaign provides an example of citizens making use of the tenets of the Tenth Amendment to the U.S. Constitution, specifically its anti-commandeering principle, to defend local values manifested as opposition to the participation in the government's deportation activities. That campaign, as well as the others described above, successfully claimed the power of the local as a sovereign space where human rights might be privileged over restrictive immigration policies and harsh enforcement practices. By refusing to acquiesce to the deportation magnet and the harms that occur at airports and on airplanes, citizens are enacting core measures of local democracy as a matter of local autonomy.<sup>384</sup>

The focus of the campaigns—on the final act that takes place at airports and on airplanes—reveals the harm that literally “got off the ground” locally while incurring damage globally. Immigration advocates made the progressive case for protecting immigrants from the ICE Air machinery by demonstrating that deportation is more than just a concept, but that it is a lived experience occurring in time and space—an act against the body, mostly black and brown bodies.<sup>385</sup> The physical abuses that occur in airports and on planes often rise to the level of brutal violence.<sup>386</sup> The project has moved from the philosophical, which often takes place in the “realm of the ideal,” to real-world achievements.<sup>387</sup>

## VI. CONCLUSION

The starting point of this Article illustrates the expanded deportation dragnet whereby noncitizens in increasing numbers arrive at the point of the final act of expulsion.<sup>388</sup> It sets forth the rights violations that immigrants suffer as they are swept through immigration systems and processes.<sup>389</sup> Importantly, in ways that have heretofore not been addressed in legal scholarship, this Article offers an empirical case of the destructive effects of ICE Air's machinery and the secret aviation networks that operate in local spaces in tension with federal operations. Our description of the abuses avoids a reenactment of “abstract debates

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384. See Nestor Davidson, *Reform Home Rule to Protect Cities from State Interference*, LAW 360 (Mar. 12, 2020, 3:30 PM), [https://www.law360.com/technology/articles/1252310?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=section?copied=1](https://www.law360.com/technology/articles/1252310?utm_source=rss&utm_medium=rss&utm_campaign=section?copied=1).

385. See *supra* note 9 and accompanying text.

386. Liz Fekete, *Accelerated Removals: The Human Cost of EU Deportation Policies*, RACE & CLASS, Apr. 2011, at 89, 91-93 (describing the brutal techniques used on deportees by official and private agencies).

387. Luke Herrine, *On Reuniting Legal Realism with Moral Pragmatism*, LPE PROJECT (Apr. 5, 2019), <https://lpeblog.org/2019/04/05/on-reuniting-legal-realism-with-moral-pragmatism>.

388. See *supra* Part II.B.

389. See *supra* Part IV.

about the law and politics,” as is often the case in legal and other scholarship.<sup>390</sup>

Our review of anti-deportation campaigns targeting airplanes and airports “[t]rac[es] the ways in which federal immigration efforts have been pushing down toward the local, and how in response the local is also pushing back.”<sup>391</sup> King County succeeded in disrupting ICE Air’s immigration enforcement dragnet by becoming home to a “sanctuary airport.” Elsewhere, immigration rights activists have disrupted the business-as-usual mode for carrying out wrongful deportation and other abuses on the airplanes known as “torture taxis” or “ghost planes.” The work of researchers to analyze aircraft networks has been key to efforts to ensure accountability for individuals whose human rights have been violated and who have been flown beyond the reach of the law.

Activists who have relied on human rights norms have further bolstered these campaigns, “precisely,” as Larry Cox has observed, “because it takes us immediately to the most unassailable and universal basis for rights claims.”<sup>392</sup> As Cynthia Soohoo has written, “a human rights framework can change the very discourse within which decision-makers operate.”<sup>393</sup> The shared language of human rights invoked in the airport/airplane campaigns amplifies efforts to scrutinize and measure the conduct of local, state, and federal officials against those norms to which we have committed. Furthermore, appealing to human rights as a basis for ending cooperation with the ICE Air machinery contributes to dismantling an entrenched ideology and practice of exceptionalism that places the United States outside of the obligations of the international treaties it has helped to create.

It would be easy, however, to misrepresent victories. The purpose of making covert aviation networks known is to end the conspiracy of silence as a means to obtain accountability for years of wrongdoings. Human rights norms, lofty though they may be, give rise to aspirational victories. Moreover, a strategy of focusing on the local raises some concerns. Localities do not always push back in ways that advance immigrant rights.<sup>394</sup> However, unless and until ICE develops mechanisms for ensuring that deportees are not removed in violation of their civil and human rights, airports’ refusal to be complicit in such

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390. See Baker, *supra* note 255.

391. Su, *supra* note 380, at 300.

392. Larry Cox, *A Movement for Human Rights in the United States: Reasons for Hope*, 40 COLUM. HUM. RTS. L. REV. 135, 140 (2008).

393. Cynthia Soohoo, *Close to Home: Social Justice Activism and Human Rights*, 40 COLUM. HUM. RTS. L. REV. 7, 13 (2008).

394. Weissman et al., *supra* note 31, at 132-33.

unlawful conduct appears the most viable, immediate means of curtailing ICE Air's abuses. Acknowledging the complexity of the problem is not to admit defeat but rather to encourage the continuation of creative, local, and global advocacy efforts such as those we describe.