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Second Chances in Criminal and Immigration Law

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Second Chances in Criminal and Immigration Law

INGRID EAGLY*

This Essay publishes the remarks given by Professor Ingrid Eagly at the 2022 Fuchs Lecture at Indiana University Maurer School of Law. The Fuchs Lecture was established in honor of Ralph Follen Fuchs in 2001. Professor Fuchs, who served on the Indiana University law faculty from 1946 until his retirement in 1970, was awarded the title of university professor in recognition of his scholarship, teaching, and public service.

In her Fuchs lecture, Professor Eagly explores the growing bipartisan consensus behind “second chance” reforms in the state and federal criminal legal systems. These incremental reforms acknowledge racial bias, correct for past injustices, and reward personal growth. Drawing on legal doctrine, her research, and examples from practice, she outlines how the immigration system—where the need for reform is also urgent—would benefit from similar second chance reforms to start to address the legacy of racism and exclusion that have built today’s criminalized immigration system. First steps could include expanding immigration judge discretion to evaluate individual circumstances, reinvigorating state pardon processes, and expanding access to counsel in immigration proceedings.

* Professor of Law and Faculty Director, Criminal Justice Program, UCLA School of Law. I thank Dean Austen Parrish and Professor Jayanth Krishnan for the invitation to deliver the Ralph F. Fuchs Lecture at Indiana University’s Maurer School of Law on April 6, 2022. I also thank Abby Akrong and the staff of the *Indiana Law Journal* for publishing my remarks. Rubina Karapetyan, Renee Moulton, and Ryan Tran provided superb research assistance. I am grateful to Scott Cummings for helpful comments on this lecture.

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INTRODUCTION

Good afternoon. Thank you to Dean Austen Parrish and Professor Jay Krishnan for their warm welcome today and to members of the Indiana University Maurer School of Law’s faculty for the invitation to join you. It is truly a privilege to deliver this year’s lecture in honor of Professor Ralph Follen Fuchs.¹

My talk today focuses on two areas of law—the criminal law and immigration law—that have a lot in common. Both have a disproportionate impact on the poor, immigrants, and people of color.² Changes in both sets of laws at the federal and state levels over the past decades have ratcheted up the punitiveness of both systems.³ These two areas have also become increasingly intertwined in important ways.⁴ The criminal legal system—through its mechanisms of arrest, conviction, and incarceration—now serves as the primary pipeline into the immigration enforcement system.⁵ In the immigration system, individuals face new punishment. For example, they can be mandatorily detained without access to a bond hearing.⁶ And, despite already serving their time in the criminal system, they can suffer deportation from the United States—permanent separation from what the U.S. Supreme Court has called “all that makes life worth living.”⁷ Importantly, this merger between immigration and criminal law—as immigration scholar Kevin Johnson has cogently shown—means that “[t]he racially disparate consequences of the modern criminal justice system” carry over into the immigration system.⁸

On a more personal note, as my lecture will make clear, these are also two areas of law that I have engaged in throughout my career, both as a scholar and as a public

1. For additional background on the distinguished career of Professor Ralph Follen Fuchs, and the establishment of the Fuchs Lecture in 2001, see *Former Faculty: Ralph Follen Fuchs*, IND. UNIV. BLOOMINGTON, <https://www.repository.law.indiana.edu/formerfaculty/20> [<https://perma.cc/4N2C-LSAD>].

2. Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 96, 103 (2005) (noting parallels between race-based enforcement in both systems and the broader “intolerance of noncitizens deemed undesirable by virtue of poverty, race, or criminal records”).

3. See Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297 (2017).

4. See Carrie L. Rosenbaum, *Crimmigration—Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9 (2018).

5. See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013).

6. See Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 7 (2018); Juliet P. Stumpf, *Civil Detention and Other Ozymorons*, 40 QUEEN’S L.J. 55, 71–72, 95 (2014).

7. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

8. Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RESV. L. REV. 993, 1025 (2016).

interest lawyer. Drawing on my research and lessons I have learned from my clients over the years, today I want to do three things. First, I begin by focusing on the criminal legal system. As I will explain, there is a growing consensus—with bipartisan support in Congress—that the criminal laws of the past require reconsideration.⁹ These incremental reforms are often characterized as “second chance” reforms that acknowledge racial bias, correct for past injustices, and reward personal growth. Although these changes in law are only just beginning to address the changes needed to reimagine our criminal legal system, they have resulted in meaningful change for the many individuals who have been released from prison as a result of these efforts. Second, I advance that immigration law should follow the example of the criminal law and incorporate similar opportunities for second chances. Third, I conclude by bringing us back to the reason why we are all gathered here today—to celebrate the legacy of the esteemed Professor Ralph Follen Fuchs.¹⁰

I. SECOND CHANCES IN CRIMINAL LAW

What do I mean by second chances? I think it is fair to say that we have all benefitted from second chances. For example, maybe you did wrong by a friend or said something you regret to a family member. That person showed you compassion and forgave you, allowing that relationship to continue to grow. Second chances are something we all seek out in life when we recognize our mistakes. They provide us with the opportunity to try harder, to do better, and to learn from life’s twists and turns.

In the criminal law of late, “second chances” means that decisionmakers—judges, parole boards, governors, and even the President—are given discretion to reconsider past case outcomes.¹¹ Second chance initiatives that have emerged in recent years rely on corrective tools like clemency, pardons, and other sentence modification procedures. These tools mean that there is an opportunity to take a second look and to reevaluate the appropriateness of a past outcome.

Let me provide an example. In 2014, President Barack Obama announced a White House Second Chance Initiative to use the President’s clemency power to address systemic injustices caused by punitive sentencing practices of years past.¹² As background, one form of clemency that the President may grant is known as a

9. See, e.g., Stephen Dinan, *James Sensenbrenner, Robert Scott Draft Criminal Justice Reform*, WASH. TIMES (July 6, 2015), <http://www.washingtontimes.com/news/2015/jul/6/james-sensenbrenner-robert-scott-draft-criminal-ju/> [<https://perma.cc/TU2W-WQ2T>].

10. For a moving collection of tributes that recognize the many contributions of Professor Fuchs to Indiana University Maurer School of Law and the greater community, see Maurice J. Holland, *Dedication—Ralph F. Fuchs*, 60 IND. L.J. 1 (1984).

11. See Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83 (2019); NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, A SECOND LOOK AT INJUSTICE (2021), <https://www.sentencingproject.org/reports/a-second-look-at-injustice/> [<https://perma.cc/4YWC-S42Q>].

12. *Obama Administration Clemency Initiative*, U.S. DEP’T OF JUST. ARCHIVES (Jan. 12, 2021), <https://www.justice.gov/archives/pardon/obama-administration-clemency-initiative> [<https://perma.cc/A8DA-6FUN>].

commutation.¹³ Essentially, through a commutation the President may reduce the sentence imposed by a federal court for a federal crime to a new, shorter sentence.¹⁴ As Rachel Barkow has described, clemency is both an “exercise of mercy” and a “critical mechanism for the President to assert control over the executive branch in criminal cases” that can address “poor enforcement decisions and injustices in this system.”¹⁵ To qualify for clemency under President Obama’s initiative—commonly known as “Clemency Project 2014”—petitioners had to show that they would have likely received a substantially shorter sentence if convicted of the same offense today, and that they merited this exercise of grace through their conduct and growth.¹⁶

When I heard about Clemency Project 2014, I knew I wanted to involve our UCLA students in this historic initiative. We took on the case of a man convicted in Los Angeles federal court in 1995.¹⁷ He had already served over twenty years in federal prison. Although his conviction was for a nonviolent drug offense, this husband and father of a young son received a sentence to die in prison: life without the possibility of parole. Unfortunately, such a sentence was not uncommon in the federal system in the 1990s.

One important matter to understand when I talk about life sentences is that, under the Sentencing Reform Act of 1984, Congress eliminated parole for all persons sentenced in federal court.¹⁸ This meant that a life sentence would result in life in prison. There would be no opportunity later for a parole board to take a second look and evaluate if continued incarceration was still necessary. Prior to the Sentencing Reform Act, as Professor Ryan Scott has written on extensively, “criminal sentencing in the federal system was ‘indeterminate,’ with judges and parole boards exercising essentially unfettered discretion in choosing the form and length of sentences within broad statutory ranges.”¹⁹ This was no longer so in the 1990s.

13. Article II, Section 2 of the U.S. Constitution authorizes the President “to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” U.S. CONST. art. II, § 2. The Supreme Court has recognized that the authority vested by the Constitution in the President is quite broad, describing it as plenary and discretionary. *Ex parte Garland*, 71 U.S. 333, 380 (1866). For additional background on presidential pardons, see MICHAEL A. FOSTER, CONG. RSCH. SERV., R46179, PRESIDENTIAL PARDONS: OVERVIEW AND SELECTED LEGAL ISSUES 4 (2020); William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977).

14. The President may order immediate release, or otherwise shorten the length of sentence.

15. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 807, 809 (2015).

16. *Clemency Project 2014: A Historically Unprecedented and Wholly Independent Volunteer Effort by the Nation’s Bar*, FAMILIES AGAINST MANDATORY MINIMUMS (FAMM) (Jan. 16, 2015), <https://famm.org/clemency-project-2014-a-historically-unprecedented-and-wholly-independent-volunteer-effort-by-the-nations-bar/> [<https://perma.cc/3QKA-88P2>].

17. I am grateful to my colleagues Professor Julie Cramer and Professor Peter Johnson for co-counseling this case with our UCLA students.

18. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. § 3551 (1984)).

19. Ryan W. Scott, *Booker’s Ironies*, 47 U. TOL. L. REV. 695, 698 (2016).

Prosecutors handling the case had used a prior conviction for a minor drug possession crime to enhance the sentence to life.²⁰ With the enhancement, the judge's hands were tied: Congress had taken away the judge's ability to exercise discretion in allocating the sentencing outcome. As it was, the federal district judge handling the case at the time thought the result was too harsh and expressed this concern in the sentencing order.

A life sentence would destroy many of us, make us give up hope. But our client remained steadily employed, took educational courses, mentored other men, demonstrated consistently good conduct, and maintained relationships with loved ones on the outside.

One moment still sticks out in my memory. As we left the federal prison with our students after a visit with our client, a prison guard escorted us out. When we reached the gate, he leaned in to say something to the students. Referring to our client, the guard whispered: "He doesn't belong in prison." Think about that. The person who stood watch day-in and day-out knew that incarceration was not necessary—that the twenty-plus years already served was more than enough.

President Obama agreed. On August 5, 2014, President Obama commuted his life sentence.²¹

Fortunately, this was by no means an isolated case. As President Obama said repeatedly during his time in the White House, "America is a nation of second chances . . ." ²² Over the course of his presidency, President Obama—the first sitting president in U.S. history to ever visit a federal prison²³—commuted 1715 sentences, more than any other President, mainly of persons serving long-term sentences for nonviolent drug offenses.²⁴ Reflecting on his presidency in the *Harvard Law Review* at the end of his second term, Obama explained: "I will be the first President in decades to leave office with a federal prison population lower than when I took office . . ." ²⁵ The work of second chances was beginning, but much more remained to be done.

How did we get here? How is it that we came to tie the hands of federal judges who knew that the mandated sentence was too harsh? Many trace the rise of mass incarceration back to the "War on Drugs," a law enforcement campaign started in

20. See 21 U.S.C. § 851 (1995) (allowing for the enhancement of a sentence for a drug conviction to life, based on prior convictions).

21. Bill Kisliuk, *UCLA Law Students Win Clemency for Man Serving Life Sentence for Nonviolent Drug Offense*, UNIV. CAL. (Aug. 23, 2016), <https://www.universityofcalifornia.edu/news/ucla-law-students-win-clemency-man-serving-life-sentence-nonviolent-drug-offense> [<https://perma.cc/6MNM-KF6D>].

22. See, e.g., President Obama (@POTUS44), TWITTER (Jan. 19, 2017, 3:39 PM), <https://twitter.com/POTUS44/status/822181779217981441?lang=eng> [<https://perma.cc/QB29-GEMC>].

23. Scott Horsley, *Obama Visits Federal Prison, A First for a Sitting President*, NPR (July 16, 2015, 5:27 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/16/423612441/obama-visits-federal-prison-a-first-for-a-sitting-president> [<https://perma.cc/YA8B-LHJ4>].

24. See *Clemency Statistics*, U.S. DEP'T OF JUST., OFF. OF THE PARDON ATT'Y (Oct. 5, 2022), <https://www.justice.gov/pardon/clemency-statistics> [<https://perma.cc/27L6-3DEF>].

25. Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 824 (2017).

the 1970s to criminalize the use and sale of drugs.²⁶ As a child growing up during those years here in Indiana, I can still remember in health class learning that drugs “fried your brain.” A frequently televised public service announcement featuring an image of an egg sizzling in a frying pan is something I am sure my generation will never forget.²⁷ We never quite knew what it meant—what does an egg over easy have to do with drugs? But the image and the narrator sternly warning us that “this is your brain on drugs,” terrified us nonetheless and helped to get more and more Americans on board with what was to come.

As part of this War on Drugs campaign, Congress passed the Anti-Drug Abuse Act of 1986 (ADAA),²⁸ which established mandatory minimum sentences for federal drug convictions. The ADAA also introduced the now infamous drug-sentencing disparity of 100:1 for crack to powder cocaine, meaning that persons convicted of drug crimes involving cocaine received vastly more time if the drug was in crack form, rather than powder. This racially discriminatory punishment scheme meant that African Americans, who tended to be convicted of crack offenses, served far more time than Whites, who were more often convicted of powder offenses.²⁹

Continuing this trend, in 1994—and by this time I was in law school—Congress passed and President Bill Clinton signed, the Violent Crime Control and Law Enforcement Act, which is commonly referred to as the “crime bill.”³⁰ The 1994 crime bill provided billions in federal funding in exchange for states and localities implementing so-called “truth in sentencing” laws, which required individuals to serve at least eighty-five percent of their sentence by reducing or eliminating the role of parole boards in evaluating the continued appropriateness of incarceration. During the 1990s, many states also passed “three strikes” laws that increased the sentence of those with prior felonies and punished a “third strike” with life in prison.³¹

26. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6 (2012) (“The impact of the drug war [on the U.S. penal population] has been astounding.”). But see John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173 (2015) (arguing that, while incarceration for drug crimes rose swiftly after 1980, such convictions have had a more limited influence on the overall prison population).

27. To watch the original 1987 campaign advertisement by the Partnership for a Drug-Free America, see Dwayne Pounds, *Partnership for a Drug-Free America “This Is Your Brain on Drugs” PSA (1987)*, YOUTUBE (Sept. 14, 2013), <https://youtu.be/o5wwECXTJbg> [<https://perma.cc/UG3P-UMEC>].

28. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

29. DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 1* (2006), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law> [<https://perma.cc/U3RS-LFG8>] (“In 2003, whites constituted 7.8% and African Americans constituted more than 80% of the defendants sentenced under the harsh federal crack cocaine laws, despite the fact that more than 66% of crack cocaine users in the United States are white or Hispanic.”); see also *Fair Sentencing Act*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act> [<https://perma.cc/56JK-WR5D>]; David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995).

30. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

31. JOHN CLARK, JAMES AUSTIN & D. ALAN HENRY, “THREE STRIKES AND YOU’RE OUT”:

The consequences of all these changes in the law are clear. In 1980, there were 500,000 people behind bars in the United States.³² By 2008, 2.3 million people were behind bars,³³ the highest rate of incarceration in the world.³⁴ Another crucial statistic: African Americans and Latinos made up sixty percent of people behind bars at the peak period in 2009, yet they only accounted for thirty percent of the population.³⁵ It is also important to realize that more and more people were being sentenced to extremely long sentences. To use the example of Indiana, by 2012 nearly a third of persons incarcerated in Indiana were serving sentences longer than twenty years, and over half were serving sentences longer than ten years.³⁶

One might think that these rapidly climbing rates of incarceration track a rise in crime. In fact, it is just the opposite. Crime rates have declined over this era of mass incarceration, what Frank Zimring has called the “great American crime decline.”³⁷ Moreover, punishment scholars agree that the rise in mass incarceration is an artifact of a complex set of societal factors, including changes in the laws like mandatory minimum sentences and other “tough on crime” initiatives—not exclusively crime rates.³⁸

But what I emphasize today is something we never thought was possible back when I was a federal public defender advising clients about their massive sentencing exposure in the federal system. That is, with bipartisan support, state and federal lawmakers have taken steps toward correcting at least some of mistakes of the past. Most recently, the First Step Act of 2018 (FSA) passed with bipartisan support and was signed into law by President Donald Trump.³⁹ The FSA included a wide range of reforms to the federal criminal system designed to shrink the footprint of incarceration, including by reducing mandatory minimums for drug crimes,

A REVIEW OF STATE LEGISLATION 1 (1997), <https://www.ojp.gov/pdffiles/165369.pdf> [<https://perma.cc/8XAA-SCZ9>].

32. See John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/> [<https://perma.cc/9FV7-6SX8>].

33. *Id.*

34. Obama, *supra* note 25, at 816 (noting that the United States has “an estimated 2.2 million [incarcerated people], more than any other country on Earth”).

35. President Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015) (transcript), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [<https://perma.cc/H8DG-BC7S>].

36. Michael M. O’Hear, *Mass Incarceration in Three Midwestern States: Origins and Trends*, 47 VAL. UNIV. L. REV. 709, 732 (2013).

37. See FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* (2007).

38. See, e.g., Sarah Shannon & Chris Uggen, *Visualizing Punishment*, THE SOCIETY PAGES (Feb. 19, 2013), <https://thesocietypages.org/papers/visualizing-punishment/> [<https://perma.cc/8ZL4-5FR3>] (“Social scientists attribute the bulk of this rise [in incarceration rates] to changes in sentencing policies and politics, rather than changes in the underlying rate of crime, which has fallen dramatically over much of the mass incarceration era.”); Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 L. & SOC. INQUIRY 489, 498 (2010) (“Although no scholar credits mass imprisonment with the bulk of the crime decline, several prominent scholars argue that increased imprisonment accounts for some of it.”).

39. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

expanding the safety valve, making other sentencing reforms retroactive, and expanding credit for “good time.”

How could such reforms render bipartisan support? Professor Shon Hopwood has credited the many “organizations and people who have been fighting for reform for decades” with the bill’s “miraculous[]” passage.⁴⁰ He also explains that, unlike other reform efforts, “[m]any of the advocates who fought for the bill on Capitol Hill, in the White House, on panel discussions, at rallies, and in op-eds were formerly incarcerated” and “brought their stories to bear before policymakers.”⁴¹ Advocacy for the bill also crossed political lines, earning the key support of President Trump’s son-in-law Jared Kushner who had a personal relationship with the federal criminal system: his own father, Charles Kushner, had served two years in a federal prison in Alabama when Mr. Kushner was a law student.⁴²

One significant change contained in the FSA was to the law of compassionate release. Prior to the FSA, only the Bureau of Prisons (BOP) could file a compassionate release motion on an incarcerated individual’s behalf and, not surprisingly, rarely did so. Under the new law, incarcerated individuals may directly file their own compassionate release motion with the federal court.⁴³ The results have been stunning. From 2006 to 2011, a dismal average of only twenty-four persons were released each year through BOP-filed motions.⁴⁴ In the first year of the FSA, 145 persons were granted release.⁴⁵ As of today, fueled in part by the COVID pandemic, that number has increased to 4425—and counting.⁴⁶ Furthermore, in 2020, ninety-six percent of those granted compassionate release had filed their own motion.⁴⁷

President Trump touted the bill as a major accomplishment of his administration.⁴⁸ At his State of the Union address in 2019, Trump invited Matthew

40. See Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. F. 791, 795, 802, 812 (2019).

41. *Id.* at 803.

42. See THE FIRST STEP FILM (Meridian Hill Pictures and Magic Labs Media, 2022) (featuring Jared Kushner’s role, and that of the many other advocates and politicians, that came together to craft and pass the FSA).

43. First Step Act of 2018 § 603(b) (authorizing courts to modify a term of imprisonment “upon motion of the defendant”); see also Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the COVID-19 Pandemic*, 18 OHIO ST. J. CRIM. L. 575 (2021).

44. OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM 1 n.9 (2013), <https://bit.ly/2S3Apb3> [<https://perma.cc/D6J7-A6SQ>].

45. U.S. SENTENCING COMM’N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 47 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf [<https://perma.cc/5BSD-Z9U9>].

46. *First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/> [<https://perma.cc/4JSR-GK32>].

47. U.S. SENTENCING COMM’N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 3 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf [<https://perma.cc/XM4U-XCP6>].

48. See *President Donald J. Trump Is Committed to Building on the Successes of the First*

Charles⁴⁹—the first person released from federal prison under the FSA—as a special guest.⁵⁰ As Trump told the cheering audience: “This legislation reformed sentencing laws that have wrongly and disproportionately harmed the African American community. . . . America is a nation that believes in redemption.”⁵¹ During his State of the Union address, President Trump also underscored that “[s]tates across the country are following our lead.”⁵² For example, here in Indiana the legislature revised its sentencing modification law in 2014 so that anyone serving time can now directly ask a judge to modify the sentence, including by considering changes in the sentencing law, self-improvement of the individual, and the impact of the sentence on the family.⁵³ Previously, the law required prosecutorial consent to request a sentencing modification, which was rarely granted.⁵⁴

So far, I have outlined a growing willingness to take a second look and reevaluate harsh policies of long and mandatory prison sentences that are unjust and not in touch with today’s laws. This reevaluation acknowledges the need to remedy the longstanding racial bias in our criminal legal system.⁵⁵ It also acknowledges the devastating harm of such policies on the loved ones of people who are incarcerated—their children, spouses, siblings, and parents. Finally, second chance reforms are supported by financial concerns. Given the astronomically high cost of incarceration,

Step Act, TRUMP WHITE HOUSE (Apr. 1, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/> [<https://perma.cc/8CSU-MB7G>].

49. For more on Matthew Charles’s journey, see *Professor Shon Hopwood and Matthew Charles: On Sentences and Second Chances*, GEORGETOWN L. (Feb. 8, 2019), <https://www.law.georgetown.edu/news/professor-shon-hopwood-and-matthew-charles-on-sentences-and-second-chances> [<https://perma.cc/L25K-97TR>].

50. *Special Guests for President Trump’s Second State of the Union Address*, TRUMP WHITE HOUSE (Feb. 4, 2019), <https://trumpwhitehouse.archives.gov/articles/special-guests-president-trumps-second-state-union-address/> [<https://perma.cc/34MR-CV6D>].

51. President Donald J. Trump, Address Before a Joint Session of the Congress on the State of the Union 3 (Feb. 5, 2019) (transcript), <https://www.govinfo.gov/content/pkg/DCPD-201900063/pdf/DCPD-201900063.pdf> [<https://perma.cc/MYD2-9B7J>].

52. *Id.*

53. See IND. CODE § 35-38-1-17(c) (2022) (effective July 1, 2014). *But see* Jessica M. Eaglin, *Neorehabilitation and Indiana’s Sentencing Reform Dilemma*, 47 VAL. U. L. REV. 867, 868 (2013) (warning that earlier sentencing reforms in Indiana failed to meaningfully address Indiana’s “growing prison population”).

54. See generally Fort Wayne Criminal Defense Lawyer, *Sentence Modifications—Recent Changes in Indiana Law*, FORT WAYNE CRIM. DEF. ATT’Y (Oct. 13, 2014), <https://www.fortwaynecriminaldefensefirm.com/blog/2014/october/sentence-modifications-recent-changes-in-indiana/> [<https://perma.cc/683M-Z768>] (“Obviously, prosecutor[s] were, more often than not, unwilling to agree to any modification.”).

55. As Yolanda Vázquez explains, “second chance[.]” reforms “are meant to eradicate the ‘criminal’ label stigma, a category of inequality delineated by race, class, and gender that causes those who fall under it to be framed as ‘dangerous,’ ‘undeserving,’ ‘morally deviant’ and ‘detestable.’” Yolanda Vázquez, *Nothing Is Ever Black & White: The Criminal Justice System and Its Expansion into “Criminal Alien” Enforcement*, 21 LOY. PUB. INT. L. REP. 110, 112 (2016) (citing Susan T. Fiske, Amy J.C. Cuddy, Peter Glick & Jun Xu, *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCH. 878 (2002)).

particularly for an aging population of incarcerated people, taking a second look results in significant savings of tax dollars.⁵⁶ In turn, these cost savings can be reinvested in supporting communities harmed by mass incarceration.⁵⁷

II. SECOND CHANCES IN IMMIGRATION LAW

About a decade ago, Professor Julie Cramer and I worked with students at UCLA to represent a young man in deportation proceedings. He had grown up in the United States, having been brought here from Mexico as a baby in his mother's arms. However, his parents never legalized his status, and he was now threatened with possible deportation.

In some respects, our client was lucky. First, he had legal representation, which is not guaranteed since immigration proceedings are considered "civil" rather than criminal proceedings. And, second, he was married to a United States citizen; the pair had a newborn baby.

Although you would think that being married to a citizen would allow you to remain lawfully in the United States, the current immigration law is not designed to keep families together. In fact, many American citizens cannot help their noncitizen spouses to adjust their status in the United States. Instead, often immigrant spouses must leave the country with the possibility of being stuck in their home country while they adjust their status. However, because our client had entered lawfully with a visa as a baby, we were able to satisfy the narrow requirements for those spouses of U.S. citizens allowed to seek adjustment.⁵⁸

At the hearing, when it became clear that the judge would grant our client's request to regularize his status, the judge leaned in to lecture our client. What did he tell him? To be careful. Very careful. He emphasized: "There are no second chances in immigration law."

The judge was right. But, how did we get here? How is it that we have an immigration system that is so unforgiving and that remains still so resistant to change?

56. The Bureau of Prisons is estimated to spend approximately \$34,705.12 a year for every person who is incarcerated. See Ronnie K. Stephens, *Annual Prison Costs a Huge Part of State and Federal Budgets*, INTERROGATING JUST. (Feb. 16, 2021), <https://interrogatingjustice.org/prisons/annual-prison-costs-budgets/> [https://perma.cc/X3BN-6THL].

57. Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 535-36 (2020) (emphasizing the cost savings that could result from second chance reforms); Dennis Schrantz, Stephen DeBor & Marc Mauer, *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, SENTENCING PROJECT (Sept. 5, 2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/> [https://perma.cc/244B-772T] (calculating the cost savings generated from closing facilities and reducing prison populations in five states).

58. Immigration and Nationality Act § 245, 8 U.S.C. § 1225 (2022) [hereinafter I.N.A.]. See also U.S. Citizenship and Immigration Services, Eligibility for Adjustment of Status (June 16, 2020), <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-immediate-relatives-of-us-citizen> [https://perma.cc/SJ8T-97UX].

From the time the Chinese Exclusion Act was passed in 1882, racism has been baked into our immigration system.⁵⁹ Beginning in 1921, the United States adopted race-based quotas that legitimized a Whites-only system for lawful immigration by privileging migration from Western Europe. When the Immigration and Nationality Act of 1965 was passed during the civil rights era, Congress finally eliminated the race-based immigration quotas and replaced them with a new structure of country caps that were facially race neutral, but in practice drastically limited migration from the Western Hemisphere.⁶⁰ Experts agree that these per-country caps placed on the Western Hemisphere for the first time contributed to a steady rise in undocumented migration in the years to come.⁶¹

Gradually, Congress began to replace the race-based quotas with something new: crime control measures disproportionately targeted against Black and Latinx communities.⁶² In 1996, two years after the passage of the crime bill that I discussed earlier, Congress enacted—and President Bill Clinton signed—a pair of laws that dramatically reformed the immigration system: the Illegal Immigration Reform and Immigrant Responsibility Act⁶³ and the Antiterrorism and Effective Death Penalty Act.⁶⁴ These two laws, along with several others passed during this time, drew immigration enforcement closer to the ballooning criminal legal system. For example, mandatory detention rules for noncitizens convicted of crimes were introduced.⁶⁵ Congress also increased the number of crimes that subjected someone to deportation. Now, relatively minor crimes could qualify as so-called “aggravated felonies,” barring even lawful permanent residents from remaining in the United States and qualifying for relief. Additionally, Congress prevented immigration judges from exercising discretion to grant relief from deportation.⁶⁶ Importantly, like the criminal legal system, this criminalized system of detention and deportation is rooted in racial control.⁶⁷

59. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889) (upholding the Chinese Exclusion Act of 1882 against legal challenge). See generally Kit Johnson, *Chae Chan Ping at 125: An Introduction*, 68 OKLA. L. REV. 3 (2015).

60. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 227 (2004).

61. See, e.g., S. DEBORAH KANG, *THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE US-MEXICO BORDER, 1917–1954*, 149–50 (2017); NGAI, *supra* note 60, at 227; NATALIA MOLINA, *HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS* 20–22 (2014).

62. See generally Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599 (2015); Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 (2018).

63. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104–208, 110 Stat. 3009 (1996).

64. *Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104–132, 110 Stat. 1214 (1996).

65. I.N.A. § 236(c), 8 U.S.C. § 1226(c).

66. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* § 240(b)(7).

67. See generally Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455 (2022) (revealing how systemic racism is embedded in U.S. immigration law).

The 1996 laws had tragic consequences for immigrants. Indeed, since 1996, more than seven million people have been deported, which is more than three times the total number of people deported from the United States between 1892 and 1996.⁶⁸ In addition, like in the criminal system, immigration enforcement during the post-1996 period was heavily racialized and gendered, focused on Latinx and Black men.⁶⁹

The 1996 immigration laws were, in large part, based on the public perception that people not born in the United States were responsible for crime. Yet, as experts in the field recognize, the notion that immigrants are criminals is a myth. Research has consistently shown the opposite: that immigration and immigrants are “associated with *lower* crime rates and *lower* incarceration rates,”⁷⁰ not higher rates.

One place where the devastation and pain caused by the 1996 immigration laws are clear is Friendship Circle, a stretch of land on the border between San Diego and Tijuana. There, a tall metal border fence divides the United States from Mexico. Families come to Friendship Circle to spend time with their deported loved ones but must do so through the narrow openings in the fence.

On the Mexican side of the border fence is a striking mural of an upside-down American flag—a longtime military distress signal. When you look at the mural from one angle, you see the red, white, and blue of the flag. From the other, you see painted on the spikes of the fence the names of dozens of veterans who now find themselves separated from the country that they fought to defend.⁷¹ Amos Gregory, an artist and Navy veteran, initiated the commemorative mural and involved deported veterans in the project.⁷²

68. OFF. OF IMMIGR. STATS., U.S. DEP'T OF HOMELAND SEC., 2021 YEARBOOK OF IMMIGRATION STATISTICS tbl.39 (2022), <https://www.dhs.gov/immigration-statistics/yearbook/2021#test> [<https://perma.cc/6KAM-BKGT>].

69. Tanya Golash-Boza, *Racialized and Gendered Mass Deportation and the Crisis of Capitalism*, 22 J. WORLD-SYS. RSCH. 38, 39–40 (2016). The injustice of the structure of the immigration law has only further magnified in recent years. For an overview of how the asylum system has been systematically dismantled, see Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 LOY. L. REV. 121 (2020).

70. Rubén G. Rumbaut, *Undocumented Immigration and Rates of Crime and Imprisonment: Popular Myths and Empirical Realities*, in THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 119, 119 (Mary Malina ed., 2008), https://www.policefoundation.org/wp-content/uploads/2015/06/Appendix-D_0.pdf (emphasis in original) [<https://perma.cc/S4LW-Z33X>]. See also Carolyn Moehling & Anne Morrison Piehl, *Immigration, Crime, and Incarceration in Early Twentieth-Century America*, 46 DEMOGRAPHY 739 (2009).

71. Maria Santana, *Deported Vets Helped Paint This Upside-Down US Flag on the Border. Will They Have to Remove It?*, CNN (Apr. 20, 2018, 3:54 PM), <https://edition.cnn.com/2018/04/20/us/paintings-us-mexico-border-fence/index.html> [<https://perma.cc/TS47-VRPU>].

72. Emily Wax-Thibodeaux, *For Years a Flag Mural at the Border Has Honored Deported U.S. Military Veterans. After Trump Visit, Agents Are Looking into Taking It Down*, WASH. POST (May 16, 2018, 6:46 PM), <https://www.washingtonpost.com/news/post-nation/wp/2018/05/16/for-years-a-flag-mural-at-the-border-has-honored-deported-u-s-military-veterans-after-trump-visit-agents-are-looking-into-taking-it-down/> [<https://perma.cc/BN9X-GYG2>].

One of the veterans whose name is painted on that fence is U.S. Army Staff Sergeant Melvin Salas.⁷³ Staff Sergeant Salas served our nation honorably, including in Operation Desert Storm, but like many veterans had difficulty adjusting to civilian life and received little assistance from the government. He sustained a conviction and was subjected to the 1996 immigration laws. At his immigration court hearing, where he had no benefit of appointed counsel, he had this to say in a letter to the immigration judge: “I truly believe that ‘YES’ I am an American at heart and in many other aspects. It’s the paperwork stating that I am an American that I regretfully lack.” Despite thirty-nine years of lawful residency in the United States, marriage to a U.S. citizen, young children, and years of honorable service to our military, the law required the judge to order this man who fought honorably for his country deported. Due to the 1996 immigration laws, the judge was barred from considering the enormously strong equities in his favor.

The deportation of veterans is especially unjust because those who risk their lives for our country—for even just one day in active duty—are entitled to automatic U.S. citizenship.⁷⁴ But the government has lagged in its duty to help servicemembers complete their naturalization paperwork.⁷⁵ The inflexibility of the immigration law in the face of criminal convictions has thus resulted in the deportation of an untold number of returning servicemembers who have not yet been naturalized.⁷⁶

How can this situation change? How can we bring our veterans back home to their families? I believe that, at a minimum, we need to revise the immigration law with opportunities for second chances. Such changes are not sufficient to remedy the legacy of racism and exclusion that built today’s criminalized immigration system, but they would nonetheless be an important first step toward achieving greater equity and justice in immigration. I want to use my remaining time to briefly sketch out three examples of possible future reforms that could help attain these goals.

First, the immigration law should be reformed—as we have done with the federal criminal law—to allow immigration judges to consider individualized factors.⁷⁷

73. For a view of the mural showing the names of deported veterans, including Staff Sergeant Salas, see *Death of a Deported U.S. Military Veteran*, EL TECOLOTE (May 9, 2014), <https://eltecolote.org/content/en/death-of-a-deported-u-s-military-veteran/> [<https://perma.cc/85JN-8BGP>].

74. I.N.A. § 329(a), 8 U.S.C. § 1440(a) (setting forth the requirements for military naturalization in periods of military hostilities). For a review of military naturalization, including the discriminatory bars placed on the naturalization of Asians who served in the military, see Deenesh Sohoni & Yosselin Turcios, *Discarded Loyalty: The Deportation of Immigrant Veterans*, 24 LEWIS & CLARK L. REV. 1285, 1294–306 (2020).

75. See generally BARDIS VAKILI, JENNIE PASQUARELLA & TONY MARCANO, DISCHARGED, THEN DISCARDED: HOW U.S. VETERANS ARE BANISHED BY THE COUNTRY THEY SWORE TO PROTECT 24–28 (Sandra Hernandez, Anna Castro & Rebecca Rauber eds., 2016), <https://www.aclusocal.org/sites/default/files/dischargedthendiscarded-acluofca.pdf> [<https://perma.cc/4DYL-9JQ5>].

76. *Id.* at 7.

77. As Amanda Frost has proposed, a complementary reform would be to give immigration officials discretion to regularize the status of “a subset” of undocumented migrants living in the United States. Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 50 (2017).

Today, the immigration law has been stripped bare, taking away from judges much of their authority to exercise discretion and grant relief from deportation.⁷⁸

What might such a reform look like? The immigration law once had a provision that contained a broader opportunity for a second chance than is available today. Under the former Section 212(c) of the Immigration and Nationality Act, which was repealed by the 1996 immigration laws,⁷⁹ judges could weigh discretionary equities to waive the deportation of certain individuals who had lived in the United States for at least seven years.⁸⁰ Judges considered factors such as military service, family ties in the United States, and value to the community in deciding whether to grant this form of relief.⁸¹ Reviving Section 212(c) and creating other more robust relief mechanisms would help to bring mercy back into the immigration law.

A related part of bringing second chances into the immigration law is ensuring that those who have already been deported can take advantage of such changes in the law. As Beth Caldwell has proposed in her book *Deported Americans*, Congress should create a right to come home.⁸² It could operate in the same way as a clemency grant, through a process of application and deliberation. Forging a pathway to return home for those who have already been deported would help to correct some of the racialized harms of the past immigration system that have excluded immigrants from membership based on criminal convictions.⁸³ In fact, thirty-five members of Congress and hundreds of community groups now support the idea of a right to come home as part of The New Way Forward Act,⁸⁴ introduced in 2021.⁸⁵ Of course,

78. For a discussion of the history of relief from removal in immigration law, see Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393 (2017).

79. Antiterrorism and Effective Death Penalty Act of 1996 § 440(d) (amending I.N.A. § 212(c) to make persons convicted of aggravated felonies ineligible); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 304(b) (repealing § 212(c) entirely).

80. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187 (1952) (codified as amended at 8 U.S.C. § 1182(c)) (repealed 1997). For additional background on the development and repeal of Section 212(c), see Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 781–801 (1997).

81. *Yepes-Prado v. INS*, 10 F.3d 1363, 1365–66 (9th Cir. 1993).

82. BETH C. CALDWELL, *DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO* 186–88 (2019). As Ming Chen has argued, Congress could also craft a right to come home for a specific population—deported veterans. Ming H. Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 97 DENV. L. REV. 669, 705 (2020).

83. Such a move would be markedly different from past legalization efforts that, as Angélica Cházaro has pointed out, have excluded immigrants considered undeserving, such as those with prior deportation orders or criminal convictions. Angélica Cházaro, *Beyond Respectability: New Principles for Immigration Reform*, 52 HARV. J. ON LEGIS. 355, 357 (2015).

84. Carlos Ballesteros, *The New Way Forward Act Could Disrupt the Prison-to-Deportation Pipeline*, INJUSTICE WATCH (Jan. 27, 2021), <https://www.injusticewatch.org/news/immigration/2021/prison-deportation-pipeline-chuy-garcia-new-way-forward-act/> [<https://perma.cc/SV6F-NS93>].

85. See Press Release, Jesus G. “Chuy” Garcia, U.S. Congressman, Reps. García, Jayapal, Pressley, Bass Re-Introduce the New Way Forward Act (Jan. 26, 2021), <https://chuygarcia.house.gov/media/press-releases/rebs-garc-jayapal-pressley-bass-re->

garnering the necessary political support to enact this kind of reform remains challenging.⁸⁶ But, I argue, we should take inspiration from the successful effort that became the First Step Act.

The second reform that I highlight can be implemented at the state level: revitalization of the governor's role to grant pardons.⁸⁷ Immigration law has long recognized the pardon power as providing a discretionary second chance for immigrants with criminal convictions.⁸⁸ State governors have the power to pardon a noncitizen,⁸⁹ thereby shielding the person from deportation.⁹⁰ With a pardon, eligibility to naturalize is also preserved.⁹¹

Through the pardon process, a governor can weigh individual factors. Has this person rehabilitated? Are they contributing to society? Will our community be safer with them in it? A pardon does not expunge or erase a conviction. Nor does a pardon minimize or forgive past conduct, or the harm it has caused. Rather, it recognizes the work someone has done to transform.

Governor Jerry Brown, who most recently served as governor of California from 2011 to 2019, provides an important case study of the role that governors may play in creating a more humane immigration system by utilizing their pardon power.⁹² Governor Brown took this responsibility seriously, granting 1332 pardons during his tenure, more than any other governor of the state.⁹³ While not all of these pardons were for immigrants, many were.

introduce-new-way-forward-act [<https://perma.cc/2ZQV-L6N5>].

86. See, e.g., Kevin R. Johnson, *Back to the Future? Returning Discretion to Crime-Based Removal Decisions*, 91 N.Y.U. L. REV. ONLINE 115, 130 (2016) (acknowledging that “[h]ow to persuade Congress to pass ameliorative laws that temper the modern criminal removal system is the daunting political task”).

87. *Governors Have the Power*, PARDON: IMMIGR. CLEMENCY PROJECT (2018), <https://immigrantpardonproject.com/> [<https://perma.cc/LD72-Q5CA>].

88. See Immigration Act of 1917, Pub. L. No. 64–301, 39 Stat. 874, 889–90 (1917) (codifying the principle that a pardoned conviction cannot be relied upon as a basis for deportation). As Jason Cade's research has unearthed, federal authorities recognized the power of gubernatorial pardons even before the 1917 Immigration Act formally codified the provision. See Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 367–68 (2012).

89. See Nora V. Demleitner, *Using the Pardon Power to Prevent Deportation: Legitimate, Desirable, or Neither in a Federal System?*, 12 LOY. J. PUB. INT. L. 365 (2011).

90. I.N.A. § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi).

91. 8 C.F.R. § 316.10(c)(2) (2022) (recognizing that a pardon waives the aggravated felony bar on establishing good moral character as required for naturalization).

92. See Melissa Gira Grant, *California Governor Jerry Brown Is Fighting Trump with Pardons. Will Other Governors Follow Suit?*, THE APPEAL (Nov. 29, 2018), <https://theappeal.org/california-governor-jerry-brown-is-fighting-trump-with-pardons-advocates-hope-other-governors-will-too/> [<https://perma.cc/S6GD-6CGE>]. Other examples of state pardon processes focused on protecting immigrants from deportation have occurred in Georgia and New York. See Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, 22 B.U. PUB. INT. L.J. 293 (2013); Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT'G REP. 184 (2001).

93. Grant, *supra* note 92.

One of these pardon recipients was Phal Sok, who has published and spoken widely about his journey.⁹⁴ Mr. Sok's parents met in a refugee camp in Thailand as they escaped the Khmer Rouge regime in Cambodia.⁹⁵ Phal Sok was born in the camp and came to the United States when he was just sixty-one days old.⁹⁶ After his parents separated, he was raised by his father in Long Beach.⁹⁷ When his father passed away from cancer, he was all alone.⁹⁸

At seventeen, under California's harsh juvenile laws of the 1990s, he was tried as an adult for armed robbery and sent to state prison, still a child.⁹⁹ When California finally rectified this mistake and created second chances for people convicted as children by passing Senate Bill 260,¹⁰⁰ Mr. Sok was granted early parole.¹⁰¹ He was thirty-five years old.¹⁰² But that did not end things. Due to the 1996 immigration laws, he was taken to an immigration prison and charged with deportation.¹⁰³ There, he "faced a system that guaranteed no right to counsel, no limit to detention, no trial, no jury, and no geographic limitation on [his] confinement."¹⁰⁴

On August 10, 2018, Governor Brown gave Phal Sok a second chance by granting his pardon request.¹⁰⁵ In the pardon grant, Brown recognized his work "in the local immigrant community and with his church."¹⁰⁶ He also acknowledged the enormous community support for the pardon, explaining that "[i]ndividuals who know Mr. Sok

94. See, e.g., Phal Sok, *I Earned My Freedom from Prison, and Now ICE Wants to Deport Me*, SILICON VALLEY DE-BUG (Sept. 25, 2017), <https://siliconvalleydebug.org/stories/california-gave-me-a-second-chance-and-now-ice-wants-to-deport-me> [<https://perma.cc/6QFJ-PME3>] [hereinafter *I Earned My Freedom*]; Men Kimseng, *Cambodian Faces Legal Battle to Remain in US After Release from Jail*, CAMBODIAN AM. (Nov. 23, 2018), <https://www.voacambodia.com/a/cambodian-faces-legal-battle-to-remain-in-us-after-release-from-jail/4669720.html> [<https://perma.cc/FJ57-L9HQ>]; Phal Sok, *Freedom for Immigrant Communities—and All of Us*, HERE TO LEAD (Nov. 10, 2020), <https://heretoleadca.org/2020/11/10/phal-sok-freedom-for-immigrant-communities-and-all-of-us/> [<https://perma.cc/T3ZK-XJ6Q>] [hereinafter *All of Us*].

95. Phal Sok, *Broken Systems: Function by Design*, 68 UCLA L. REV. DISCOURSE 14, 18 (2021) [hereinafter *Broken Systems*]; *All of Us*, *supra* note 94.

96. *All of Us*, *supra* note 94; *Broken Systems*, *supra* note 95, at 18.

97. *Our Stories*, YOUTH JUST. COAL., <https://youthjusticela.org/our-stories/> [<https://perma.cc/UN8K-DGXJ>].

98. *Id.*

99. *I Earned My Freedom*, *supra* note 94.

100. S. 260, 2013–14 Reg. Sess. (Cal. 2013).

101. *All of Us*, *supra* note 94.

102. *Id.*

103. *Our Stories*, *supra* note 97.

104. *Broken Systems*, *supra* note 95, at 19.

105. Don Thompson, *California Governor Grants Pardons to 3 Facing Deportation*, SEATTLE TIMES (Aug. 18, 2018, 6:07 AM), <https://www.seattletimes.com/nation-world/california-governor-grants-pardons-to-3-facing-deportation/> [<https://perma.cc/62SJ-69BV>]; *All of Us*, *supra* note 94.

106. EDMUNG G. BROWN JR., EXECUTIVE REPORT ON PARDONS, COMMUTATIONS OF SENTENCE, AND REPRIEVES 615–16 (2018), <https://www.ca.gov/archive/gov39/wp-content/uploads/2019/01/2018-Executive-Report-on-Pardons-Commutations-of-Sentence-and-Reprieves.pdf> [<https://perma.cc/LWG5-4L6X>].

have described him as ‘a tireless advocate for immigrants, particularly refugee children and youth,’ and ‘a true American.’”¹⁰⁷

Today, Mr. Sok is an organizer and leader for the Youth Justice Coalition (YJC) in Los Angeles.¹⁰⁸ As he explains, at YJC he strives “to resource our communities and build support structures that incarceration cannot provide, to bring real peace and true public safety to our streets.”¹⁰⁹ His work and leadership are essential to fundamentally restructuring the immigration and criminal systems and envisioning new approaches.¹¹⁰

Governor Brown’s tenure serves as a model of what other state governors could do to protect residents from unjust deportations.¹¹¹ Far too many allow the pardon power to remain dormant.¹¹² As immigration scholar Jason Cade has illuminated, a “widespread use of the pardon power in principled and transparent ways would spare many individuals and families from unjustified hardship . . . and promote . . . justice and empathy in the national dialogue about appropriate immigration enforcement policy.”¹¹³

The third reform that I highlight today is expanding access to counsel for immigrants. Because deportation is considered a civil proceeding, not a criminal one, the Sixth Amendment of the U.S. Constitution does not require the appointment of counsel.¹¹⁴ Yet, without counsel, it is unlikely that future “second chance” reforms could be accessed by eligible individuals.

In a study that I published a few years ago with Steven Shafer, we evaluated access to counsel in U.S. immigration courts. We analyzed over 1.2 million

107. *Id.*

108. *Our Stories*, *supra* note 97.

109. *Id.*

110. See generally Jennifer Lee, *Immigration Disobedience*, 111 CAL. L. REV. (forthcoming 2023) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4079709 [<https://perma.cc/8VTX-3HC9>] (acknowledging the power of “immigrant voices, control, and leadership” in growing the movement for immigrant rights and “fundamentally chang[ing] the policy possibilities for immigration reform”).

111. Cf. Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698 (2017) (arguing that power over crime-based deportations should rest in local, as opposed to national, government).

112. For a state-by-state review of the pardon power, along with other laws regarding the restoration of rights, see MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., THE REINTEGRATION REPORT CARD: GRADING THE STATES ON LAWS RESTORING RIGHTS AND OPPORTUNITIES AFTER ARREST OR CONVICTION 1 (2020), https://ccresourcecenter.org/wp-content/uploads/2020/10/The-Reintegration-Report-Card_FINAL-converted.pdf [<https://perma.cc/U7VA-9CXP>].

113. Jason Cade, *Pardons for Immigrants: Legal, Legitimate, and Long Overdue*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 7, 2019), <https://ccresourcecenter.org/2019/01/07/pardons-for-immigrants-legal-legitimate-and-long-overdue/> [<https://perma.cc/GB2Y-RBG6>].

114. I.N.A. § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (providing that individuals in removal proceedings “shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings”); see generally Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L. J. 2282 (2013).

immigration cases decided between 2007 and 2012, obtained from the immigration court's own database.¹¹⁵ We found a dismal picture of legal representation in immigration proceedings. Nationally, only thirty-seven percent of immigrants found a lawyer.¹¹⁶ For immigrants held in detention centers during their court case, the situation was even more dismal: only fourteen percent of detained immigrants attended court with a lawyer.¹¹⁷ Representation rates were even lower in rural areas and small cities.¹¹⁸ Without counsel, it was almost impossible for immigrants to defend themselves in court. Immigrants in detention were ten-and-a-half times more likely to successfully avoid deportation if they had counsel representing them.¹¹⁹ Released immigrants were five-and-a-half times more likely to succeed, and persons who were never detained were three-and-a-half times more likely to succeed.¹²⁰

Some states and localities, working together with private philanthropy, have taken crucial steps to address the unmet need for lawyers in immigration court. The first such program, the New York Immigrant Family Unity Project, was established in 2013.¹²¹ Three years later, a coalition of city government and foundations contributed to create the Los Angeles Justice Fund to represent detained immigrants.¹²² Like the pardon power that I discussed earlier, initiatives such as the N.Y. Immigrant Family Unity Project and the L.A. Justice Fund illustrate the potential for states and localities to shape the fairness of our immigration system.¹²³

115. Our work on this study was conducted as Fellows with the Transactional Records Access Clearinghouse (TRAC) at Syracuse University. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015).

116. *Id.* at 16.

117. *Id.* at 32.

118. *Id.* at 36. In rural communities, there are even fewer lawyers, a problem recent research has attributed in part to the lack of diversity in the legal profession. Luz E. Herrera, Amber Baylor, Nandita Chaudhuri & Felipe Hinojosa, *Evaluating Legal Needs*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 175, 179–80 (2022).

119. Eagly & Shafer, *supra* note 115, at 49–50.

120. *Id.*

121. Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 FORDHAM L. REV. 485, 496–97 (2018). This effort was guided by the tireless work of Peter Markowitz and others to document the critical need for attorney representation in New York. See, e.g., Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541 (2009).

122. Matt Reynolds, *Los Angeles County Will Kick in \$3 Million to Immigration Fund*, COURTHOUSE NEWS SERV. (Dec. 21, 2016), <https://www.courthousenews.com/los-angeles-county-will-kick-in-3-million-to-immigration-fund/> [<https://perma.cc/K4EQ-PUMH>]. For an argument against “universal representation” programs, see Andrew Free, *Hard Questions for Immigration Advocates One Year into the Biden Administration*, PATREON: FOLKSMOVE (Jan. 21, 2022), <https://www.patreon.com/posts/61474810> [<https://perma.cc/KK63-7EGT>] (acknowledging that “folks do better with lawyers,” but concluding that a system of “universal rep” will not “meaningfully reduce harm or create conditions for abolition” of immigrant incarceration).

123. For a broader examination of “sanctuary cities,” see Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703 (2018).

Stephen Manning's Innovation Law Lab has launched a complimentary volunteer-centered program he calls "Massive Collaborative Representation," which seeks to unite volunteer lawyers from around the country to "ensure[] that every immigrant who needs legal representation receives it."¹²⁴ For example, the Immigration Law Lab has mobilized volunteers to represent detained families seeking asylum¹²⁵ and established four regional "Centers of Excellence," where attorneys seek "to revitalize judicial ecosystems and win every meritorious asylum claim."¹²⁶ Manning and Kari Hong have pointed out that such representation efforts should also extend to "rapid" forms of deportation, like reinstatement and administrative removal, that take place outside of immigration court.¹²⁷ The Vera Institute of Justice has recently proposed that a more comprehensive solution could be modeled after the highly successful federal public defender system, where I used to work as a trial attorney, that is known for its high-quality representation of indigent clients.¹²⁸ Michael Kagan has detailed how a federal system of immigration representation could fill gaps in current local efforts.¹²⁹

The idea that nobody should face detention and deportation without a lawyer has growing public support. A recent survey found that two-thirds of people in the United States now favor providing attorneys for people facing the serious sanction of deportation.¹³⁰ Providing counsel for immigrants would also result in significant savings in detention costs—because far more migrants would have bond hearings

124. Stephen Manning: *Ashoka Fellow*, ASHOKA, <https://www.ashoka.org/en-ca/fellow/stephen-manning> [<https://perma.cc/ZNA3-GGA9>].

125. For an excellent discussion of the "big immigration law" approach and how it differs from traditional one-on-one legal services representation, see Stephen Manning & Juliet Stumpf, *Big Immigration Law*, 52 U.C. DAVIS L. REV. 407 (2018).

126. Supplemental Declaration of Stephen W. Manning at 2, *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018) (No. 3:18-cv-06810).

127. Stephen Manning & Kari Hong, *Getting It Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 679 (2018).

128. VERA INST. OF JUST., *A FEDERAL DEFENDER SERVICE FOR IMMIGRANTS: WHY WE NEED A UNIVERSAL, ZEALOUS, AND PERSON-CENTERED MODEL* (Feb. 2021), <https://www.vera.org/publications/a-federal-defender-service-for-immigrants> [<https://perma.cc/NCN6-QQJG>]. *But see* Angélica Cházaro, *Due Process Deportations*, 97 N.Y.U. L. REV. (forthcoming 2023) ("Advocates should instead embrace local funding for immigrant representation as one tactic among many for challenging the mass deportation regime from different corners of the country.").

129. Michael Kagan, *Toward Universal Deportation Defense: An Optimistic View*, 2018 WIS. L. REV. 305, 312 (2018) ("[W]e could envision a hybrid system in which the federal government pays for appointed counsel in specialized cases, while a mixture of local and private resources supplies lawyers in other cases.").

130. Lucila Figueroa & Nina Siulc, *It's Time to Provide Government-Funded Lawyers to All Immigrants Facing Deportation*, VERA INST. OF JUST. (Jan. 24, 2021), <https://www.vera.org/blog/its-time-to-provide-government-funded-lawyers-to-all-immigrants-facing-deportation> [<https://perma.cc/CNR9-B4VU>] (finding that 67% of people surveyed supported government-funded attorneys for immigrants facing deportation, including 80% of Democrats, 53% of Republicans, and 66% of people who did not identify with either party).

and be released from detention.¹³¹ In fact, a 2014 study concluded that the resulting “fiscal savings could exceed the costs of providing publicly funded counsel.”¹³² As Matthew Boaz has advanced, fiscal arguments in favor of expanding access to counsel have appeal among conservatives but also converge with the movement to abolish immigration detention.¹³³

Ensuring more equitable access to counsel would support efforts to shrink immigration detention by securing release of more immigrants from detention, while at the same time helping to address the systemic race and class inequities in the immigration system. Providing increased funding for immigration counsel through nonprofit organizations would also help to address the serious problem of ineffective counsel that prey on immigrants with limited funds.¹³⁴ At the same time, access-to-counsel initiatives must take heed of the thoughtful warnings of immigration scholars and activists. As César Cuauhtémoc García Hernández and Lindsay Nash caution, it is essential that programs are not built around exclusions that bar noncitizens with convictions from eligibility, further reifying the “bad” versus “good” immigrant narrative.¹³⁵ Other types of restrictions on use of funding, such as the type of organizing work that attorneys can engage in, should also be resisted.¹³⁶ Lawyers

131. Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 HUM. RTS. 14, 16 (2013) (“Advocates have also shown that speedy appointment of counsel can save substantial detention costs if detained immigrants have qualified lawyers to promptly assess their claims.”); see also Eagly & Shafer, *supra* note 115, at 71 (finding that 44% of represented respondents were released after a custody hearing, compared to only 11% of those who lacked counsel at their bond hearing).

132. JOHN D. MONTGOMERY, NERA ECON. CONSULTING, *COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS 3* (2014), https://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf [<https://perma.cc/7F4V-U43P>].

133. See Matthew Boaz, *Practical Abolition: Universal Representation as an Alternative to Immigration Detention*, 89 TENN. L. REV. 199, 200 (2021) (seeking “to extend the theoretical framework of abolition to immigration detention” by “advocating for universal representation”).

134. As an empirical study by Jayanth Krishnan underscores, immigrants who are victims of ineffective legal representation face significant challenges in bringing these claims in the courts. Jayanth K. Krishnan, *The Immigrant Struggle for Effective Counsel: An Empirical Assessment*, 2022 U. ILL. L. REV. 1021 (2021).

135. See César Cuauhtémoc García Hernández, *Immigrant Defense Funds for Utopians*, 75 WASH. & LEE L. REV. 1393, 1396, 1413 (2018) (objecting to immigrant defense funds that include “exclusions against people convicted of certain crimes” and explaining that such funds “suffer from an egotistical belief that some people are good and others bad”); Lindsay Nash, *Universal Representation*, 87 FORDHAM L. REV. 503, 505 (2018) (“[R]estrictions like the conviction-based eligibility carveout threaten the most basic underpinnings of the universal representation project.”).

136. Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 CAL. L. REV. 1597, 1656 (2022) (warning against legal representation programs that place “restrictions on lawyering methods and means, including prohibiting legislative advocacy, support for organizing efforts, and impact litigation”).

working within such programs should have the flexibility to lawyer rebelliously,¹³⁷ including by collaborating with campaigns to end detention and supporting policies that challenge the prison-to-deportation pipeline.¹³⁸ And, advocates must involve vulnerable community members in assessing legal needs and in thinking of ways to more fundamentally address structural injustice.¹³⁹

III. HONORING THE LEGACY OF PROFESSOR RALPH F. FUCHS

In my comments thus far, I have set forth a forward-thinking set of reforms that would be an initial step toward bringing the time-honored value of second chances into the immigration system. I want to conclude with a few brief remarks that connect us back to Professor Ralph Fuchs, whose meaningful legacy has brought us all together today. Professor Fuchs, who has been described as Indiana University's "Jewel in the Crown," is celebrated as someone who believed in "freedom, justice and human dignity."¹⁴⁰ One thing that I find particularly remarkable is Professor Fuchs's deep commitment to integrating public service into his career as a lawyer and professor of law. For instance, Professor Fuchs was a pioneering and prolific scholar in the emerging field of administrative law.¹⁴¹ But, he was also a lifelong member of the American Civil Liberties Union (ACLU) and helped to found and lead Indiana's ACLU chapter.¹⁴²

Professor Fuchs was also ahead of his time in thinking about how best to develop law school pedagogy to ensure that more law students graduated with a commitment to public service. An award-winning instructor, Professor Fuchs is remembered as meticulous and demanding, while at the same time showing "personal care for his students."¹⁴³ In his scholarship, Professor Fuchs recognized that law schools should

137. See Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L.J. 1, 77 (2014) ("Problem solving rebelliously pursued melds street savvy, technical sophistication, and collective ingenuity into a compelling practical force.").

138. See, e.g., Cházaro, *supra* note 128, at 73 (supporting collaboration between deportation defense programs and "local and national efforts to shut down detention facilities, end the pipeline from the criminal legal system to the immigration detention system, stop new surveillance technologies, and more"); Hlass, *supra* note 136, at 1657 (encouraging immigration lawyers to work toward "eliminating detention and deportations," including by "shin[ing] light on the racism built into the immigration legal system").

139. Herrera et al., *supra* note 118, at 188.

140. David G.T. Williams, *Law and Administrative Discretion*, 2 IND. J. GLOB. LEGAL STUD. 191, 192 (1994).

141. For a sampling of Professor Fuchs's foundational scholarship in the field of administrative law, see Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259 (1938); Ralph F. Fuchs, *An Approach to Administrative Law*, 18 N.C. L. REV. 183 (1940). For later influential works, see Ralph F. Fuchs, *The New Administrative State: Judicial Sanction for Agency Self-Determination in the Regulation of Industry*, 69 COLUM. L. REV. 216 (1969); Ralph F. Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. U. L. REV. 781 (1965).

142. *Ralph Follen Fuchs, Former Faculty*, *supra* note 1.

143. Jost Delbrück, *In Memoriam Ralph F. Fuchs*, 27 GER. Y.B. INT'L L. 9, 9 (1984).

devote more attention to the study of social problems and the actual operation of legal institutions.¹⁴⁴ He firmly believed that the University had a duty to equip law students to be critical of the law—and to have the tools to change it.¹⁴⁵

In the spirit of this Fuchs lecture, my final thoughts are directed to the law students in our audience. Some of you may pursue careers in immigration or criminal law, but many will not. In fact, you are likely still figuring out what your future focus in the law will be. As you move forward in your unique paths, I encourage all of you—no matter what your ultimate specialty—to take on the cases of the vulnerable, the poor, and the people for whom access to a lawyer can be life changing. Initiatives like President Obama's Clemency Project 2014 and Governor Brown's ambitious pardon program did not happen on their own. These initiatives relied on the hard work of applicants, their families, and dedicated community advocates. But they were also supported by a veritable army of volunteer legal workers.

As more changes come down the road, many more such volunteer opportunities will come with them. I encourage you not to hesitate—get involved. And encourage others to do the same. Through this work, you will make a difference. But it is also through this work—by stepping inside our prisons, appearing in our immigration courts, and working alongside others engaged in this struggle—that that you will see up close the injustice that our legal system too often inflicts and become part of the important conversation on how it must change.

144. Ralph F. Fuchs, *The Educational Value of a Legal Clinic—Some Doubts and Queries*, 8 AM. L. SCH. REV. 857, 858 (1937).

145. Ralph F. Fuchs, *Legal Education and the Public Interest*, 1 J. LEGAL EDUC. 155, 163, 165 (1948).